

Chile: A Time of Reckoning

Human Rights and the Judiciary

INTERNATIONAL COMMISSION OF JURISTS

CENTRE FOR THE INDEPENDENCE OF JUDGES

AND LAWYERS

Geneva - Switzerland

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Preface

Since the 1973 coup d'état by General Pinochet, the Chilean system of justice has been a major cause of concern to the International Commission of Jurists (ICJ). In April 1974, Mr. Niall MacDermot, the then Secretary-General of the ICJ, took part in a delegation that visited Chile to "enquire into the situation of human rights and the Rule of Law." The report of this delegation was amongst the first accounts of the excessive deterioration in the respect for justice in Chile. The ICJ focus on Chile has continued ever since. We examined Chilean laws expressing our concern over whether they conform to international standards. We published reports and brought the case of Chile before the international and regional fora.

In 1978, the Centre for the Independence of Judges and Lawyers (CIJL) was created by the ICJ with the aim of promoting judicial and legal independence throughout the world as a prerequisite for the legal protection for human rights. Since then, the CIJL has taken up the case of Chile as it exemplified how these concepts could be abused. As part of its protection efforts, the CIJL organized support for Chilean jurists who have been harassed or persecuted.

Indeed, during the legacy of oppression, the role of the judiciary constituted a cause of concern to the ICJ and the CIJL. Motivated by anger against what it perceived as an interference in the judicial process by the government of Salvador Allende,

the judiciary supported the coup of General Pinochet. Interpreting "independence" as separation without accountability between the Executive and the Judicial Powers, the majority of judges silently watched as unconstitutional decrees were being enacted and gross violations of human rights were being committed. Guarding their vision of "independence", they refused to review the actions of the military. Hence the judiciary lost its role as a protector of justice and victims of human rights violations in Chile had no legal remedy.

The 1989 transition to democracy raised hope that the past injustice could be rectified. But several measures taken by the military government, the most significant of which was the passage of the 1978 Amnesty Decree, made this task difficult. Despite the delicate political balance, the Chilean government attempted to deal with these issues. Are these efforts adequate?

As organizations upholding the Rule of Law, the legal protection of human rights and the independence of the judiciary, the ICJ and the CIJL are firm in their belief that gross violations of human rights should not go unpunished. Indeed, impunity violates the basic principles of human rights and justice. Thus the ICJ and the CIJL decided to focus on Chile as a case study on how countries in transition to democracy are dealing with the legacy of oppression.

This study was carried out by Mr. Sebastian Brett, a writer on human rights, who has been a resident of Santiago since 1989. Mr. Brett conducted the research from March 1990 until September 1991, when the main body of the report was completed. Events since that date are covered in the Epilogue.

Mr. Brett interviewed lawyers, representatives of Chile's nongovernmental human rights organizations, relatives of victims of human rights violations, political prisoners, members of the judiciary and parliamentarians belonging to both government and opposition parties. Interviews were also held with government members, including the Minister of Justice, Francisco Cumplido, and officials of the Justice and Foreign Ministries.

Finally, some acknowledgments are due. This study was conceived by the CIJL at the time when Mr. Reed Brody was its Director. It benefited from his thoughts and revisions. Dr. Alejandro Artucio, the ICJ Legal Officer for Latin America, played a key role in editing this report. Lastly, this report could not have been completed without the editorial assistance of Mr. Dennis Clagett.

Adama Dieng

Mona Rishmawi

ICJ Secretary-General

CIJL Director

September 1992

PART ONEThe Chilean Transition

Chapter 1

Introduction

Global political changes in recent years, particularly the growing rejection of authoritarian systems of government, have created a new focus of debate around the problems of transitional regimes. One of the most urgent and emotional of these problems has been how newly constituted democratic governments should confront the legacy of human rights violations which they inherit from a previous dictatorial regime.

The political dilemmas surrounding this issue are especially acute in countries in which the new government has come to power as the result of negotiations with the former rulers or following constitutional prescriptions laid down by the latter and designed to preserve intact enclaves of power and privilege. Such rules have often included special amnesties to protect members and agents of the previous government from accountability for their actions, or institutional arrangements permitting military intervention where "national security" is perceived to be at risk. In such situations the priority of restoring judicial accountability often appears threatening to the fragile pact on which democratic stability is based. As a result, initially firm commitments by the new rulers to bring human rights violators to justice become progressively modified and diluted during the period of transition.

In this connection it has been noted that international legal standards are much less precise concerning the obligations of successor governments to prosecute and punish human rights violations by a previous regime than they are about the obligations of governments not to commit such violations themselves. Nevertheless, a growing body of opinion holds that the discretion of governments in this area, although broad, is not unlimited. It is argued, for example, that the requirement imposed upon governments under international human rights conventions to "ensure" respect for human rights entails a duty to bring those who violate such rights to justice.¹

Furthermore, international instruments such as the Convention on the Prevention and Punishment of Genocide (1948) and the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) specifically place limitations on the discretion of states to amnesty or pardon offenders in the case of certain grave violations such as genocide, war crimes or "crimes against humanity". The inclusion under these rubrics of human rights crimes such as extrajudicial executions, torture or "disappearances" is a matter of continuing debate.

March 1990.

The United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment is explicit in this regard. Comprehensive human rights conventions, such as the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights, although not explicit, require governments to "ensure" certain rights, criminal sanctions against violators being one of the most effective ways of achieving this. The Human Rights Committee established under the Optional Protocol to monitor compliance with the ICCPR has repeatedly asserted that States Parties must investigate summary executions, torture and disappearances, and bring those responsible to justice. For a recent discussion of the relevant international legal standards see Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime", The Yale Law Journal, Vol. 100, 2537, 1991. See also Robert Goldman, "International Law and Amnesty Laws", Human Rights Internet Reporter, 1988; George C. Rogers, "Argentina's Obligation to Prosecute Military Official for Torture", Columbia Human Rights Law Review, vol.20/259, 1989; and Naomi Roht-Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law", California Law Review, Vol. 78/2,

Most analysts do not go so far as to assert that states must bring to justice all persons implicated in every case of human rights violations. Besides being practically impossible, such a policy might present real dangers to the goal of national reconciliation. At any rate, the fundamental purpose of prosecutions is to deter repetition of such abuses and buttress the rule of law, and in this case to demonstrate that persons vested with the power of the state are ultimately accountable for their actions. It is argued that this can be accomplished by restricting prosecutions to the most notorious crimes and to those most responsible for planning and overseeing their execution.²

Conversely, there is a growing consensus that a situation of blanket impunity — whether stemming from government amnesties, measures of clemency or simple ineffectiveness of the courts — violates customary international law. This is based on the conviction that a complete failure to enforce the law vindicates the same logic of secrecy and impunity that lies behind state crimes such as torture and disappearances. It effectively deprives the law of its power to deter similar policies in the future and undermines the moral legitimacy of the new democracy.

However it is also recognized that the courts represent only one of the possible vehicles of accountability and reparation for past abuses, and of prevention for the future. The legacy of hidden state violence, often practiced for years on a scale unimagined by most citizens, must be chartered and described so as to become part of the country's collective memory. National reconciliation must be founded upon the truth, and upon answers to key questions about the events that took place. Who were the victims and who were their victimizers? What were the causes of the descent into barbarism and terror? What can be done to repair

This, for example, is the position of the United States-based organization Human Rights Watch: "The duty to investigate, prosecute and punish those responsible for gross abuses is proportionate to the extent and severity of the abuses and the degree of responsibility of such abuses." **Human Rights Watch**: "Accountability for Past Human Rights Abuses", December 1989.

the damage to the victims and their families? What can society do to reinstate their memory?

Answering these questions requires a global effort of documentation and historical analysis which is obviously beyond the capacity or purpose of the judiciary. Even assuming the most propitious conditions of independence and cooperation, it is unlikely that the courts could establish a full picture of what happened within a reasonable period of time. For this reason, there has been a growing trend for successor governments to establish special commissions charged with investigating the past. In Chile this task fell to the Rettig Commission, whose activities and findings are discussed in detail later in the present report.

Such Commissions however have neither the purpose nor the powers of the courts and cannot substitute for them. The relatives of the victims have a natural right to justice. They have often pursued that right for years, in the hope that eventually, under changed circumstances, their quest would be fulfilled. Only the final enactment of justice, however fragmentary or incomplete, can restore some of the lost confidence in the rule of law.

The present report examines how this important human rights goal has been tackled in Chile. It examines in detail the policies pursued by the new government in confronting the legacy of past human rights violations. In doing so, it focuses particularly on the country's judiciary in the transition period.

The Present Report

Chile's experience differs in several important respects from that of neighbouring countries which underwent similar transitions to democracy in the early 1980s. In Argentina, whose judiciary suffered pressure from the military government after the 1976 coup, human rights prosecutions were initiated by government decree in the early days of the new administration. In Uruguay

judicial investigations began only in the closing months of military rule, when relatives overcame their fear and presented denunciations to the ordinary courts. By contrast, in Chile such claims had been before the courts for years at the time of the transfer of power, but the cases had barely led to a single conviction.

The issue, then, was not about initiating investigations or limiting their scope or extensiveness. It concerned what, if anything, the government should do to expedite those cases which already existed, through legislation to remove inherited institutional and legal obstacles. Since the judiciary is a power of the state, it falls to the government to rectify the deficiencies of courts which fail to provide effective remedies to victims of human rights violations. This issue however has proven to be particularly controversial in Chile, where the judiciary retained the trappings of formal independence during military rule despite the dictatorial system of government, and where under democracy it continues to jealously guard its autonomy from intervention by other branches of government.

In exploring the way this situation has unfolded in Chile, the present report examines the human rights issues with which the democratic government was confronted, and details the conditions under which the new regime moved to address these issues, specifically as this relates to the role of the judiciary. Toward this end, the remaining chapter of this first section of the report provides an outline of the political and institutional background to the Chilean transition.

Chapter 3 then chronicles the legacy of repression during the years of military rule from 1973 to 1990. Particular attention is focused on three periods during which human rights abuses were most severe. The following chapter then examines the shortcomings of the courts in protecting human rights under the military government. It analyses how the judiciary was unable or unwilling to assert its independence in defending human rights guarantees; how the Supreme Court surrendered its traditional

powers to oversee military tribunals, and then failed to resist the judicial encroachment of these courts over public order crimes; and how both military and civilian courts contributed to the climate of impunity for human rights violators.

The third section of the report, entitled "Confronting the Past", looks at initial steps taken to determine the truth about the period of repression. Chapter 5 details the dramatic discovery of mass graves of "disappeared" or executed victims, discoveries which intensified public awareness about the nature and extent of the repression. Chapter 6 then reports on the establishment and the activities ofNational Commission of Truth Reconciliation - the Rettig Commission - which, as noted above. was charged with investigating the period of military rule. The chapter analyzes the background to the formation of the Commission, its subsequent findings and public reactions, with particular attention paid to conclusions effecting or relating to the judiciary.

Finally, the fourth section of the report details the efforts of the Aylwin government to confront the legacy of military repression, and describes the social and political factors circumscribing these efforts. Chapter 7 focuses on the situation of political prisoners inherited from the former regime and the attempt to deal with these persons fairly through a series of legislative measures known as the "Cumplido Laws". In moving to redress injustices stemming from the military's special laws on crimes of opinion. political violence and terrorism, the government sought to restore the rights of persons convicted under these laws by transferring their cases to civilian courts and ensuring them basic procedural guarantees. Chapter 8 discusses issues of terrorism and public order with which the new administration itself was confronted, and how public and political reaction to these events affected the government's attempts to eradicate torture and violation of prisoners' rights.

The next two chapters concentrate on juridical aspects of the government's program, with Chapter 9 detailing the effects of an

amnesty decree issued by the former regime in 1978. The decree exempted military and police personnel from prosecution for crimes committed prior to that date, including the fiercest periods of repression following the 1973 military coup. The chapter examines the debate on the Amnesty Law in the pre-electoral period, a key decision by the Supreme Court upholding the law and the fate of President Aylwin's attempts to persuade the courts to continue investigation of cases documented in the Rettig Commission's report.

Chapter 10 then examines the issue of judicial reform more closely, summarizing the main issues of contention between the Aylwin administration and the courts in this area and enumerating the government's proposals to redress aspects which it believed had contributed to a climate of impunity for human rights violators. The persistence of serious deficiencies in Chile's justice system is widely recognized by the current opposition as well as by President Aylwin's government, but sharp differences remain on the precise remedial action to be taken. Chapter 11 provides the conclusions of the present report in this regard, including recommendations based on an analysis of past developments.

The Political Context

Before turning to the report itself, however, a word should be said about the political context of the government's policies. Despite overwhelming public support for the return to democracy, Chile is still divided by its recent confrontational past. To this day, political discussions can revert all too easily into passionate disagreements about events leading up to the military coup in September 1973 and about its violently repressive aftermath.

Unlike military leaders in Argentina or Uruguay, Chile's former president General Augusto Pinochet presided over a period of sustained economic growth in the late 1980s. Chile still enjoys a

reputation as an economic "success story" at a time of mounting inflation and international debt in neighbouring countries. General Pinochet and his civilian supporters continually vaunt this achievement, and in fact they commanded half the national vote in the 1988 plebiscite and 1989 elections. On the other side of the divide, Chile's left-wing parties have undergone a painful process of reorganization and self-examination. Supporters of the Popular Unity (UP) Government of Salvador Allende overthrown in the 1973 coup, their self-examination has been compounded by the effects of exile and by the current universal questioning of established orthodoxies on the left.

Each side approached the advent of democracy with certain qualms: the Right feared that the *Concertación* coalition government ³ would succumb to pressures from the Left, leading to a repetition of the political anarchy and economic chaos of the Popular Unity years; the Left feared behind-the-scenes military interference or, in the worst case scenario, direct intervention.

Clarity about human rights violations under the military government had long been a victim of this mutual distrust, and the facts of the matter were continually clouded by the allconsuming political controversy. For years Pinochet had branded communist propaganda accusations as aimed undermining the "mission" of the armed forces. The true extent of human rights violations in the country were dimly sensed by many Chileans but known in detail to only a small number of politicians, journalists and human rights activists. Despite their success in disseminating this information abroad, these persons were ghettoized within the country itself. The Right, with few exceptions, were ignorant civilian indifferent to the record being discussed in international fora — and where they knew about it, they were highly sceptical of its truth.4 For years the families of the victims were treated as

Concertación de Partidos por la Democracia.

representatives of a subversive and threatening reality, and shunned or ignored in their search for truth and justice.

Discussions on a program through which to tackle the human rights legacy had begun within the *Concertación* coalition before the plebiscite of October 1988. In early 1989 the coalition set up specialized sub-commissions involving the participation of human rights organizations and lawyers to draw up proposals for future human rights policy and judicial reform. After wide consultations – including those with representatives of organizations grouping relatives of the victims – the policy guidelines were published in the *Concertación*'s electoral programme in August 1989.

In the course of this debate on the terms of a possible reconciliation, the new government was forced to juggle various contending priorities. At first the demands of the relatives of the victims for justice received a sympathetic response, and a consensus within the coalition emerged on measures to remove existing obstacles to human rights trials. But the measures advocated – which included repeal of the 1978 Amnesty decree – aroused a storm of protest from the armed forces on the eve of the elections, and none of the measures were included in the government's legislative programme. The result was a shift in emphasis under which the establishment of truth took priority over the search for justice: the latter, in the words of President Aylwin, would be sought "en lo posible" (as far as possible).

Thus a policy of actively seeking justice had become the victim of a consensual style of politics habitual to the parties of the coalition since their days of opposition in the final years of the military regime. This style had been successful in securing agreement by the "moderate" Right for a package of constitutional reforms before the 1989 elections, and its

Even in early 1990 the conservative national daily **El Mercurio** was still referring to the "disappeared" as the "alleged disappeared" and to the political prisoners as the "self-styled political prisoners". This practice began to alter as the year progressed.

continuation had derived in large degree from the formidable political obstacles faced by the new democratic government. The nature of these obstacles and their influence on the transition are treated at the beginning of this study which focuses on the political and institutional background to the Chilean transition.

Acknowledgments

The author would like to express his thanks to Carlos López Dawson, head of the legal department of the Chilean Commission of Human Rights, for his constructive advice and to the documentalists of the Commission and the *Vicaría de la Solidaridad* for their help in tracing elusive references. The author is indebted to José Zalaquett and Ingrid Wittebroodt for their moral support and encouragement throughout, and for the office support generously provided by the Chilean consultancy firm, SINERGOS. Finally, special thanks to Patricia Garcia for her painstaking work in monitoring and filing articles in the national press. Needless to say, none of these people share responsibility for the points of view expressed in this report, which are the author's alone.

Chapter 2

Political and Institutional Background

The Plebiscite and the Elections

In a national plebiscite held October 5, 1988, the Chilean people voted to reject the Commander-in-Chief of the army, General Augusto Pinochet Ugarte, remaining as president for the next eight years. The plebiscite was the first occasion on which Chileans had been allowed to vote on Pinochet holding office since the armed forces overthrew the elected government of President Salvador Allende on September 11, 1973. General Pinochet's power had increased steadily over the 15-year period of military rule. After presiding over the military Junta which took power following the coup, he became *de facto* president of the country, and after a new constitution was introduced in March 1981, constitutional head of state.

However as a result of the "no" vote, and under the terms of the 1980 Constitution, national elections were held on December 14, 1989. Patricio Aylwin Azócar, candidate of the 17-party opposition coalition *Concertación de Partidos por la Democracia*, was elected president with 55 percent of the national vote.⁵

The Concertación was formed in 1989 from parties which had collaborated in favour of the "no" vote in the plebiscite campaign, including the Christian Democratic Party (PDC), the Partido por la Democracia – the Party for Democracy –(PPD), the Socialist Party (PS), the Radical Party, the Humanist Party and other smaller groups. The two largest Marxist parties, the Communist Party (PC) and the Movimiento Izquierda Revolucionaria (MIR) were not part of the coalition, although they supported Aylwin's candidacy.

In the accompanying parliamentary elections, the *Concertación* won most of the elected seats in both houses: 71 in the 120-seat Chamber of Deputies and 22 of the 38 elected seats in the Senate. *Democracia y Progreso* – the electoral alliance of the two major right-wing parties, *Renovación Nacional* (RN) and the pro-Pinochet *Unión Demócrata Independiente* (UDI) – also achieved a strong parliamentary representation in the two bodies. This included some key civilian politicians who had held office or acted as advisers under the military government.

Parties of the left-wing coalition, the *Partido Amplio de Izquierda Socialista* (Broad Party of the Socialist Left), gained only one seat each in the Chamber and the Senate. The Communist Party, although the largest member of the coalition, failed to win any. It was widely commented that the electoral system introduced by the military government favoured the parties of the centre-right at the expense of the *Concertación* and the left.⁶

President Aylwin was formally invested on March 11, 1990 at the hurriedly installed new Congress building in Valparaiso, outside of Santiago. Following a carefully devised protocol, he received the presidential sash from the recently-elected president of the Senate, while General Pinochet looked on. The two men – president-elect and former dictator – then shook hands. The deputies and senators took their seats on the same day.

The elections were conducted under a "binomial" system, whereby the two representatives for each district were elected from two-candidate lists proposed by the competing parties or electoral alliances. In order to gain both seats, the party or alliance had to win two-thirds of the vote, so that those with just over a third of the votes could gain half of the representation for that constituency. This system worked to the disadvantage of those placing second on the winning list, who lost seats to candidates with fewer votes.

The Transition in the 1980 Constitution

The steps in the political evolution which culminated in this solemn moment had closely followed a scenario laid down in the Constitution devised by the military and adopted following the plebiscite of September 11, 1980.⁷ This envisaged a step-by-step "transition" to democracy under the tutelage of the military. The 1980 Constitution contained 29 "transitory" articles which regulated the period from its entry into force on March 11, 1981 until the holding of a national plebiscite eight years later. Under the terms of the Constitution, General Pinochet was designated president for the duration of this "transitional" period, with the functions of the legislature continuing to be exercised by the Junta of Commanders-in-Chief, consisting of the heads of the army, navy and airforce and the Director-General of the Carabineros, the police. Numerous political and constitutional rights continued to be suspended.

The transitional period was to culminate in the holding of a plebiscite to ratify the Junta's nominee for president for the next eight years. Transitory Article 27 declared the Constitutional prohibition on re-election inapplicable for the transitional term, allowing General Pinochet to present himself to the country for a further period of office. Having obtained his popular mandate in the plebiscite, the president would then preside over the first congressional elections, which would be held during the year.

The plebiscite was held under a state of emergency throughout the national territory. There was no electoral register; voting, which was compulsory, was based on identity cards. Blank votes were counted as "yes" votes. Press restrictions remained in force, and no independent scrutiny of voting was allowed, although informal checks by opposition groups revealed widespread irregularities.

The Carabineros, Chile's uniformed police force, is subordinate to the Ministry of Defense. Its Director General, General César Mendoza, who was appointed on the day of the coup, was a member of the Military Junta.

However, the 29th Transitory article provided that, in the event the Military Junta's nominee failed to win the plebiscite, he would retain power for only one more year. Elections would be held 90 days before the year expired, and in March 1990 an elected president and parliament would assume office. In the event, this is what transpired, with General Pinochet being rejected in the 1988 plebiscite and Patricio Aylwin elected president at the end of the following year.

Beyond these specific stipulations governing the procedures of the transitory period, it should be noted that the conception of democracy underlying the 1980 Constitution represented a radical departure from Chile's democratic traditions. It included built-in restrictions on the exercise of popular sovereignty, prohibited any expression of Marxist ideological currents⁹ and placed the elected authorities under the permanent tutelage of the armed forces. Individual articles restricted freedom of association, freedom of the press and the principle of a fully-elected legislature. Under Article 96, the Council of National Security – on which the armed forces held a majority – was given broad powers to intervene in matters involving national security.¹⁰

The parties of the Concertación took up the challenge of working within the ground-rules of this authoritarian charter, although

Article 8 outlawed the "propagation of doctrines attacking the family, advocating violence or a conception of society, the state, or the legal order of a totalitarian nature or based on the class struggle". The Communist Party has a long tradition of parliamentary and trade union activity in Chile.

According to the 1980 Constitution, the Consejo des Seguridad Nacional is composed of the President, the commanders-in-chief of the army, navy and airforce and the Director General of Carabineros, and the presidents of the Senate and the Supreme Court of Justice, giving its military members a clear majority. One of the constitutional reforms approved in July 1989 was the inclusion of the Comptroller-General of the Republic in the membership of this body, giving civilians parity with its military members. The Concertación's electoral programme called for the CSN to also include the president of the Chamber of Deputies.

they declared that their aims included extensive constitutional reforms. Toward this end, the coalition continued the policy of laborious negotiation with the pro-military civilian parties begun during the last years of the military regime.

Such negotiations had brought results in the second half of 1989, when in meetings with the military government and its supporters in the RN and UDI, the *Concertación* achieved some important constitutional revisions. These included derogation of Article 8 proscribing Marxist ideological currents, introduction of a paragraph giving international human rights instruments ratified by Chile the status of domestic law, and changes to the composition and attributes of the National Security Council. In the same package of reforms, approved by referendum in July 1989, the term of office of the president to be elected the following December was fixed at four years, with the incumbent becoming ineligible for re-election.

One provision, however, left unaltered by the 1989 reforms had an extremely important effect on the dynamics of the transition. This involved the institution of appointed senators (senadores designados).

The Appointed Senators

Article 45 of the 1980 Constitution originally stated that the Senate was to be composed of 26 elected senators (two for each of Chile's 13 regions) and nine appointed senators. Of the latter, four were to be appointed by the National Security Council, three by the Supreme Court, and two by President Pinochet himself. After sustained pressure, the opposition parties succeeded in obtaining the military government's consent in July 1989 to a constitutional reform increasing the number of elected senators to 38. However the provision for the nine appointed members of the Senate was retained. Although the reform increased the weight of the elected representatives in the Senate, the government still required 24 of the 38 elected seats to

command a majority, assuming that the appointed senators voted en blok against it.

In the event, the results of the senatorial election gave the *Concertación* parties only 22 seats — two short of the majority required to defeat the combined forces of the opposition parties and the appointed senators. This meant that no contentious legislation could be passed without prior negotiation and compromise with the right-wing opposition, particularly in the Senate, and that the appointed senators effectively held the balance of power.

In December 1989 the Supreme Court, the National Security Council and General Pinochet announced their appointments - all former military officers or civilians closely identified with the departing regime. In effect, nine (nearly one-fifth) of the Senate's 47 members had been elected by a narrow circle of no more than 23 people, and these nine were in a practical position to veto legislation.

As noted, most of those appointed to the Senate were directly involved in the out-going government, as cabinet ministers, members of the Council of State or military members of Pinochet's inner circle. Many Chileans viewed the appointed senators – or "institutional" senators, as they preferred to call themselves – as an engineered authoritarian enclave within the legislature. The appointment of controversial figures, such as the former Minister of the Interior Sergio Fernández, who had enforced the Junta's laws implacably during his two periods of office, was seen as particularly provocative. Fears of the appointed senators' power to block controversial legislation – particularly on human rights issues – was undoubtedly a major factor behind the government's cautious and consensual parliamentary strategy.

The Organic Constitutional Law of Congress

The sovereignty of the elected legislature was further limited by an additional constraint imposed by the military government only weeks before the transfer of power.

Under Article 48 of the Constitution, the Chamber of Deputies is empowered to control the legality of the government's actions and to formulate constitutional charges where appropriate against the president, government ministers, high court judges, the armed forces high command and local government officials. The Constitution specifies the type of charges that may be made, which range from "compromising the security or honor of the nation" to treason, extortion, misappropriation of funds and bribery. High court judges may be charged with "gross neglect of duty". If the charges are supported by a vote in the Chamber of Deputies, they pass to the Senate, which acts as a tribunal. If the charges are substantiated and the official is found guilty, he or she may be dismissed and is not allowed to hold public office for five years.

On January 26, 1990, the Junta approved the Organic Constitutional Law of Congress (Law no.18,918), which regulates the legislature and contains three transitory articles dealing with the installation of Congress. The third of these articles prevents Congress from formulating constitutional charges in relation to acts committed prior to its installation on March 11, 1990.

The parties of the *Concertación* lodged protests with the Constitutional Tribunal because many felt that these restrictions had been devised in order to cast a mantle of political (although not criminal) impunity over the actions of the military government, which, during its existence, had never been subject to any form of democratic legislative control. The law, however, was ratified by the Constitutional Tribunal in a divided vote.

One of its effects was to remove the teeth of parliamentary investigative organs, such as the Human Rights Commission of the Chamber of Deputies. It also appears to have counted among

the factors which dissuaded the parties of the Concertación from presenting constitutional charges against members of the Court for Supreme their conduct under the military government.¹¹ Representatives of the parties of the Right argued that talk of "impunity" or "second amnesties" was irrelevant, since charges against former government officials could still be pursued through the courts. Indeed, one effect of the law was to make ordinary courts the only avenue available through which to apply legal sanctions to those responsible for abuses committed in an "official" capacity under the military regime.

Civil-Military Relations

Against this backdrop of political and parliamentary restrictions, one of the greatest challenges facing the newly elected government of President Aylwin was how to confine the armed forces to the constitutional framework of civilian democratic control.

Over the 16 years of military rule, traditional concepts of the neutrality and professionalism of the armed forces had been displaced by essentially political concepts of their mission as "guarantors" of national values. The size and status of the army officer corps had been greatly enhanced, and General Pinochet – who considered himself the architect of many of the constitutional changes that the new government now sought to reverse – remained at the head of the army, which reportedly stood cohesively behind him. This made the spectre of military intervention, even if only indirect, a real one.

A proposal was made in September 1990 by the Socialist Party and the Christian Democrat Youth to impeach members of the Supreme Court for their failure to protect human rights under the military government.

The 1980 Constitution, labelled "Caesarist" by some experts, reserved a special role for the armed forces as guardians of "national security and the institutional order of the Republic". At the same time, it refers to them as "essentially obedient and non-deliberative...professional, hierarchical and disciplined". The tensions created by the co-existence of these interventionist and "neutral" roles became evident in the periodic upsets which marked civil-military relations during the first year of the Aylwin government.

Both the 1833 and 1925 Constitutions established the principle of the armed forces as a professional institution responsible to the elected civilian authorities, and whose principle function was the external defence of the nation. In contrast, the 1973 military coup had represented the culmination of concepts based on the "National Security Doctrine", focusing on protection against perceived internal threats to the integrity of the country. In Decree Law No. 1, issued on the day of the coup, the Junta described the "supreme mission" of the armed forces as being that of "assuring, above any other consideration, the survival of such realities and values, which are the highest and permanent expression of the Chilean nation."

This "higher mission" of the armed forces was not supported by any legal doctrine until the 1980 Constitution defined the functions of these forces for the first time. The Constitution placed unprecedented constraints on the power of elected government authorities to intervene in military affairs, while guaranteeing the military an important sphere of intervention in the affairs of state.

Thus the President may only appoint Commanders-in Chief of the armed services from among the five most senior generals eligible for the post. Once appointed, the Commanders-in-Chief may not be removed before the end of their four-year term of

¹² Cf. Augusto Varas, Los Militares en el Poder: Regimen y Gobierno Militar en Chile 1973-1990. Pehuén, Santiago, 1987, pp. 75-80.

office, except with the consent of the Council of National Security (Consejo de Seguridad Nacional). This body was empowered to "represent" its opinion to any government authority on any matter which "in its judgement represents a grave threat to the foundations of the institutional order or may affect national security". Apart from its powers to choose four of the nine appointed senators, it also selected two of the seven members of the Constitutional Tribunal, so that the tentacles of the armed forces extended into the legislature and one of the highest judicial organs of the state. To the constitutional experts of the Christian Democratic Group of Constitutional Studies, the intent of these provisions was to create a parallel military power within the future "democratic" polity.

Meanwhile, the crucial question of military appointments and tenure was addressed in the out-going government's Organic Law of the Armed Forces, which came into force January 11, 1990. The law fell short of the *Concertación's* expectations on various aspects, including this question of appointments.

However the importance of the issue only became apparent in October 1990, when General Pinochet attempted unilaterally to restructure the army high command. President Aylwin refused to agree to the promotion of two persons on the army's list, and a stand-off ensued in which neither the government nor the army would concede. It was left to the Comptroller-General of the Republic to pronounce on the legality of the decree announcing the proposed changes¹³. While the government stressed the basic constitutional principle that it must be the one to make the ultimate decision, the army appealed to the disputed text of its Organic Constitutional Law. In the event, the Comptroller-General rejected the army's case, giving the elected government an important symbolic victory.

¹³ The Comptroller-General of the Republic is an autonomous body whose main function is to monitor the legality of government decrees and audit state incomes and investments. The Comptroller is appointed by the President with the consent of the Senate and has security of tenure until retirement at age 75.

From Dictator to Army Chief

Prior to the 1989 elections, General Pinochet had stated publicly that he would remain in his post as Commander-in-Chief of the army under the new government. His right to do so was sacrosanct under the 1980 Constitution, which ensured continuity in the high command of the armed forces during the transition by making the three commanders-in-chief and the director-general of the *Carabineros* unremovable until 1998 The new government had made it clear early on that it would respect this rule.

Nevertheless, noone in the new government could have had any doubt as to the difficulties the rule would present. The presence at the head of the army of General Pinochet - the very embodiment of the former regime - must have seemed a formidable obstacle. Tied by stronger links of allegiance to his officers and troops than to the new government authorities, Pinochet had functioned as de facto head of state during the worst period of human rights violations immediately after the military coup.

The President-elect repeatedly stated in public that "it would be better for all, including for him and for the image of the Armed Forces" if General Pinochet were to resign his army post. He diplomatically told Pinochet so in their first private audience. However Pinochet, who evidently had no thought of resigning, justified his presence as a stabilizing force in the transition. A more plausible indication of the General's motivations was contained in a series of statements he had made prior to the transfer of power, denouncing the dangers of a witch hunt against the armed forces and reprisals by the elected government. He made it clear that the armed forces would not accept attempts to "stain their honour" because "to do so is to affront the nation and its fundamental institutions".

Pinochet's remarks were clearly intended as a warning against government-promoted recriminations on human rights, a message the *Concertación* hardly needed reminding of. Both in its electoral programme and in numerous speeches by its leaders thereafter, the coalition had made clear that there would be no

special courts to try those responsible for human rights violations. There would be no anti-army campaign. President Aylwin and his Minister of Defense, Patricio Rojas, were also on record as insisting that the government's interest was to ensure that the armed forces conduct themselves strictly in accordance with the Constitution, and that there were no plans to restructure or "democratize" them.

Nevertheless, General Pinochet had taken important steps to prepare for the period ahead. In January 1990, the Junta passed a decree officially dissolving the Central Nacional de Informaciones Information. (National Centre for CNI). government's centralized political intelligence agency. The CNI's resources - including what files had not been previously destroyed - were reabsorbed along with many of its officers and agents into the army's own intelligence unit, the Directorate of Army Intelligence (DINE). The DINE was headed by the last Director of the CNI, Brigadier-General Gustavo Abarzúa Rivadaneira. In another example of "shadow" power, many on the staff of the former government's General Secretariat of the Presidency were recruited to a new army entity known as the Political-Strategic Advisory Committee (CAPE).

The retention by the army of the resources and much of the personnel of the former secret police was a source of apprehension for the new authorities. During 1990 and 1991, DINE officials were twice caught in the act of political espionage. The CNI-DINE structure, inflated far beyond the normal requirements of military intelligence in peacetime, and without a constitutional function, had far greater resources, experience and sources of information than the intelligence branches of the constitutional law-enforcement agencies serving the new government (Carabineros and Investigaciones). 14

Investigaciones, the plain-clothes criminal investigation branch of the police, is independent of Carabineros, although it also falls under the authority of the Ministry of Defense. There were frequent rivalries and disputes between the two forces under the military government.

For its part, the army's distrust of what it felt to be a campaign by the government to manipulate the climate of opinion in the country against it, rose to the surface in late April 1990. The immediate cause was President Aylwin's announcement of the formation of the Rettig Commission. It later transpired that General Pinochet had tried repeatedly without success to contact the President to persuade him not to persist with the idea of the



Pinochet arrives for the fateful meeting with Aylwin looking grim (May 1990)

Commission. On May 3rd, in a tense meeting in the Moneda Palace, a visibly Pinochet irritated reportedly forced to listen while the President read him Article 90 of the Constitution, which deals with the authority of the Ministry of Defense over the Commanders-in-Chief. Brought to book, Pinochet complained that the object of the Rettig Commission evidently sit was to in judgement on his government.

In the following weeks the army multiplied its attempts to pressure the government into abandoning the Rettig Commission. But on May

28th President Aylwin, overwhelmingly backed by public opinion, summoned Pinochet to the Moneda Palace and reprimanded him for exceeding his constitutional authority. The General was obliged to back down and agree to guarantee the army's cooperation with the Commission. It was a decisive moment, both for the stability of the transition and

for the possibility of success of the President's human rights policy.

During this meeting, President Aylwin also insisted that Pinochet provide him with details about the disbandment of the CNI and that he hand over the agency's files. He protested at the activities of the CAPE and asked for a written report on its structure, composition and purpose, insisting that the headquarters it occupied be returned to the government. The fear was that the Committee had been set up to coordinate the army's political strategy with the pro-military parliamentary opposition, an activity which would have been plainly unconstitutional.

The armed forces continued to take offense at the revelations on past human rights atrocities and military corruption scandals which occupied headlines throughout the year, as well as at the debate such reports provoked. On the basis of legislation still in place, journalists from numerous left-wing publications and even the Director of the Investigations Police (an Aylwin appointee), were detained or prosecuted for "insults" (*injurias*) to the armed forces.

Nevertheless, the disclosures continued and tensions remained high, reaching a climax in December 1990, when there was genuine government fear of military intervention. During the preceding month press headlines had reported the dramatic revelations of two separate investigations, both of which pointed at the heart of the military regime. The first concerned the activities of an illicit money-lending operation run by the CNI in the late 1980s, partly as a means of raising funds for its own operations. Generals and other senior figures in the army establishment were called before the judge for questioning, and several former CNI personnel were detained and charged with criminal offences.

The other investigation, carried out by a multi-party Commission of the Chamber of Deputies, was seeking to clarify the

circumstances in which Pinochet's son had received nearly US \$3 million in cheques from the army for the purchase of a bankrupt armaments firm. The widely-publicized investigation was reported to have gathered enough information for possible prosecution of the former president and his son.

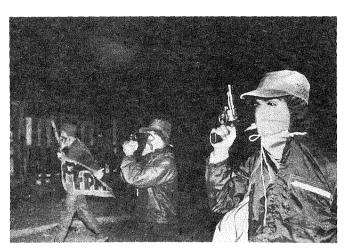
During the evening of December 19th, with the scandal at its height, Chileans were shocked to learn on radio and television that the army had been ordered to return to barracks and had been put on a "grade one" state of alert. Confusion reigned, and scarcely abated when in the early hours of the morning the Minister of Defense appeared on television to reassure the population that the state of alert was in reality a "practice mobilization to test liaison plans".

Although the immediate cause of the army's action was later explained away as a misunderstanding between government and military officials, its underlying purpose was clearly to send a warning signal to the government. The congressional committee's final report on the "cheques" scandal, released soon after, avoided any firm conclusions, and the money-lending inquiry soon left the front pages, although court investigations continued. The high tensions at the close of 1990 were not repeated during 1991, even following the dramatic revelations of the Rettig Commission's report, suggesting a *modus vivendi* had been reached between the army and the Aylwin government.

Armed Opposition Activity 1990-1991

Finally, apart from the institutional restraints described above, and the bulwark of military power, the Aylwin government inherited another legacy from its predecessor for which it was much less well prepared and which complicated its initiatives on human rights — namely, the enmity of the ultra-left armed groups which had pitted themselves against the Pinochet state during its final years.

These groups, although numerically few and politically isolated, unleashed violent attacks of the most varied kind, giving the new authorities little respite. Statistics on the scale of the violence are unreliable, and tend to exaggerate or minimize it according to the interpretation given to incidents



"Frontistas" (FPMR members) in a nocturnal action

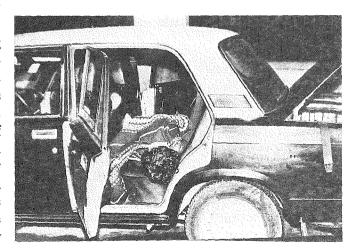
whose motivation authorship or is often unclear. But by conservative estimates there were more than 100 such violent incidents during 1990, and their scale did not seem to have diminished significantly from the years immediately preceding the elections.

From March 1990 to September 1991, at least 15 people (including six police and four prison officers) were killed in ajusticiamientos (targeted political killings) or in indiscriminate attacks and shootouts. Many other members of the police were wounded. The homes of Supreme Court judges and government offices were bombed, politicians of both the Concertación and opposition parties received death threats, police stations in poor neighbourhoods were assaulted with rockets, grenades and automatic weapons, and there were repeated robberies of supermarkets and banks by armed gangs riding in stolen vehicles. Consistent targets of attacks were properties associated with the United States, such as fast-food chains and Mormon churches.

The groups mainly responsible for anti-government violence since the elections have been the Autonomous Fraction of the Frente Patriótico Manuel Rodríguez (FPMR-A) and two armed groups issued from the MAPU-Lautaro: the Fuerzas Populares y Rebeldes Lautaro and the Movimiento Juvenil Lautaro. To a much smaller extent, an armed splinter faction of the MIR, the MIR-Comisión Militar has also perpetrated armed attacks.

The FPMR-A has its origins in the former armed wing of the Communist Party, but it split with the party over the latter's decision to abandon armed struggle in 1986. Its members are predominantly young people from deprived barrios of the cities, which over the years have borne the overwhelming

brunt of military repression, and which during the street prothe in tests mid-1980s b e c a m e strongholds organized resistance. Many of those the group are believed to have close family members who were murdered or "disappeared" after the coup.



"Extremist" killed in a supermarket robbery

The FPMR-A is believed responsible for most of the targeted political killings that have occurred since March 1991, as well as other terrorist activities, such as bombing the houses of Supreme Court judges, issuing threats against doctors alleged to have participated in torture sessions, and ambushing the car of one of the

opposition's most noted parliamentarians, Jaime Guzmán Errázuríz.

The type of violence associated with the MAPU-Lautaro has been more indiscriminate. Deaths of police (and of several Lautaristas) have occurred during clashes following bank-raids or "armed propaganda actions" in poor neighborhoods. The group has no coherent political ideology beyond an extreme antiauthoritarianism: according to reports, the movement is rooted in a deviant youth culture fed by urban deprivation and marginality. Since its members come predominantly from deprived city areas, it shares with the FPMR a front-line experience of police and army repression during the 1980s and an ingrained bitterness and hatred toward symbols of the law, particularly Carabineros.

The group carries out audacious raids on banks and supermarkets, distributes stolen electrical goods and contraceptives in city slums, and conducts armed "take-overs" of schools. During 1990 many such incidents led to armed battles with the police in which both police and members of the group were killed or wounded.

The persistence of incidents like these greatly complicated the government's initiatives on human rights and penal reform, as we note in the discussion of the Cumplido Laws in Chapter 7. A major police drive against terrorism also provided the context for some serious abuses of human rights under the democratic government, a subject treated in Chapter 8.

PART 2

Human Rights Violations and Justice under the Military Government

Chapter 3

The Legacy of Repression: 1973 – 1990

The step-by-step plan envisaged by the 1980 Constitution for transfer of power to an elected government portrays a painless transition cemented by progress and modernization. Indeed, as the transfer approached the armed forces considered themselves victors. Their prestige seemed intact and they remained wedded to the values implanted in the country since 1973. In the eyes of their supporters, these values had engendered an era of unprecedented economic growth and financial stability, an achievement which had received grudging recognition even from their political opponents. The military and their civilian supporters considered themselves the architects of Chile's new democracy.

Yet the sense of satisfaction conveyed in the armed forces' valedictory slogan *misión cumplida* (mission accomplished) concealed another history, long suppressed and hidden by the official media. During the 1980s human rights organizations, the opposition press and independent writers and journalists had documented and published much of this history, often braving closures, persecution and imprisonment. Yet officially these reports of human rights violations under the military were depicted as a fabrication of subversives and anti-social elements of the society. For years the government had dubbed these accusations "communist propaganda" or "defamation of the

armed forces", and had denied the reports brazenly or with diplomatic subterfuge in international fora.

The facts had fared no better in the courts, which - except in a handful of the thousands of cases "disappearance" torture. and murder brought before them - had failed to complete investigations, establish criminal the responsibility of agents of the state, or bring any of those responsible to justice.

The Rettig Commission's report on human rights violations under the military government, delivered to President Aylwin on February 8, 1991, provided the following statistics¹⁵:



Misión Cumplida: General Augusto Pinochet Ugarte in 1989

Deaths by execution (including execution after trial, extrajudicial execution, death as a result of torture, and killings during street protests)

1,068

"Detained - Disappeared"

957

Informe de la Comisión Nacional de Verdad y Reconciliación, Santiago, February 1991, Vol 1, part 2, Appendix, p. 883.

These official figures were based on documented cases in which the Commission had concluded that victims had been killed as a result of action by the state.

However, since the Commission's brief was limited to human rights violations resulting in death, official statistics do not exist on the number of credible allegations of torture, of those arbitrarily detained or imprisoned without due process and fair trial, "relegated" without trial to distant parts of the country, or forced to leave the country into exile. The difficulty of obtaining reliable statistics in these areas is evident. The Vicaría de la Solidaridad gives the following lower-limit estimates, 16 based on documented cases from 1973 -1989:

| Arrests ordered by government decree under the State of Siege, excluding | |
|---|--------|
| unauthorized and unacknowledged arrests (1973 – 1976) | 42,486 |
| Political arrests (1976 – 1989) | 40,043 |
| Cases of torture on which testimonies exist (1973 – 1977) | 1,429 |
| Cases of torture denounced to Santiago courts (1978 – 1989) ¹⁷ | 1,312 |

Vicaría de la Solidaridad del Arzobispado de Santiago: "Algunas Cifras sobre Atentados a los Derechos Humanos Durante el Régimen Militar" (unpublished), December 1990. The Vicaría de la Solidaridad, which is an office of the Archbishop of Santiago, was created in early 1976 by Cardinal Raúl Silva Henríquez to provide humanitarian assistance to political prisoners and victims of human rights violations. Apart from its indefatigable efforts on behalf of victims and their families, it developed a very professional approach to data collection, and its archives remain a unique source on human rights under the military government.

¹⁷ The Vicaria adds as a caution that only a tiny proportion of the cases registered were legally denounced.

| Cases of "unnecessary violence" during demonstrations (1983 – 1989) | 2,982 |
|--|-------|
| Victims of death threats, harrassment and intimidation (1977 – 1989) | 4,513 |

The present chapter gives an abbreviated chronological account of this legacy of human rights violations. Although grave violations persisted throughout the 16-year span of the military government, their scale and intensity was much greater in the first four years of the regime (1973 – 1977) than in the remainder of the period. More precisely, it is possible to distinguish four specific periods during the military's rule: September 11, 1973 – June 1974; June 1974 – August 1977; August 1977 – 1983; and 1983 – March 1990.

September 11, 1973 - June 1974

The violent overthrow of the Popular Unity (UP) government of President Salvador Allende Gossens¹⁸ was the culmination of a drawn-out political and institutional crisis which had profoundly divided the nation and shattered the consensual basis of Chile's well-established democratic traditions.

The military coup was initially supported by a wide segment of the Chilean population. Conservative sectors and those whose economic interests were threatened by the socialist policies of the Allende government had directly helped to bring the coup about.

The Popular Unity coalition, which won elections in 1970, included the Communist Party, the Socialist Party, the Radical Party, the Movimiento de Acción Popular Unitaria (Movement of United Popular Action - MAPU), the Izquierda Christiana (Christian Left - IC) and other smaller left-wing groups. Members or former members of all these parties are now represented in the government or parliament, with the exception of the Communist Party.

But many ordinary people also endorsed it in an exhausted reaction to the economic chaos and permanent political turbulence of the final months of the UP government. During that period, violent polarization between supporters and opponents of the left-wing government had threatened to erupt into full-scale civil war. The coup's supporters included significant sectors of the Church, the traditionally centrist Christian Democrat party, the judiciary, and various influential professional associations, among them the Chilean Bar Association.

But these "moderate" supporters, who hoped that the coup would be a surgical intervention and lead to a swift "reestablishment of democracy", had gravely miscalculated the military's intent. Although the coup itself met only token armed resistance, the armed forces unleashed a ferocious assault on the Popular Unity government and its backers. The repression began with the aerial bombardment of the presidential palace, during which Allende reportedly committed suicide rather than surrender to the rebels. It continued with the mass arrest, torture and summary execution of hundreds of government officials and supporters of the regime. Moreover, rather than relinquishing power after re-establishing order, the military set about effecting a fundamental restructuring of the political system and economy, setting no time-limit to the duration of its rule.

During the final months of 1973 scores of prisoners were killed after being sentenced to death by war tribunals, and hundreds more were shot in summary executions or "while trying to escape". In many cases the deaths were not officially recognized, and the victims "disappeared", having been secretly disposed of or buried on the orders of the military authorities. In those cases in which the deaths were recorded in official records, details concerning the circumstances of death and place of burial were often falsified.

The victims were drawn from all walks of life; many were former members of the Popular Unity Government, leaders of the political parties which comprised the governing coalition, or local government or government-corporation officials. A large number of peasants and agricultural workers, who had been active in movements for agrarian reform and rural unionization, were singled out, detained and killed in rural areas. Land reform, which began under the administration of President Eduardo Frei (1964 – 1970) and continued under the Allende government, had generated fierce resentment among land owners in some areas, and many of these killings appear to have been acts of revenge.

The killings and "disappearances" took place throughout the country, with victims being reported in all of the major cities. For example, in October 1973, a special military task force operating in the north of the country executed at least 72 prisoners sentenced or awaiting trial by military tribunals. Under the pretext of accelerating the procedures of the tribunals, members of this task force removed political prisoners from local prisons, summarily executed them and in many cases secretly disposed of the bodies in common graves. Although the victims

¹⁹ The Rettig Commission provided the following figures on victims in both categories (Informe de la Comisión Nacional de Verdad y Reconciliación, March 1991 Vol 1, Part 3, Chapter 1, A,2):

| Santiago metropolitan region | c.500 |
|------------------------------|-------|
| Bío-Bío | 212 |
| Los Lagos | 128 |
| Auraucaria | 115 |
| Antofagasta | 72 |
| Maule | 62 |
| Valparaíso | 41 |
| Tarapacá | 35 |
| Coquimbo | 22 |
| Atcama | 19 |
| Aysen | 10 |
| Bernardo O'Higgins | 8 |
| Magallanes | 5 |
| | |

were depicted as dangerous terrorists, many were well known and respected in their community, and many had voluntarily given themselves up to the authorities.²⁰

During the final months of 1973, approximately 50 persons "disappeared" after being detained by *carabineros* and soldiers in the locality of Paine, a rural community a few miles south of Santiago. Twenty others were summarily executed. The case became famous after the restoration of democracy: no other small town in the country had so many victims. According to Andrés Aylwin Azócar, a lawyer who was formerly a deputy for Paine and represented many of the relatives:

"There was no war in Paine. Most of the disappearances happened in October 1973 when there was absolute calm. It was really a question of a group of fanatical civilians which doubtless joined up with a fanatical group in the armed forces and together perpetrated dire acts of repression against people who had been on the front line in defending agrarian reform and peasant unionism." ²¹

Aylwin's account agrees with other reports of mass reprisals taken after the coup against peasant unionists and local UP leaders. Those responsible for the atrocities in rural areas included *carabineros* and local military units, and in some cases

The task force was led by General Sergio Arellano Stark and operated under special orders of the Presidency. Patricia Verdugo: Los Zarpazos del Puma, CESOC Ediciones Chile-America, Santiago, 1990, tells the story of the so-called Caravana de la Muerte compellingly, and is based in part on interviews with high military officials involved. The book broke best-seller records in Chile in 1990. The Rettig Commission's report on the episode stresses that all of the members of the task force except its leader participated actively in the DINA, and many were directly implicated in human rights violations.

Patricia Verdugo: Tiempo de Días Claros: Los Desaparecidos CESOC Ediciones Chile-America, Santiago 1990, p.35. Andrés Aylwin, brother of the President, Patricio Aylwin, is currently a member of the Chamber of Deputies and President of its Committee on Justice, Legislation and Constitution.

civilians who collaborated with security forces in identifying those considered "dangerous agitators". Local disputes, often related to land reform measures, seem to have contributed to the severity and brutality of the measures adopted. The army high command did nothing to curb or sanction such excesses. Indeed during October 1973 it issued orders for a toughening of measures against former UP supporters, in the belief that in some areas local military commanders were acting with excessive leniency. There were even reports of officers arrested and tortured for opposing orders to "deal severely" with prisoners.²²

Meanwhile scores of testimonies indicate that a pattern of torture and ill-treatment of detainees became established immediately in the days and months following the coup. Thousands of persons rounded up in large-scale raids were held for interrogation in stadiums in Santiago, and in military barracks and police stations throughout the country. The prison of Pisagua, Navy vessels used for detention, and barracks of the School of Military Engineers at Tejas Verdes became particularly notorious for torture. Hundreds of prisoners were tried and sentenced by war tribunals on the basis of "confessions" extracted under torture, and were sent to rapidly improvised prison camps such as Chacabuco, Ritoque and Punchuncaví.

Trials were conducted according to the special procedures established in the Military Code of Justice for *consejos de guerra* (war tribunals). These severely abridged rights of defence and procedural guarantees and provided for much severer penalties, including the death penalty. (The Rettig Commission

Patricia Verdugo describes the case of Efraín Jaña Girón, Commander of the Mountain Regiment No. 6, the "Talca", who was relieved from his post, detained and tried by a consejo de guerra which sentenced him to three years imprisonment for lack of repressive zeal. Another case was that of Major Fernando Reveco Valenzuela, commander of the "Calama" Regiment, who was tortured after his arrest and held prisoner 459 days for being insufficiently severe in his verdicts as President of the consejo de guerra. Verdugo, Los Zarpazos del Puma, op. cit.

documented 59 executions following death sentences passed by the *consejos de guerra*. After analysing the structure, procedures and verdicts of the courts, it concluded that all of these victims had been denied their right to a fair trial).²³

The jurisdiction of the tribunals was determined by Decree Laws nos. 3 and 5, issued within days of the coup, which declared a State of Siege and defined it as a "state or time of war" (estado o tiempo de guerra). According to Article 81 of the Code of Military Justice, crimes under military jurisdiction in a State of War are dealt with exclusively by the consejos de guerra. Their jurisdiction was also extended to include certain crimes under the Arms Control Law and the Law of State Security.

These courts, whose use evidently was intended originally to be restricted to the special circumstances of wartime, grossly violated essential guarantees of fair trial, such as the presumption of innocence, consistency of judgements and independence. The tribunals fell under the jurisdiction of the General-in-Command (General en Jefe) of the respective territorial division, who had absolute powers to confirm, revoke or alter sentences, with the defendant having no right of appeal to a higher military or civilian court.

There were wide disparities between the categories used to criminalize conduct and in the sentences meted out for identical "offences". The determination of the date from which the country was considered to be "at war" varied from one tribunal to another, and some prisoners were executed for crimes purportedly committed before the state of war had been put into effect (the law was thus applied retroactively). There was no minimum time allowed for the defence to prepare its case, and the officers enlisted as judges normally had no legal training

Informe de la Comisión Nacional de Verdad y Reconciliación, Santiago, February 1991, Vol 1, Part 2, pp. 79–94.

(although they could be advised by a qualified lawyer). According to a lawyer who participated as a defence attorney in more than 100 trials by war tribunals in 1974–1977:

"They were absolutely partial and dependent courts in which we were never able to get across our truth, the defendant's truth. The person was invariably convicted, page one of the indictment was always the final truth." ²⁴

The formation of war tribunals was based on the military's view that the Popular Unity Government had brought the nation to the brink of civil war, and that its intent had been to implant socialism in Chile by force. But though the existence of "organized military rebel or seditious forces" was a legal requisite for the constitution of consejos de guerra (under Article 73 of the Code of Military Justice), no such forces existed at the time. This led the Rettig Commission to conclude that the consejos de guerra were illegal. From a legal point of view, the Commission held, it was not possible to confuse what it described as a climate of political confrontation which was "objectively conducive to civil war" with war itself.

The thesis of the "internal war" in 1973, however, remains the official position of the armed forces. On June 13, 1990, following the discovery of a burial site of victims of army executions in Pisagua, the army issued a statement justifying its actions, which, it said, however regrettable, must be seen in the context of "an internal war which we had to confront, provoked by foreign ideologies."

The idea of internal war is different from the traditional notion of non-international armed conflict. It reflects the tenets of the National Security Doctrine, fashionable in Latin American

Roberto Garretón: "El Poder Judicial en la Dictadura" in Comisión Chilena de Derechos Humanos: Encuentro Internacional de Magistrados: Poder Judicial y Derechos Humanos, 1987.

²⁵ Op. cit., p 80.

military circles in the 1970s. That doctrine views internal politics through the prism of the coldwar conflict and a virulent form of anticommunism, according to which socialist ideas are essentially a subversive foreign import and their active propagation a disguised form of sedition. Those holding such views are perceived as a potential "enemy within". Reflecting this viewpoint, military personalities made allusions to "extirpating the cancer of Marxism", a fundamentally dehumanizing metaphor redolent of Fascist ideas of preserving the health of the body politic by ridding it of its malignant, unhealthy elements. 26

June 1974 - August 1977

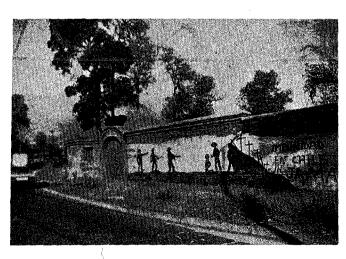
In November 1973 the first steps were taken to centralize the intelligence services of the army, navy, air force and *carabineros* into a single agency responsible directly to the Junta Militar – and, in practice, to the head of state.

The Directorate of National Intelligence (DINA) was originally set up under the guise of being a branch of the National Secretariat of Detainees (SENDET). This latter agency was formed by decree in

Another pretext frequently cited by military and civilian apologists of the coup was the existence of the so-called Z Plan, an alleged left-wing plot to assassinate the entire armed forces high command during the September 19 military parade to commemorate the Fiestas Patrias national holiday. Numerous prisoners detained after the coup were accused of involvement in the plot. The plan was linked to the "discovery of large quantities of weapons and ammunition" and the alleged presence in the country of up to 100,000 trained paramilitary forces. Apart from the inherent implausibility of the "plan", its authenticity was questioned in an interview given in 1986 by one of the architects of the coup, General Gustavo Leigh Guzmán, then Commander-in-Chief of the Air Force. Some evidence has been uncovered which links it indirectly to the Central Intelligence Agency of the United States Government. See Eugenio Ahumada et al.: Chile: La Memoria Prohibida, Pehuén, Santiago 1989, Vol 1, pp. 59-63, and APSI 18-31 July 1990 "La CIA y el Plan Z: La Culminación de un Engaño".

December 1973 to coordinate information and regulations on detainees. However, on June 14, 1974 the Junta approved Decree No. 521, which established the DINA as an autonomous body with its own resources. The decree contained three "secret" articles published in a restricted circulation version of the Official Gazette: Article 9 gave the DINA the task of coordinating all the intelligence services, Article 10 gave it legal powers to carry out arrests and raid premises under the State of Siege, and Article 11 retroactively legalized its actions up to the date of the decree.

The DINA came to command enormous resources and operated without any effective legal control. The agency rapidly developed into a large-scale bureaucracy with an intricate structure of groups, units, brigades and specialized departments headed by a General Command of approximately 50 persons. Many of its officers and agents were recruited from



Villa Grimaldi, once an elegant town house

intelligence the services of the armv. navy, air force and carabineros and included civilians extreme rightwing views belonging to the paramilitary group Patria v Libertad. It operated a network of clandestine detention centers. initially based

at the School of Military Engineers at Tejas Verde, then using in succession houses in Londres and José Domingo Cañas streets in the city centre, and Villa Grimaldi, a formerly elegant residence which became the DINA's headquarters. Other smaller secret detention centres were also welldocumented. Most detainees were taken afterwards from one of these places

to the "official" detention centre of *Tres Alamos*.²⁷

During the months immediately following the coup, t h e repression had been directed indiscriminately at UP supporters (including peasants trade unionists) without reference to party



Group of relatives of victims and former inmates visit the site of Villa Grimaldi, November 1990

affiliation. By contrast, the pattern from 1974 indicates a systematic attempt to dismantle and liquidate the clandestine structures of the parties considered most "dangerous", principally the MIR,²⁸ the Socialist Party and the Communist Party. The methods and organization of the repressive apparatus in turn became more instrumental and systematic.²⁹ During the

See Ascanio Cavallo Castro et al.: La Historia Oculta del Régimen Militar, Santiago, 1988, pp. 42-50; Vicaría de la Solidaridad: "Los Servicios de Inteligencia del Gobierno Militar y los Derechos Humanos Fundamentales", Santiago, August 8, 1975, reprinted in Colegio de Abogados de Chile, Justicia Militar en Chile, pp. 126-136.

The Movimiento Izquierda Revolucionaria (MIR) was founded in 1965, inspired by the ideas of Ernesto (Che) Guevara, whose legendary status as a revolutionary leader in the 1960s led a generation of Latin American youth to adopt armed revolutionary struggle. The MIR went underground in 1968 and did not participate in the electoral campaign of 1970 or in the UP coalition.

Héctor Contreras: "Los Detenidos Desaparecidos" in Comisión Chilena de Derechos Humanos, op. cit., Santiago pp. 41-58.

period June 1974 to December 1975, the DINA's principal targets were the MIR and the Socialists. From the end of 1975 and in 1976, most of the victims of killings and "disappearances" were members of the Communist Party.

Also in contrast to the earlier period, enforced "disappearance" was adopted by the DINA as a deliberate strategy to terrorize and deter government opponents and at the same time to ensure absolute impunity. DINA agents used false names to ensure anonymity, often drove vehicles stolen from their victims, and operated from secret quarters identified by code-names. They carried out intensive and long-term surveillance, backed up by the organization's access to official and unofficial data, gradually building up information extracted from detainees under torture or gathered through infiltration or the use of collaborators forced to cooperate in exchange for their lives.

The victims of the DINA were usually seized without arrest warrant, regardless of the presence of family members or other witnesses. DINA agents carefully mounted "traps" (ratoneras). awaiting the arrival of targets at their homes or at pre-arranged meetings. The persons seized were routinely blindfolded and taken to one of the secret detention centres, where they might be held for weeks or months incommunicado and without official acknowledgment (though in some cases prisoners "disappeared" even after their arrest by the DINA had been admitted). While held incommunicado they were interrogated, often under severe and prolonged torture, and a decision was taken on their fate. Most detainees were subsequently transferred to the prison camp of Tres Alamos, where their detention was officially acknowledged and they were allowed to receive visits. A small number were unceremoniously released: often just dumped on the street. Hundreds however "disappeared" and were never seen again.³⁰

At the time of the change of government in March 1990, the

Análisis: Informe especial: "La Verdad de los Sobrevivientes" July 9–15, 1990.

Vicaría de la Solidaridad had documented 683 "disappearances" from 1973–1987. However, in the final year of the military government and the first six months of the Aylwin administration, nearly 400 new cases pertaining to the same period were denounced by relatives who had been too frightened to come forward previously. This is reflected in the large increase in the number of cases documented by the Rettig Commission.

As noted, torture was practiced systematically by the DINA during interrogation. The most commonly reported methods included the application of electric shocks to sensitive parts of the body while the victim was strapped to a metal bed; suspension by the wrists and knees; submersion of the head in filthy water to the point of near-drowning; and severe beatings. There were frequent reports of rape and other sexual abuse in some detention centres, and the occasional use of animals in torture sessions is well documented.

Toward the end of 1975, a new intelligence agency began to compete with the DINA. Known as the Combined Command (Comando Conjunto), its nucleus was in the Air Force Intelligence Directorate (DIFA), which had operated alongside and often in rivalry with the DINA in the persecution of the MIR. It included agents from the intelligence services of the army, navy and Carabineros as well as civilians from Patria y Libertad. The unit was established to coordinate operations against the clandestine organization of the Communist Party.

During 1976 there were large-scale arrests of Communist Party members, especially trade unionists and members of the party's youth sector. The Combined Command participated in these operations alongside the DINA, but retained its operational autonomy and had its own clandestine detention centres: initially

Previously known as the Air Force Intelligence Service (SIFA), the DIFA was directed by Air Force Commander Edgar Ceballos Jones, while its operational chief was a civilian, Roberto Fuentes Morrison. Fuentes was assassinated by the FPMR in June 1989.

the AirForce War Academy, but later including houses in the Avenida Vicuña McKenna and the Gran Avenida (known respectively as *Nido 18* and *Nido 20*) as well as at the air base at Colina on the northern outskirts of Santiago.

Evidence of the activities of the Combined Command, including information about specific operations, became available following the desertion in 1984 of one of its members, Andrés Antonio Valenzuela Morales. Valenzuela, who was based in the Air Force War Academy until his transfer to a Combined Commando taskforce, gave details concerning individual "disappearances" and executions in which his unit participated. This included the killing of 15 prisoners held at the Colina air base. According to Valenzuela, the prisoners were drugged and flown out over the ocean where they were hurled out of a helicopter, after their stomachs had been slit to ensure that the bodies did not float.

Valenzuela said other killings took place in the Cajón del Maipó, a river valley a few miles to the South of Santiago. This strongly suggests that several unidentified bodies discovered in the Maipo river at the time belonged to victims of the Combined Command. Valenzuela's declarations and the condition of the corpses – some tied with wire and their fingers removed – indicated that the bodies had been hurled into the river after boulders had been tied to them to make them sink.³²

What was the response of the military government in the face of international concern over the problem of the "disappeared"? In November 1975, Sergio Diez, Chile's representative to the United Nations, gave a speech defending the government's human rights record in which he claimed that 64 of the "alleged disappeared" were legally registered as deceased, and that a further 153 were "entes presuntos", fictitious names which were

Eugenio Ahumada et al; op. cit., Vol 2, pp. 271-339.

not recorded in official identification records. Subsequent investigations showed that among those declared to be dead were four persons from among 15 "disappeared" rural workers whose bodies were later found in a disused mine at Lonquén in December 1978. It was also shown that other disappeared persons had been assigned autopsy register numbers corresponding to unidentified bodies which had been brought to the morgue.

Some of these 153 people whose existence Mr. Diez denied were well-known public figures such as the cyclist Sergio Daniel Tormen Méndez, whose arrest on July 20, 1974 had been officially confirmed two weeks later. In other cases, there were official records, press reports, testimonies and statements of relatives and friends assuring that the person had been arrested.

In May 1975 the relatives of the "disappeared", who had only recently formed an association to campaign for the reappearance of their loved ones,³³ presented an appeal to the Supreme Court requesting the appointment of a special judge (*ministro de visita*) to investigate the fate of 163 prisoners who had disappeared since September 11, 1973. Publicity surrounding the case led to a disinformation campaign masterminded by the DINA to make it appear that those on the list had invented the story of their "disappearance" to enable them to travel clandestinely to Argentina, from where they were planning an armed offensive. Subsequent investigations proved this version to have been concocted in an elaborate DINA plan known as "Operation Colombo".³⁴ However in October 1976, the Supreme Court

The Group of Relatives of the "Disappeared" (Agrupación de Familiares de Detenidos-Desaparecidos) continues to campaign actively for the truth to be revealed about the fate of the "disappeared" and for those responsible for the crimes to be brought to justice.

Fictitious information was planted in ephemeral ad hoc Brazilian and Argentinian magazines in July 1975, claiming that 119 MIRistas (115 of whom were on the list presented by the relatives to the Supreme Court) had been found dead in Argentina, allegedly killed in shoot-outs with the security forces or brought to justice by their own comrades.

rejected the relatives' appeal for the designation of a special investigating judge.³⁵



Operación Colombo

August 1977 – 1983

The closing months of 1976 heralded a relaxation of the intense repression of the previous two years. In November, several Decree Laws brought the release of approximately 300 political

prisoners and lifted "relegation" orders against 198 persons who had been banished to remote parts of the country. January 1977 was the first month since the coup in which human rights organizations recorded no cases of "disappearances".

The state of siege, however, which had been in force continuously since September 11, 1973, continued to provide the government with sweeping special powers of arrest and detention, internal banishment and exile. It was lifted in March 1978, one of a series of measures enacted by the new civilian Minister of the Interior, Sergio Fernández Fernández, aimed at normalizing the situation in the country. However the state of emergency remained in force. Decree Law No. 1877 allowed people to be detained for up to

Patricia Verdugo: Tiempo de Días Claros: pp. 275-294; Eugenio Ahumada et al.: op. cit., pp. 101-136.

five days without warrant under the state of emergency, and short-term detentions, the use of secret detention centres and systematic torture continued.

In August 1977 the DINA was dissolved and replaced by a new agency, the National Centre οf Information (CNI). The terms of the decree establishing the CNI, however, almost were identical to those of the decree which had created the DINA.



Protest demonstration 1990. The faces belong to some of the 119 "disappeared" whose fate the DINA systematically obscured by Operation Colombo

Furthermore, the CNI was given the task of adopting measures for the "protection of the normal development of national activities and the maintenance of the institutional order", concepts drawn textually from Decree No. 1009 regulating the state of siege. These now became permanent functions of the CNI, applicable regardless of whether the state of siege was actually in force.³⁶ The agency was also made directly dependent on the Ministry of the Interior, by-passing the Junta.

During this period the MIR had recovered sufficiently from its losses of 1974–1975 to plan the clandestine return to Chile of its members in exile (the so-called Operation Return). The first manifestation of MIR activity was a spate of bomb attacks in

³⁶ Colegio de Abogados de Chile: op. cit., pp. 96-102; 146-151.

1978 and 1979. It only became known much later that an infiltrator had passed detailed information to the security forces concerning MIR militants due to return. Many of those who did return were kept under close surveillance from the moment of their arrival, and were subsequently arrested or killed in false "shoot-outs".

In July 1980, following the assassination by a MIR commando of Colonel Roger Vergara, Director of the Army Intelligence School, 14 persons were kidnapped by a self-styled Commando of Avengers of Martyrs (Comando de Vengadores de Martires – COVEMA). One of them, Eduardo Jara, died from grave injuries as the result of torture. According to a joint statement issued by the Ministers of the Interior and Defence, detectives from Investigaciones were implicated in the operation. CNI agents, however, also allegedly participated. It was the first of a series of shadowy right-wing commandos linked to the intelligence services, which over the next ten years would threaten, intimidate and kidnap government opponents with impunity.

The murder of Colonel Vergara and the reaction it provoked marked a resurgence of repressive and counterinsurgency activities by the CNI. Summary executions disguised as "shootouts" or caused by bombs, which the police said had been planted by terrorists, began to occur repeatedly after 1980. Often the victims had previously been detained or had recently disappeared from their homes. Many showed the signs of beating and torture.

During the early 1980s, debates within the Communist Party in exile resulted in the adoption of a policy advocating armed popular resistance to the dictatorship, and from 1980 onwards its militants in exile also began to return to the country. In 1983 the Manuel Rodríguez Patriotic Front (*Frente Patriótico Manuel Rodríguez* – FPMR), an armed group linked to the Communist Party, began operations on an increasing scale. Actions perpetrated by the MIR and the FPMR included bank robberies to

obtain funds, "armed propaganda" and kidnappings, and assassinations of military and police personnel.

The Government response was to tighten the repression. For the first time in Chile since the immediate aftermath of the coup, human rights violations occurred in the context of the response of the authorities to armed action by left-wing opposition groups.

The new Constitution, "approved" in the 1980 plebiscite came into force on March 11, 1981. As noted previously, it included 29 "transitory articles" which were to remain in force until elections in 1989. Transitory Article No. 15 gave the President powers to declare a state of emergency without consultation, and to declare a state of siege with the approval of the Junta. The remedy of judicial protection (amparo) introduced by the new Constitution was declared inadmissible against administrative measures exercised under states of emergency. This formalized the position repeatedly taken by the Supreme Court on this issue.

Transitory Article No. 24 contemplated a third kind of emergency: "danger of perturbation of internal peace", under which the President was empowered to hold people in detention for up to twenty days, prohibit entry to Chile and expel those considered a danger, and confine individuals to restricted areas of the country for periods as long as three months. The State of Danger to Internal Peace was declared in March 1981 and remained in force continuously until August 1988.

During this period the Arms Control Law (Ley de Control de Armas) became a major legal weapon in the government's battle against armed opposition groups. Dating from 1972, the law was modified by the military government in December 1977 (Decree No. 400) This modification stipulated that persons charged under the law would be tried by military courts, with the CNI being legally empowered to investigate infractions and detain suspects, thus displacing Carabineros and Investigaciones, which had previously exercised this function. Penalties under the Arms Control Law had been increased drastically by an early decree issued September 22, 1973.

Meanwhile, the political opening connected with the plebiscite on the new constitution as well as increasing opposition political activity contributed in 1982-1983 to the first large-scale public protests and demonstrations against the military regime. Collective arrests of demonstrators and bystanders during these protests increased rapidly, soon outnumbering individual arrests.³⁷ These were often accompanied by violent raids by the security forces in poor neighbourhoods known to be strongholds of opposition activity. Civilians presumed to be CNI agents frequently participated in these raids. In some cases organized groups of civilians broke up street protests, beating up demonstrators under the passive gaze of the police. Popularly known as Gurkhas, these groups first appeared during a protest in December 1982 in the Plaza Artesanos, where they harassed and beat journalists covering the events. Subsequent court investigations identified them as CNI agents.

The crackdown on demonstrations coincided with a series of targeted political killings. An example of this was the assassination in February 1982 of Tucapel Jiménez Alfaro, President of the National Association of Government Employees (Associación Nacional de Empleados Fiscales). Jiménez was brutally killed by a team of nine assassins, who kidnapped him from his taxi in the middle of Santiago and slew him on a country road, shooting him five times in the head and slitting his throat. Jiménez (who had supported the coup) was a key figure in the resurgence of the trade union movement, and it was believed that his killing was related directly to his attempts to reunite the various opposition union federations. The professional way the killing had been carried out and the complicated logistics of the operation strongly suggested the participation of people with military or security backgrounds.

Eugenio Ahumada et al., op. cit., Vol 3; p. 469.

1983 - March 11, 1990

Mounting street protests and anti-government demonstrations on one hand, and intensified armed actions by MIR and FPMR commandos on the other, set the context for human rights violations by the military government during the period leading up to the plebiscite of October 1988. Non-violent forms of protest continued to be harshly repressed, and violent confrontations between police and young demonstrators were commonplace in the *poblaciones*, the poor outlying neighbourhoods of the capital. With barricades of burning tires still smouldering, police squads carried out large-scale and often violent raids.

On August 30, 1983, General Carol Urzúa, regional Governor of Santiago, was assassinated by a MIR commando. Within a week of the killing, the CNI eliminated five *Miristas*, including two of the group's most wanted leaders. The five were killed during a police assault, backed by machine-gun fire, on two houses in the capital. The Rettig Commission, basing its findings partly on eye-witness testimony, concluded that the purpose of the assault had been to kill the men, and that official accounts which stated there had been a shoot-out were false.³⁸

The Anti-Terrorist Law ³⁹ of May 17, 1984 introduced drastic increases in penalties – including the death penalty – for a list of 16 offences defined as "terrorism". Military courts were given jurisdiction in cases in which the perpetrator or victim was a member of the armed forces, and in practice in other cases as well. Article 12 of the law expressly envisaged the CNIs involvement in criminal investigation of "terrorist" crimes. The security forces were permitted to hold suspects for up to 30 days before bringing them before a court.

Informe de la Comisión Nacional de Verdad y Reconciliación, Vol 1, part 2, pp. 634-635.

³⁹ Ley No. 18,314: Las Conductas Terroristas y su Penalidad.

Legal procedures for the enforcement of national security-related legislation, such as the Arms Control Law, the Law of National Security and now the Anti-Terrorist Law, severely infringed due process rights and facilitated torture. An increasing number of cases were placed under the jurisdiction of ad hoc military prosecutors, one of whom – Fernando Torres Silva – gained notoriety for the grossly abusive nature of the investigations over which he presided. Many detainees spent weeks in incommunicado detention, and routine use was made in trial proceedings of confessions obtained under torture while suspects were held by the CNI. The procedures of the ad hoc military prosecutors were harshly criticized by the United Nations Special Rapporteur on Chile, Fernando Volio, in his December 1987 report to the General Assembly of the United Nations.

On March 29, 1985 Juan Manuel Parada Maluenda, Director of Archives of the Vicaría de la Solidaridad, was kidnapped and brutally murdered together with two other members of the Communist Party, Manuel Guerrero Ceballos and Santiago Nattino. The crime, (which became known as the degollados (slitthroats) case, caused a wave of public revulsion and a major upheaval in the security services. A courageous investigation by Judge José Cánovas Robles uncovered powerful evidence of the involvement of a special and hitherto little known intelligence unit of Carabineros, the Directorate of Communications of Carabineros (DICOMCAR). The investigation revealed that some of its agents had previously served in the Combined Command, about which Parada was conducting a special probe for the Vicaría at the time of his murder.

In August three senior police officials including Luis Fontaine Manríquez, chief of DICOMCAR, were arrested along with seven lower-level agents. In view of the evidence regarding involvement of serving members of the armed forces, Judge Cánovas declared himself incompetent to preside, but the military court denied its own jurisdiction in the matter and the

case was returned to the judge by a Supreme Court ruling. However in January 1986, the Supreme Court further ruled that there was insufficient evidence to sustain charges against the accused, and they were released. ⁴⁰ The political reverberations of the case led to the resignation of the Director-General of *Carabineros*, General César Mendoza, a member of the Junta since 1973. However the crime remained unclarified. ⁴¹

Increasing armed attacks and bombings from April to August 1986 culminated on September 7th in an attempt on the life of President Pinochet. While returning to Santiago from his country residence, the President's party was ambushed by a FPMR commando. Although his armoured car was peppered by bullets, the President escaped injury, but five bodyguards perished in the attack and twelve others were wounded. The government promptly reintroduced the state of siege and the curfew.

For two years prior to the assassination attempt, the FPMR had been transporting large quantities of weapons into the country for use in a future popular uprising. The discovery of the weapons in a secret cache at Carrizal Bajo in northern Chile led to intense persecution of the FPMR and those suspected of having links with it. The investigations, which became notorious for the use of torture and abuse of due process, were entrusted to the Ad Hoc Military Prosecutor, Fernando Torres Silva.

In the days directly following the assassination attempt, four members of the MIR and the Communist Party were taken from their homes by unidentified gunmen and shot summarily. One of the victims was journalist José Carrasco, a staff member of the political weekly, *Anàlisis*. A fifth intended victim, a lawyer for the *Vicaría*, managed to raise the alarm and escape with his life. A self-styled "September 11 Command" claimed responsibility for

Manríquez was assassinated by FPMR gunmen in May 1990.

Eugenio Ahumada et al., op. cit., Vol 3, pp. 525–590; Ascanio Cavallo et al., op. cit., pp. 445–454, 468–478; José Cánovas: **Memorias de un Magistrado**, Emisión Ltda, Santiago, 1989.

the killings, apparently eye-for-an-eye revenge murders after the death of the five presidential bodyguards. However the hand of the CNI was suspected in the affair. Other human rights violations in this period also appear to have been carried out in reprisal for attacks by the FPMR.

The state of siege continued until January 5, 1987. In June of the same year, the secret detention centres used by the CNI were closed by government decree, and detainees were transferred to regular police custody. However the CNI continued to operate from police stations of the *Investigaciones*, the crime investigations branch. During the run-up to the plebiscite of 1988, the state of emergency and the "state of danger to internal peace" were lifted: August 1988 was the first month since the coup 15 years earlier in which no emergency legislation was in force.

There were frequent reports of arrests, harassment and intimidation of persons participating in the campaign for the "no" vote, during the months leading up to the October plebiscite. A number of shadowy extreme right-wing groups were responsible for harassment and intimidation of government opponents, but the government denied responsibility in such attacks. Despite these incidents, few grave cases of political violence or repression marred the year spanning the plebiscite and the parliamentary elections of December 1989.

Chapter 4

Human Rights and the Judiciary under the Military Government

Introduction

As we have seen, the first five years of the military government were marked by gross and systematic violations of human rights. It might be supposed that the unchecked persistence of such violations could only have been possible through a purge of the judiciary and through the appointment of new subservient judges, particularly on the Supreme Court. This was the case, for example, in neighbouring Argentina, where up to 80 per cent of judges were replaced by the military junta which took power in March 1976. The new judges were made to swear to uphold the new institutional order decreed by the Junta and which took preeminence over the existing Constitution. 42

No such purge occurred in Chile. The Chilean Supreme Court was left untouched by the Junta, and itself presided over the dismissal in late 1973 of many judges perceived to be supporters of the Allende Government. The formal trappings of judicial independence were preserved. As a result, various questions are now posed about the role of the judiciary during the period of

⁴² Americas Watch: Truth and Partial Justice in Argentina, August 1987, p. 5.

military government. Why was it for years a pliant partner in the enforcement of laws which violated constitutional rights? Why did it prove unwilling or unable to confront the authorities over consistent abuses such as "disappearances" and torture. Given its prestige and authority with the new rulers, why did the judiciary fail to offer protection or redress to individual victims?

These questions were the subject of intense controversy during the first year of the Aylwin government. They were addressed by the Rettig Commission in its official report in a special chapter devoted to the judiciary. President Aylwin, himself a lawyer and the son of a respected former Supreme Court judge, frequently alluded to this theme in speeches, noting that public confidence in the judiciary had ebbed to the point of crisis. The fact that with the transfer of power from the military to an elected government, the judiciary had once again emerged intact and untouched by far-reaching political changes, 43 naturally focused public expectations on a change in the posture of the Supreme Court under the new democratic conditions. In fact, however, key Supreme Court decisions in the course of 1990 largely betrayed these hopes and seemed to indicate a hardening of the Court's position. This was particularly the case on the issue of judicial investigations into past crimes against human rights.

The present chapter reviews in broad outline the record of the judiciary in protection of human rights under the military government. Discussion of judicial protection in the early years of the regime (1973–1977) centres on the two most important areas in which courts were constitutionally empowered to

⁴³ In striking contrast to the wholesale dismissal of judges by de facto regimes in Argentina, Brazil, El Salvador and Peru. Following the 1976 military coup in Argentina, the entire Supreme Court as well as numerous federal and provincial judges were dismissed by the Junta, and with the return to democracy in 1983 the Supreme Court was replaced again in its entirety. Under Institutional Act No. 8 of July 1, 1977, the Uruguayan military eliminated the judiciary as a separate branch of government, and gave the Executive discretion to dismiss any judge for any reason. See "The Protection of Judicial Independence in Latin America", Bulletin of the Centre for the Independence of Judges and Lawyers, No.22, October 1988, pp. 26, 30.

intervene to prevent abuses, but did not do so. These include the remedy of habeas corpus (known in Chile as the recurso de amparo) against illegal arrests which resulted in torture and "disappearances", and the exercise of review powers over sentences passed by war-time military tribunals. From 1977 until the close of military rule, the discussion focuses on abuses resulting from the wide extension of military jurisdiction over civilians accused of politically motivated crimes, and the issue of impunity, i.e. the failure of the courts to conclude successful prosecutions against any military or civilian personnel in connection with human rights abuses.

The Principle of Independence

From its early development in the final quarter of the 19th Century, the Chilean judiciary has retained strong corporate traditions of autonomy and independence. The landmark legislation which created the modern judiciary, the Organic Code of Tribunals of 1875, established the principle of a single unified jurisdiction, giving the ordinary courts – under tutelage and disciplinary control of the Supreme Court – authority "in all judicial matters which are promoted within the territory of the Republic, whatever their nature or the capacity of the persons who intervene in them."

The Constitution of 1925, in force at the time of the military coup, gave the Supreme Court powers to declare the application of a law unconstitutional. It also established an appointments system based on merit and seniority, which helped create a clearly defined career structure for judges. Under this system, the President was responsible for appointments to the Supreme Court from a list of candidates pre-selected by the Court itself.

The principle of the autonomy and independence of the judiciary was strongly reaffirmed in the 1980 Constitution. Article 73 gives the Courts sole authority to adjudicate civil and criminal actions, explicitly prohibiting the President or the Legislature from

exercising judicial functions, assuming jurisdiction in pending cases, revising the grounds or content of judicial verdicts or reopening closed cases. It obliges government officials to implement court orders promptly and without argument over their justification or legality.

Article 79 meanwhile reasserts the principle of unified jurisdiction, giving the Supreme Court administrative, disciplinary and economic oversight over all the courts of the nation — with the exception of the Constitutional Court, the electoral courts and military courts in war-time. One of the individual due process rights protected under the Constitution is that "no one may be judged by special commissions, but only by the court indicated and previously established in the law" (Article 19,3).

The Judiciary and the Popular Unity Government

With the election of the Popular Unity Government in 1970, criticism of the judiciary, and particularly of the Supreme Court, erupted into a climate of open conflict. The Supreme Court was denounced by members of the governing parties as a bastion of conservative resistance to the government's program of social and economic reforms, and on repeated occasions the Court's rulings were bypassed or flouted. Politically motivated murders and serious woundings came to be viewed as political rather than criminal problems, and sometimes went unpunished. Clashes were frequent between the government and the courts over the failure of the authorities to observe court orders restituting owners whose land or property had been illegally seized.

On May 26, 1973 the Supreme Court sent Allende a letter complaining at the failure of the authorities and police to enforce court orders. It stated:

"The Court must protest to you, as it has done innumerable times in the past, about the illegal acts of the administrative authorities who are illicitly interfering with the proper exercise of judicial power, and who are preventing the police force from carrying out criminal sentences duly emanating from the criminal courts... These acts signify a decided obstinacy in rebelling against judicial sentences and a total lack of concern about the alteration that these attitudes and omissions have produced in the juridical order. All of this no longer means a simple crisis of state under the rule of Law...but a peremptory or imminent rupture of the country's legality." ⁴⁴

The letter led to an angry exchange of correspondence, in which the court threatened to "enter the administrative arena" in retaliation against the government's interference in judicial decisions.

In addition, the Popular Unity Government proposed reforms of the judiciary which included the creation of "neighbourhood courts" (tribunales vecinales) composed of members of base-level party or labour organizations who lacked legal training and were outside the career judiciary. This initiative was strongly opposed by the Supreme Court as well as by the Christian Democrat Party, both of which considered it an affront to the rule of law. During the final year of the Allende government, in which the consensus on the nation's democratic institutions gave way to an increasing ideological polarization, the Supreme Court abandoned all pretensions to neutrality and entered the fray, allying itself squarely with the mounting opposition.⁴⁵

The Court's public stance against Allende enabled the new military authorities to justify their assumption of power as a

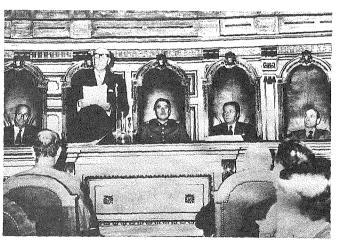
Quoted in Keith S. Rosenn: p. 34.

The clearest example was the attack on the President in the plenary of the Supreme Court in June 1973. Significantly, this statement was the Court's last public attack on the government for 16 years, until in 1990 it took public issue with President Aylwin for declaring the judiciary to be "in crisis".

necessary step for the restoration of the rule of law, without fear of legal or constitutional challenge. It was significant that the only power of state, and one of the few major institutions allowed to function without interference after the military coup, was the judiciary. Indeed the early relationship between the military junta and the Supreme Court was one of evident mutual respect and ideological affinity.

The Judiciary under the Military Government

On the day of the coup, the Junta issued Decree Law No. 1, which pledged to "guarantee the full effectiveness of the attributions of the judiciary...to the extent permitted by the actual situation of the



Ceremony to celebrate 150th anniversary of the Supreme Court in December 1973. Left to right: José María Eyzaguirre, Enrique Urrutia Manzano, President of the Court, General Pinochet, Gonzalo Prieto, Minister of Justice, and Eduardo Varas

country for the accomplishment of the goals which have been set." Significantly. the Supreme Court failed to call the attention of the Junta to the veiled threat to its autonomy implicit in the second part of the phrase. Instead, the President of the Court. Enrique Urrutia Manzano,

acknowledged the authority of the new government without delay, expressing his "most intimate satisfaction" (su más íntima complacencia) with the government's assurances of respect for judicial autonomy.

The declaration was widely read as an endorsement of the Junta itself. Indeed, the statement was ratified by the plenary of the Court the following day, and on September 25th the four members of the Junta were received in the Palace of Justice – still occupied by troops – by Urrutia, who greeted them warmly and again expressed satisfaction at the army's action in restoring the rule of law.⁴⁶

In the years that followed, the Court would sacrifice its constitutional powers – particularly those relating to the protection of individual rights and guarantees - without complaint. It never questioned whether the exceptional measures implanted in the country were really necessary to preserve order, and the effects of this position were to be felt at all levels of the judiciary.⁴⁷

Instead, it was the government itself which responded to the unconstitutionality of its own actions and decrees. On January 3, 1974 the Military Junta passed Decree No. 288, which retroactively legalized detentions practiced by the DINA. The Supreme Court had accepted these detentions without question and rejected hundreds of *habeas corpus* appeals accordingly. When an appeal was lodged with the Court contesting the

Roberto Garretón Merino, op. cit., p.32. The president's statement read: "The President of the Supreme Court, aware of the intentions of the new Government to respect and implement the decisions of the Judicial Branch without a prior administrative review of their legality, as is rquired under Article 12 of the Código Ordinario de Tribunales, declares its most intimate satisfaction in the name of the administration of justice in Chile, and trusts that the Judicial Branch will carry out its obligations as it has until now." Quoted in Carlos López Dawson: La Corte Suprema Frente a los Derechos Humanos, (unpublished).

Note the comments of Judge René García Villegas, dismissed in February 1990 for bad conduct following his public denunciation of torture by the CNI: "If the Supreme Court was on its knees, committed body and soul to the military regime, what could the lower levels do, if they depend on the highest court alone for their tenure and promotion?"; and similar views expressed by Sergio Dunlop, who resigned in 1983 after presiding the National Association of Magistrates for 15 years. Cited in Patricia Verdugo: Tiempo de Días Claros: Los Desaparecidos, op. cit., p. 298.

constitutionality of an earlier decree,⁴⁸ the Junta passed Decree Law No. 788, which allowed it to retroactively modify the Constitution by simple decree. The law served the Supreme Court as a formal basis for the rejection of the appeal in this case and in countless others filed subsequently.

In his speech inaugurating the judicial year in March 1975, President Urrutia praised the government for respecting the jurisdiction and authority of the Court. He also complained that the courts had been overwhelmed by the number of habeas corpus appeals lodged "on the pretext" of arrests under the state of siege on behalf of persons who "according to the plaintiffs" had disappeared, but who "in reality" were living in clandestinity or who had left the country. Urrutia accused the petitioners – the relatives of the "disappeared" – of seeking publicity, wasting the courts' time and disrupting the administration of justice. He suggested, moreover, that they were motivated by a desperate bid to camouflage the clandestine activities of their relatives while gratuitously attacking the authorities.⁴⁹

With the demise of the DINA, the lifting of the state of siege and the entry into force of the 1980 Constitution, the first dissident voices began to be heard among the judiciary. Various individual court decisions, dating from the acceptance of an *amparo* appeal in January 1977, suggested some movement, however timid, toward a more critical and independent stance. Within the Supreme Court it became possible to detect divergences of viewpoint between judges who continued to rule in accordance with earlier expressions of adhesion to the authoritarian project of the

Decree Law No. 81, which permitted the government to expel citizens from the country without trial or prevent their re-entry.

Another notorious remark illustrative of the attitude of senior judges was that made in 1981 by Israel Bórquez, then President of the Supreme Court, who snapped during a meeting with relatives of the "disappeared", "I'm fed up to the teeth with the 'disappeared'!"

government, and a minority who distanced themselves from it, appealing to the judiciary's traditional role in the defence of individual rights and democratic freedoms.⁵⁰ However, in no important case involving human rights did this critical view gain the upper hand.

The first expressions of dissent were heard in the speech of the new President of the Supreme Court, José María Evzaguirre. inaugurating the judicial year in March 1977. While voicing reservations about the powers attributed by Constitutional Act No. 4 to the President in times of emergency, he nevertheless stressed that his comments were limited to the "field of constitutional theory" and did not imply criticism of the current government. His successor, Israel Bórquez Montero, who occupied the presidency of the Court from 1979-1983, for his part demonstrated evident disdain and disinterest in human rights. Only under the presidency of Rafael Retamal (1984–1988) did the Court show a more consistent concern. In his inaugural speeches Retamal referred explicitly to "disappearances", torture, exile and the right to a legal defence, and attacked the use made by the government of Transitory Article No. 24 of the Constitution to violate individual rights.⁵¹

Within the appeals courts, which rule in the first instance on writs of amparo (habeas corpus) and "protection",⁵² the dissenting views sometimes tilted the balance in the other direction,

[&]quot;If during the phase of consolidation of the authoritarian state the judiciary gave it unconditional support, the cautious change of attitude of some judges from 1977 onwards expressed a desire to recover the lost image of impartiality, in order to accompodate the judiciary to the modifications being undergone by the authoritarian state itself." Hugo Frühling: Poder Judicial y Política en Chile, Programa de Derechos Humanos, FLACSO, Santiago, August 1980, p. 28.

According to Judge René Cánovas Robles, who served on the Santiago Appeals Court from 1969 until his retirement in 1986, the government used a legal subterfuge to block Retamal's appointment in 1981 because of his record of dissenting judgments. See José Cánovas Robles, Memorias de un Magistrado, Edición Emisión, Santiago, 1989.

⁵² "Protection" is a legal remedy to protect constitutional rights (other than personal freedom) which are threatened.

producing majority verdicts in favour of the petitioners. However these verdicts, rendered by a small number of appeals court justices whose record became a matter of public comment and recognition, were almost invariably overturned by the Supreme Court. Further down the judicial hierarchy, a handful of criminal court judges also became known for their energetic pursuit of investigations into allegations of torture by the CNI and other abuses. Other judges ruled in opposition to the Supreme Court's broad interpretation of the 1978 Amnesty Law. 53 Yet the Court failed to support any of these judges and even punished some by temporary suspension or, in one case, dismissal.

Habeas Corpus

The remedy of *amparo* has a long history in Chile, dating back to the Constitution of 1833. Article 16 of the 1925 Constitution provides that any person may present an appeal to the competent court for a writ of *amparo* on behalf of a person subject to illegal detention. The Court may order the detainee to be brought before it, and after investigating the person's legal situation, may order his immediate release, rectify the irregularities of his arrest or place him at the disposal of the competent judge.

The amparo procedure is regulated by the Code of Penal Procedures (1907), which establishes that appeals will be heard in the first instance by the Appeals Court, and on further appeal (of the petitioner) by the Supreme Court. The court must rule on the appeal within 24 hours, although this may be extended to six days under certain circumstances. The Public Prosecutor is required to take the necessary legal or disciplinary action against officials found to have breached legal regulations regarding arrests. Article 148 of the Penal Code provides for a possible prison

⁵³ The Amnesty Law and its implications for judicial investigations in human rights cases is discussed below in Chapter 9.

sentence of two months to three years for the crime of illegal arrest.

The first ruling by the Santiago Appeals Court on an *amparo* appeal lodged after the military coup set the tone for the rejection of thousands of similar appeals made on behalf of persons held in unacknowledged detention or "disappeared" following their arrest. The appeal was lodged by telephone on September 14, 1973 on behalf of seven persons whose whereabouts were unknown following their arrest by the military⁵⁴. The court rejected the appeal immediately on the grounds that Decree Law No.1 had declared a State of Siege, authorizing the executive to detain people in places other than prisons or public sites of detention.⁵⁵ The court failed to order that the prisoners be located, or to establish who was responsible for their arrests and on what grounds the arrests had been carried out.

Thousands of *amparo* appeals were subsequently rejected by the courts while the state of siege was in force between 1973 and 1978. In only three or four cases did the court accept the petition and order that the detainee be brought before it.

For much of this period, the appeals courts followed a procedure laid down (at the government's insistence) by the Supreme Court in March 1975, whereby inquiries had to be directed in writing, not – as the law required – to the authority directly responsible for the detention (in most cases the DINA), but to the Ministry of

The seven were Carlos Briones, Clodomiro Almeyda, Jorge Tapia, Claudio Jimeno, Oscar Waiss, Luis Armando Garfias and Alvaro Morel. Jimeno, who was taken prisoner in the Moneda Palace on the day of the coup, remains "disappeared".

In fact, the State of Siege decree (Decree Law No. 3 and not No.1 as stated by the Court) was not published in the Official Gazette until September 18th, four days after the arrests. See Roberto Garretón Merino, op. cit. pp. 32-33.

the Interior. This prevented the courts from inspecting detention centres and ordering detainees to be brought before them.⁵⁶ The procedure guaranteed the DINA and other security services using secret detention centres, and often acting in complete anonymity, absolute freedom from interference.⁵⁷

The courts devised a routine paper procedure, which involved registering the details of the case, sending a written request for information to the Ministry of the Interior, and waiting as long as was necessary for the reply. The responses were equally standardized. An improvised form was issued which varied only in respect to the name of the party affected, and which normally contained one of two different pieces of information: the number of the decree authorizing the arrest of the person in question (often issued after the event) or a statement that no such person had been arrested. In the first case, the court would deny the appeal on the grounds that the detention was in accordance with the emergency powers under the State of Siege; in the second case, it would reject it on the grounds that the person referred to had not

Cases involving torture and disappearances under investigation by the criminal courts were blocked by the refusal of the DINA to allow judges access to detention centres and by the government's refusal to permit the secret police to testify in court. The Appeals Court finally concluded that this was unacceptable, and its agreement, to be communicated to courts across the nation, received the backing of the Supreme Court. Unfortunately, within a few days the agreement was revoked by the Supreme Court itself, which issued new instructions to the courts, ruling it to be beyond their competence to investigate the intervention of members of the DINA in the commission of crimes. See José Cánovas Robles, op. cit.

During the first six months of 1977, out of 54 appeals, none were heard within the 24 hour limit. The time lapse recorded for these cases was 1–10 days: 2; 11–20 days: 19; 21–30 days: 16; 31–40 days: 7; 50–60 days: 5; more than two months:4; more than three months:1. See Alejandro González: "El Recurso de Amparo y el Hábeas Corpus en Chile", Cuadernos Jurídicos No.8, Vicaría de la Solidaridad, July 1979.

been detained.⁵⁸ Hundreds of persons who fell victim to this circular logic "disappeared".⁵⁹

Appeals presented on the grounds that arrests infringed the legal and constitutional requirements established in government decrees regulating the state of siege, were equally unsuccessful. Although on May 5, 1975 the Junta passed Decree Law 1009, which limited to five days the period detainees could be held before being brought before a judge, and provided that relatives be informed of their arrest within 48 hours, in practice neither of these provisions was respected, and appeals for *amparo* citing infringements of the law were always denied.

Indeed, in July 1974 the Supreme Court had ruled that detainees could be held incommunicado indefinitely at the discretion of the executive without infringing the regulations of the State of Siege. It argued that if the government had the right to order detentions, "it followed logically" that it could also, on its own discretion, vary the terms of the detention, and that appeals for judicial protection to end incommunicado detention were inadmissible.

So routine and uniform were the rejections that when an appeal was accepted it caused a stir of renewed hope among the relatives of the victims and their lawyers. One such case was the "disappearance" of a former Concepción local government official, Carlos

Official papers denying arrests were almost always considered more creditworthy than evidence provided in the form of sworn statements of witnesses or fellow-detainees, contravening the principle of equality before the law.

[&]quot;When we lodged a recurso de amparo the court would ask for a report from the Ministry of the Interior, which took weeks or even months to reply. During that time, the DINA would deal with the detainee and take a decision over his or her fate. If the person was to be killed – or had died under torture – the DINA would deny the detention to the Minister, who would inform the court that the victim was not detained...If it was decided that the prisoner was to live, a request was made for a decree which 'legalized' the detention, and the Minister of the Interior replied to this effect to the court." Héctor Contreras, Vicaría lawyer, quoted in Patricia Verdugo, op. cit., pp. 300–303.

Contreras Maluje, who was abducted in a Santiago street on November 2, 1976. The Minister of the Interior denied that Contreras was in detention on its orders, but following the presentation of overwhelming evidence to the contrary – including eyewitness reports and information linking the abduction to Air Force Intelligence – the Santiago Appeals Court, by two votes to one, accepted the appeal for *amparo* on January 31, 1977 and called for Contreras' release.

In the months that followed, the court accumulated more evidence regarding the involvement of the DIFA in the crime. However the Ministry of the Interior, the Air Force Director of Intelligence and General Pinochet himself denied that Carlos Contreras was in detention, arguing that it was impossible to carry out the court's order to release him. The case was finally passed to the Aviation Court of Santiago, which closed it in July 1978, arguing that "the existence of the crime could not be sufficiently established". Both the *Corte Marcial* (the military appeals court) and the Supreme Court upheld the ruling on appeal. ⁶⁰

Patricia Verdugo gives a dramatic account of the case; ibid, pp.71–112. In 1984, Air Force defector Andrés Valenzuela Morales testified to the Vicaria de la Solidaridad that he had participated in Contreras' abduction, and that Contreras had been taken to a detention centre used by the Combined Command in Dieciocho Street, where according to Valenzuela he was killed the same night.

The three judges on the Santiago Appeals Court bench which granted amparo to Contreras - Adolfo Bañados, Marcos Libedinsky and José Cánovas Robles - all later distinguished themselves for courageous and painstaking criminal investigations against members of the security forces. Judge Cánovas, however was alone in opposing granting the writ of amparo, preferring that the court conduct a criminal investigation. He explained the decision in his memoirs, arguing that, "the true situation of Contreras Maluje - whether he was alive or dead - was unknown. It is of the essence of the amparo appeal that it be soundly established that the person is detained, in what place and on whose orders; or that there exists an arbitrary order for his arrest.

Judge José Cánovas Robles, who presided over the Appeals Court from January 1974, describes the experience of responding to the flood of appeals at the time in a chapter in his memoirs:

"Of course, we were left in many respects outside the law, despite the fact that the courts continued to function...The major obstacles derived from the lack of cooperation of the military governors, and in particular the Ministry of the Interior...after repeated demands, a reply would be received from the Ministry of the Interior, which was often negative. In those cases the appeal was denied and a formula was devised to ensure the events were investigated: since the presumed disappearance of X may constitute a crime, the details (of the recurso de amparo) are to be passed to the competent criminal judge for the facts to be investigated". 61

Such investigations, which were usually transferred to military courts, were invariably unsuccessful, offering no legal protection to the victim.

The Supreme Court and the Consejos de Guerra

As noted previously, judicial oversight by the Supreme Court was traditionally one of its most cherished principles, and one that in the past the Court had asserted repeatedly against attempts by governments to establish special areas of jurisdiction outside the purview of the judiciary.⁶² Persons affected by what they

⁶¹ José Cánovas, op. cit, pp. 73-74.

See Hugo Frühling, op. cit., pp. 16–18. "The need to submit the various different courts to the tutelage of the Supreme Court was envisaged as an imperious necessity".

considered faults, injustices or abuses in the ruling of any court could lodge a *recurso de queja* with the Supreme Court. ⁶³

Nevertheless, within months of the military coup the Supreme Court ruled that it had no competence to exercise supervisory powers over the *consejos de guerra* set up according to the special dispositions applicable to the state of internal war. Nor, the Court declared, was it competent to amend or overturn verdicts issued by such courts. In repeated rulings, citing Article 74 of the Code of Military Justice, it asserted that the prerogative of disciplinary control over military courts during war-time was exercised solely and exclusively by the military commander of the zone.

In its decision concerning a jurisdictional dispute between the Air Force Prosecutor (*Fiscalía de Aviación*) and the First Juvenile Court in a case involving two minors, the Supreme Court ruled that:

"Military Justice constitutes a special sphere of jurisdiction, whose organization and functioning in war-time is regulated by articles 71–91 and 180–202 of the Code of Military Justice. The provisions regulating the structure and functioning of these war-time military tribunals constitute an autonomous chain-of-command independent of any other authority of the ordinary or special jurisdiction, a chain-of-command which culminates in the General en Jefe..."

In August 1974 the Supreme Court ruled on a recurso de queja filed against the Consejo de Guerra in Arica. The court denied its own competence to hear the appeal, arguing that:

"The Highest Ordinary Court, which is the Supreme Court, cannot exercise powers of

The *recurso de queja* is a technical complaint against procedural or other abuses during judicial proceedings, which, if accepted, may overturn a court ruling.

jurisdiction with respect to the functions of the military command exercised exclusively by the General en Jefe or his delegate..."

This ruling was reached over the dissenting vote of one judge, José María Eyzaguirre, who argued that Article 86 of the Constitution was not subject to derogation by the provisions of ordinary legislation, and in case of conflict between Article 86 and the Code of Military Justice, the Court was bound to uphold the Constitution. However, the majority members insisted that the special conditions created by a state of war were sufficient to suspend the applicability of Article 86. The Court's position was thus contrary to its own jurisprudence regarding special courts under previous governments.

As in the case of the retroactive "legalization" of detention orders, it was the government rather than the judiciary which made some effort to rectify the worst excesses of the *consejos de guerra*. On August 9, 1974 the Ministry of Defence issued orders to the military justice authorities to correct inconsistent or unsound judgements. This resulted in some large reductions in sentences and favourable modification of charges for individual prisoners. The promulgation of Decree No. 504 in 1975 allowing prisoners to apply for their sentences to be commuted to exile, represented a further government response to widespread criticism of the injustices of the war tribunals. The highest representatives of the judiciary, however, had accepted these injustices in silence. ⁶⁵

The Encroachments of Military Justice

Although the termination of the State of Siege – which was considered as a state of internal war – officially reinstated the Supreme Court's power to oversee military courts, the

⁶⁴ Cited in Colegio de Abogados de Chile, op. cit., pp. 67–73.

Andrés Barrientos D.: "El Poder Judicial y las Garantías Constitutionales", Mensaje, 250, July 1976, pp. 300–301.

encroachment of the latter on the faculties of the ordinary judiciary continued unabated and unchecked throughout the period of military government. In a review of the relevant legislation curtailing the jurisdiction of the ordinary courts, a study by the Chilean Bar Association⁶⁶ lists – among other measures – the following:

| Number | Date | Provisions |
|----------------|------------------|--|
| Decree Law 77 | October 8, 1973 | Prohibited political parties considered "Marxist". Placed under military jurisdiction cases in which infringements were committed by members of the armed forces, whether on their own or jointly with civilians. |
| Decree 81 | November 6, 1973 | Gave military courts jurisdiction over cases involving clandestine entry into the country. |
| Decree Law 604 | August 9, 1974 | Prohibited entry to the country of government opponents or those who carry out actions "contrary to the interests of Chile or who in the view of the government constitute a danger to the State". Provided for penalties of 15–20 years imprisonment for infractors, thus converting into a penal offence the right to return to their own country; the law was enforced by military courts. |

 $^{^{66}}$ $\,$ Colegio de Abogados de Chile, op. cit., pp 159 et seq.

| Decree 890 | August 26, 1975 | Reworked the Law of State Security, dating from 1958: offences under this law committed in "war-time" (tiempo de guerra) were to be dealt with by military courts, whether committed by members of the armed forces or civilians. |
|------------|------------------|--|
| Decree 400 | December 6, 1977 | Modified the Arms Control Law, dating from 1972, which provided that infringements of the law would be dealt with by military courts. The modifications introduced in 1977 included cancelling the right of appeal against remand orders and sentences confirmed by the <i>Corte Marcial</i> . Empowered CNI to intervene directly to enforce the law. |

Among the innovations affecting penal procedures, the Bar Association also cites the creation (by Decree Law 3425 of June 14, 1980) of a new office of General Military Prosecutor (Fiscal General Militar), with broad powers to initiate prosecutions as well as oversee and intervene in military trials. This official was appointed by the President from among military justice officials who were serving officers and were removable. The creation of this office meant that the machinery of military justice could be readily mobilized for the persecution of government opponents. One example was the frequent prosecution of human rights activists and journalists, accused under the military penal code of "insults (injurias) against the armed forces."

Decree Law 1769 of April 30, 1977 further reduced the effectiveness of rights of appeal against military courts by changing the composition of the cortes marciales (military appeals courts). Previously, three of the five members of the corte marcial, including the two civilian Appeals Court Judges who sit on the panel and the army representative, who was a retired officer, were not removable. The 1977 revision provided that the army representative must be a colonel in active service, thereby subjecting him to military discipline and possible removal. The

change altered the balance on the court, reducing its independence. The *Cortes Marciales* subsequently issued frequent verdicts on a 3–2 majority, with the civilian members consistently outvoted.

During the 1980s this process of encroachment – which came to be known as the "hypertrophy" of the machinery of military justice – was carried to an unprecedented extreme. The impetus for "institutionalization" of the military regime gave rise to the new Constitution of 1980 and to a welter of "special laws" to permit the legal persecution of political opponents considered to propagate "Marxist" ideas.

Thus Article 8 of the Constitution, as previously noted, explicitly criminalized doctrines considered to "attack the family, or propagate violence or a conception of the society, the State or the legal order of a totalitarian character or based in the class-struggle". Article 9 declared terrorism to be "of its essence contrary to human rights", and deprived those convicted of terrorist offences of the possibility of amnesty or an official pardon.

Paragraph 3 of Article 41 explicitly declares the recurso de amparo and the recurso de protección inapplicable under a state of siege, and prohibits courts from making judgements during such periods on the legitimacy of detentions or other measures restricting civil liberties. The draconian measures which the President may adopt under a state of "danger of perturbation of internal peace" (the declaration of which is a discretionary power of the President, according to Transitory Article 24) are "not susceptible to any appeal whatsoever, except to the authority which decreed them."

However decisions on individual recursos de amparo and recursos de protección during this period demonstrate a growing dissidence within the judiciary concerning these appeals. There were judges with dissident views on the Supreme Court itself – notably its president from 1984–1988, Rafael Retamal – but most such judges were concentrated in the Santiago Appeals Courts.

They maintained that the recurso de amparo was not expressly excluded by the terms of Transitory Article 24, and that at any rate it was the courts, rather than the executive, which should rightfully determine the admissibility of such appeals. The Appeals Court of Concepción urged the Supreme Court to notify the Ministry of the Interior to this effect, and on June 5, 1981 the Supreme Court did so.

On April 28, 1982 the Court made formal representations to the President after the Director of the CNI ignored instructions to bring a detainee before it. However, such decisions were exceptional. The judiciary lacked the teeth to compel the Minister of Interior or the CNI to comply with its instructions, which were repeatedly ignored or circumvented. In such circumstances the courts customarily accepted official papers retroactively legalizing detentions, as they had done so frequently in the past. Effective judicial control over measures taken under transitory Article 24 was non-existent. According to the Chilean Commission of Human rights in a submission to the government in June 1981, "the situation described is unlike anything the country has known, even in the years of the juridical emergency which the present Constitution is supposed to bring to an end." 67

The powers of the President under Transitory Article 24 to expel citizens from the country and to prohibit their re-entry without legal process also generated an undercurrent of opposition within the judiciary. On February 4, 1987, the Santiago Appeals Court – citing principles of international human rights law – upheld a recurso de amparo presented by an exile prohibited under Article 24 from returning to Chile. One of the judges on the bench, Carlos Cerda Fernández, had used the same arguments to justify a dissenting vote in a similar case in 1984. Regrettably, the Supreme Court overturned the decision of the Appeals Court

⁶⁷ Carlos López Dawson, op cit., p. 78 et seq.

and reiterated the majority view that the judiciary could not intervene in the interpretation of Transitory Article 24.⁶⁸

Article 79 of the Constitution formalized the exemption of military tribunals in war-time from the supervision and control of the Supreme Court. The issue had generated a heated debate in the Ortúzar Commission, which was responsible for drafting the new text. The then president of the Supreme Court, José María Eyzaguirre, who in earlier years had consistently defended the Court's constitutional right to oversee the consejos de guerra, argued that the exclusion should apply only to a state of "external" war. In an intervention which startled his colleagues on the Commission, Eyzaguirre described the abuses of the military courts under the State of Siege as "pavorosas" (fearsome).

Equally notable were the interventions of the Minister of Justice at the time, Mónica Madariaga. in defense of the war tribunals. She expressed the government's insistence that abuses by the consejos de guerra were due to the exceptional "war-time" circumstances prevailing when they had occurred, and that under "normal" conditions fears of irregularities by military courts employing war-time procedures were groundless, and supervision by the Supreme Court an unnecessary interference.

Further evidence of the government's intentions to ensure "reliable" and "efficient" procedures for dealing with political opposition was provided by Decree Law 3655, approved one day before the entry into force of the new Constitution. This law stipulated that crimes of any sort whose principle action resulted in the intentional death or serious injury of members of the armed forces should be dealt with by military tribunals applying wartime procedures. At the time of its passage, no state of war existed, nor were the conditions met which the Code of Military

John A. Detzner: Tribunales Chilenos y Derecho Internacional de Derechos Humanos, Comisión Chilena de Derechos Humanos, Editorial Tiempo Nuevo, Santiago, 1988, pp. 30–32.

Justice required for the constitution of war tribunals. Nevertheless, the constitutionality of the law was upheld by the Supreme Court when it ruled on an appeal lodged on behalf of seven persons charged with the murder of General Carol Urzúa Ibañez. Four judges dissented, including José María Eyzaguirre and Rafael Retamal.

In introducing new legislation in 1984 to combat the increasingly organized armed opposition, the government intended to give military courts exclusive competence to investigate and prosecute crimes of terrorism. The discussion of the issue, however, again revealed resistence by the judiciary to further encroachments on its traditional powers. In his speech inaugurating the judicial year in March 1984, Rafael Retamal accused the government of distrusting the ordinary judiciary.

The Anti-Terrorist Law (Law No. 18314 of May 17, 1984) represented an extension of earlier efforts by the military government to institute special judicial procedures for certain categories of offenders who, because of the gravity of their offence, were in effect "excommunicated" from the ordinary rights inherent in the rule of law.⁶⁹ The Constitution expressly denies those convicted of terrorist offenses the possibility of official pardon or amnesty, or those charged the right to bail. The Anti-Terrorist Law provided that arrests and searches could be carried out without a judicial warrant, that detainees could be held for up to 30 days before being committed for trial (and held incommunicado for up to 15 days), the prosecution was allowed to withhold evidence from the defence for long periods, and military courts were permitted to order the CNI to assist in their investigations. Penalties for a wide range of offences were drastically increased and included the death penalty.

[&]quot;The Constitution presupposes that terrorism and the terrorist are beyond human rights. This vision is implicit in every legal action and decision taken by the government towards terrorists in all these years." Hernán Montealagre, Solidaridad, December 1987.

Finally, the culmination of the government's strategy of using the courts it controlled as an instrument of political persecution can be seen in the so-called Ad Hoc Military Prosecutors (*Fiscalias Militares Ad-Hoc*). Article 29 of the Code of Military Justice envisaged such prosecutors as officials who might be appointed by the military judge to carry out investigations on his behalf "when the requirements of the service require". In fact they became responsible (with the close collaboration of the CNI) for the entire investigation of the case, and for accumulating the evidence on which the judge was to base his ruling.⁷⁰

The procedures of one of these prosecutors, Colonel Fernando Torres Silva, became particularly notorious. Torres controlled the investigations into the assassination attempt on General Pinochet in September 1986 and the discovery of a large weapons cache in Carrizal Bajo. The use of declarations obtained under torture. the routine use of incommunicado detention (which was often prolonged in excess of the already lengthy periods permitted under the Anti-Terrorist Law), manipulation of the secrecy of the investigation to the detriment of the defence, and seemingly interminable trials were all characteristic abuses.⁷¹ The 1988 report of the United Nations Special Rapporteur on Chile. Fernando Volio Jiménez, included a section devoted to the Ad-Hoc Military Prosecutors, in which the Rapporteur concluded that the trials conducted by Torres had been converted into a "particularly odious and unjust instrument to repress and cause great insecurity to the citizens".⁷²

The opposition Grupo de Estudios Constitucionales, also known as the Group of 24, argued in a submission to the Supreme Court in January 1987 that the Fiscalias Ad-Hoc were in essence special courts, and as such in violation of Article 19, No. 3 of the Constitution, which expressly prohibits such courts.

⁷¹ See Amnesty International: Chile: Law and Justice for Political Prisoners, AMR 22/11/89.

⁷² Informe Sobre La Situación de los Derechos Humanos en Chile. Comisión de Derechos Humanos: E/CN 4/1988/7, 5 February, 1988.

A dramatic episode in the history of the Fiscalías Ad-Hoc was the outcome of a disciplinary complaint lodged by the Vicaría de la Solidaridad against Colonel Torres Silva. The complaint was lodged in protest at the prolonged legal harrassment of the human rights organization, which Torres Silva accused of being an "illicit association" designed to assist and provide cover for terrorists. The accusations followed the arrest of Vicaría lawyer Gustavo Villalobos and doctor Ramiro Olivares after they had unwittingly provided professional assistance to a man who was wanted in connection with the murder of a police officer.

On December 9, 1988 the *Corte Marcial* accepted the *Vicaría's* case against the Ad Hoc Prosecutor, a decision possible only because the army's representative on the bench, Colonel Joaquín Erlbaum, unusually – and very unexpectedly – voted with the two civilian members. The verdict was publically attacked by a senior military justice official as politically motivated, and not long afterwards the four highest officials of the military justice hierarchy, including Erlbaum, were forced to resign.

Extraordinarily, Torres Silva, the Ad Hoc Military Prosecutor and defendant in the *Vicaría* case, was promoted over the backs of his four senior colleagues to the position of General Auditor, the highest legal position in the army judicial system. Torres thereby earned himself a place on the Supreme Court, which he still occupies.⁷³ The course of events shocked not only the government's opponents, but also some of its distinguished supporters, who had been concerned for some time at the rapidly deteriorating image of the military justice system.

This concern was expressed in clear terms by the new President of the Supreme Court, Luis Maldonado Boggiano, in his speech marking the inauguration of the 1989 judicial year. He pointed out that more than 80 per cent of those currently undergoing trial

⁷³ The General Auditor has a seat on the Supreme Court when the Court hears military justice cases.

by military courts were civilians, and he called for a constitutional reform limiting the extension of military justice.⁷⁴

Mechanisms of Impunity: Human Rights Investigations in Military Courts

The existing norms governing jurisdiction over common crimes committed by military personnel, and the broad interpretation of these norms given by military judges in support of claims



David Silberman Gurovich

for jurisdiction, have placed a powerful brake on the efforts of some civilian courts to identify and bring to justice those responsible for human rights violations.

The jurisdiction of Chilean military courts over members of the armed forces

has traditionally extended far beyond properly "military" offences such as disobedience, insubordination, desertion, mutiny, etc. Under Article 5(3) of the Code of Military Justice, military jurisdiction covers any criminal offences com-mitted by soldiers or police in wartime, in acts of service and in military establishments or premises. Military judges have exploited these provisions to the full — often on questionable grounds, such as

⁷⁴ Luis Maldonado Boggiano, Diario Oficial, March 14, 1989.

the mere fact that a crime (e.g. a human rights violation) was alleged to have been committed in a military detention centre.

The result, particularly in the case of "disappearances", has almost invariably been the same. The civilian judge would concede jurisdiction, or if he or she contested it, the Supreme Court would rule in favour of the military. The case would then stagnate in the military court, ⁷⁵ until a military prosecutor called for it to be closed temporarily or permanently, a recommendation which was normally upheld by a military judge. If the closure was temporary, further appeals to the *Corte Marcial* to reopen the case were unsuccessful, unless the plaintiffs could convince the court that important new evidence had become available. Given that by this time years would have passed since the commission of the crime, this was often impossible, and many such appeals were rejected anyway despite the possibility of new lines of inquiry. Efforts to appeal such judgements to the Supreme Court seldom bore fruit. ⁷⁶

A notorious case was that of David Silberman Gurovich, who "disappeared" on October 4, 1974 after being abducted by the DINA from the Santiago Penitentiary, where he was serving a 13-year sentence for "offences against state security". Despite the existence of an affidavit signed by the Director General of Prisons indicating that he had handed Silberman over to a military officer on the written orders of a high-ranking military justice official, the Santiago Appeals Court rejected a writ of amparo. An investigation into Silberman's "disappearance" had already been opened by a military prosecutor, and this was cited by the Appeals Court as grounds for its rejection of the appeal.

The decision was upheld by the Supreme Court, although by then overwhelming evidence had been accumulated of Silberman's illegal abduction. The military prosecutor disregarded repeated

As in civilian proceedings, military judicial investigations are conducted in secret.

To reopen a case temporarily closed (*sobreseido temporalmente*), the court must be satisfied that new evidence warrants further investigation.

instructions by the Supreme Court to provide it with prompt and regular reports on the results of his investigations, but the Court failed to demand the file until one year had passed since the abduction. By this time new evidence had emerged in the form of affidavits by two former detainees who testified to having seen Silberman in a DINA detention centre. On October 20, 1976 the military judge, following the prosecutor's recommendation, ordered the case to be closed. The grounds given were that the crime was unproven, since Silberman could have left the prison on his own volition, and the testimonies were not creditworthy since they had been made by persons "of the same political ideology" as Silberman.⁷⁷

The 1978 Amnesty Law

On April 19, 1978 the Military Junta promulgated an amnesty decree (Law No. 2191), the effect of which has been to ensure impunity for the authors of human rights crimes committed during the harshest years of the repression, and to obstruct investigation of these crimes.

The law contained three preambular paragraphs and four brief articles. Article 1 conceded "amnesty to all those persons who as authors, accomplices or concealers took part in criminal acts while the state of siege was in force between September 11, 1973 and March 10, 1978, provided that they are not presently undergoing trial or serving sentence." Article 2 extended the amnesty to those convicted by military courts during this period.

The decree accompanied a series of measures to relax restrictions following the lifting of the state of siege in March 1978, and it was

Jorge Ortíz, a prison officer at the Penitentiary whose evidence exploded an elaborate DINA cover-up to explain the crime as a kidnapping by leftists, was branded a collaborator and dismissed from the prison service in September 1977. He was reportedly reinstated only in April 1990. See Patricia Verdugo: "Secuestro y Homicidio, Dramático Testimonio de Ex-Alcaide", Análisis, April 6-May 30, 1990.

advertised by the government as a reconciliation measure. However, apart from its lack of democratic legitimacy, the decree's positive effects were limited, since the majority of convicted prisoners had had their sentences commuted to exile but despite the amnesty were denied permission to return.

On the other hand, with regard to human rights crimes, the law was to have two major effects. First, it prevented the application of penal sanctions in those few cases in which judges were able to clarify responsibility for human rights violations during the period in question. Second, it provided a legal pretext for the courts to close investigations into killings and "disappearances", thereby not only ensuring impunity and anonymity for those responsible, but also preventing the relatives of the victims and society at large from knowing what crimes, if any, had been committed and who was responsible. The vast majority of the cases to which the law was applied in the years to come fell into this second category.

Between 1978 and 1985, some criminal courts investigating charges related to political "disappearances" began to invoke the amnesty law to close the cases before the court investigation had been completed. However in almost every such case the appeals courts, both civilian and military, reversed the decision and kept the case open. During 1985 and increasingly in 1986, however, the appeals courts adopted a different interpretation of the law, declaring the amnesty applicable even before the existence or nature of the crime had been established and before evidence had been gathered identifying the possible authors.

The Judge Cerda Case

The change of interpretation appears to have been a result of a policy decision by the Supreme Court, after a civilian judge, Carlos Cerda Fernández, contested an Appeals Court decision to close under the Amnesty Law a case he was investigating. The case involved ten Communist Party members who "disappeared"

in Santiago in November and December 1976. The government maintained that the ten had left the country and travelled by foot and car to Argentina. Despite the appointment of two prior *ministros en visita*, progress in clarifying the case was effectively obstructed until 1983, when Judge Cerda took over the investigation and began to penetrate the shadowy world of Chile's intelligence services.

First he discovered that evidence used to support the government's explanation about the victims' whereabouts had been falsified. The real breakthrough came however when revelations by former agent Andrés Valenzuela Morales provided a number of new leads pointing to the implication of the Combined Command in the crimes. In August 1986, Cerda indicted 38 military personnel, including Air Force General Gustavo Leigh Guzmán, formerly a member of the military Junta, plus two other Air Force generals and numerous high-ranking officers of the Air Force and *Carabineros*. This was the first criminal investigation implicating top officers in 13 years of military rule, and it naturally caused a public sensation.

After several of the accused appealed the indictment, however, the Santiago Appeals Court closed the case on the grounds that the Amnesty Law was applicable. On October 6th the Supreme Court upheld the Appeals Court ruling, despite the fact that the guilt of none of the accused had yet been established and the investigations were far from complete. Acting on conscience and his conviction of the illegality of the decision, Judge Cerda refused to give effect to the verdict. He insisted that the benefit of amnesty applied solely at the moment of the execution of a court judgement, leaving the stages of investigation and judgement unaffected. Judge Cerda was punished by the Supreme Court for his defiance with a two-month suspension, and was taken off the case.

In August 1989 the Supreme Court rejected an appeal of "cassation" (annulment) against the decision to close the case, and ordered Cerda, as the original investigating judge, to give

effect to the closure order. Cerda, however, filed the case away without closing it, and when the matter came to the Supreme Court's attention in June 1990, he was severely reprimanded and obliged to comply with the order. In a detailed legal argument, he explained his conviction that the closure was illegal and inconsistent with Chile's international human rights treaty obligations. In January 1991, Cerda was again suspended for two months on half salary, and was subsequently informed of his dismissal from the judiciary because of his poor grading for two consecutive years. He was reinstated only after a personal letter of apology to the Supreme Court.

The clash between Judge Cerda and the judicial hierarchy struck the nerve of a central issue: the lawfulness of a decree which apparently denied the right of equal access to the law. ⁷⁹

As 1989 drew to a close and the countdown to the transfer of power began, the Military Judge of Santiago dug out of the archives more than 30 cases of "disappearances" which had been temporarily closed by military courts. (The cases reportedly involved more than 100 victims). He reopened the cases and then

An amendment to Article 5 of the Constitution in August 1989 had given such treaty obligations the force of domestic law.

Mónica Madariaga Gutiérrez, Minister of Justice from 1977–1983 (though subsequently an outspoken critic of the military regime), and who personally drafted the law, has publicly taken a position similar to that defended by Carlos Cerda. She claimed that at the time of the drafting of the law – which was completed under pressure and with a minimum of legal consultation – neither she nor many other civilian government officials were aware of, or gave credence to, the accounts of massive human rights violations after the coup. They were therefore only dimly aware of the law's possible consequences. We lived, she said "in a bubble" of ignorance. Nevertheless she maintained that the injustice was caused "less by the law itself than by the incorrect way in which courts have interpreted it, which has prevented it from operating legitimately, i.e. to extinguish the proven responsibilities of those who benefit from its norms. This is the only mechanism which is in accordance with the law." Sergio Marras Confesiones, Ed. Ornitorrinco, Santiago, 1988 page 76. Mónica Madarriaga, a second cousin of Augusto Pinochet, served as Chilean Ambassador to the OEA from March 1984 to January 1985.

abruptly declared them permanently closed in application of the Amnesty Law. The purpose of this manouevre was evidently to prevent the reopening of these cases in the likely event of new witnesses coming forward in the changed atmosphere after the elections.

Vicaría de la Solidaridad lawyers acting on behalf of the relatives appealed to the Corte Marcial, and during 1990 the court accepted the appeal in at least four cases, revoking the order to close them. The two civilian members of the bench consistently voted to keep the cases open, but their view prevailed only when one of the three military judges supported it. In most cases, the Corte Marcial confirmed the verdict of the military judge.

After the Amnesty

Despite the thousands of criminal investigations opened by ordinary courts into alleged human rights violations after 1978, not a single culprit was serving a prison sentence for any of these crimes when the elected government took office on March 11, 1990. During this period there was no amnesty law to prematurely curtail the investigations, and many of the cases had been in the courts for years.

The culprits, even when arrested and charged, invariably seemed to slip through the fingers of the courts. Many well-documented cases wilted away after being transferred to military courts, others when appeals courts dismissed the charges or military or police witnesses stonewalled or simply refused to answer summonses to testify. At times it seemed as if a double standard was at work: a presumption of guilt in the case of political opponents of the government; a presumption of innocence (or excessively rigid formal standards of evidence) in the case of those able to shield themselves behind their official investiture.

Part of the explanation must be sought in the excessive area of competence of military courts and their progressive

encroachment on the traditional attributes of the judiciary, as discussed above. During the 1980s, not only were these powers used increasingly, further eroding the jurisdiction of the ordinary courts, but also new powers or exemptions were added which transformed the military into a privileged caste, converting the constitutional principle of equality before the law into a dead letter.

In a chapter of its compendium on military justice, entitled "Discriminatory Laws and the Quest for Impunity", the Chilean Bar Association has listed the following legal innovations:

- Extension of rules governing the permissible use of lethal force

Law No. 18342 of September 1984 extended the criteria governing exemption from culpability in lethal use of firearms, from the police to other branches of the armed forces, when members of these forces are engaged in law enforcement tasks.

- Widened definition of military premises (recintos militares)

Law 18342 also included police or army vehicles in its definition of military establishments or premises. Furthermore, although the CNI was legally under the Ministry of the Interior, jurisdiction over crimes allegedly committed in CNI detention centers was claimed by military courts.

- Creation of special privileges for military personnel facing criminal prosecution

The so-called Ad-Hoc Laws were intended to shield senior military personnel currently facing prosecution from the usual rigours of interrogation and pre-trial custody. Article 137 of the Code of Military Justice allows military personnel facing criminal charges to be held in preventive custody in a military establishment. New laws introduced in 1980 and 1984 extended this privilege to retired military officers who could prove they had been in service at the date the offence was committed.

Former generals were allowed to fix their home as the venue for interrogation by the judge. 80

Even when the ordinary courts did not find their competence contested or restricted by the military justice establishment, they were constrained by their loss of authority in the face of the law enforcement agencies. All of the latter were involved to varying degrees in counter-subversive activities and were prone to sit on requests for sensitive information for as long as they wished, without the slightest risk of sanction. The agencies most implicated in human rights abuse were originally conceived to work outside the law and generally treated the courts with disdain, submitting contrived testimony which received widespread publicity as the "official" version of the events.⁸¹

According to Article 137 of the Code of Military Justice, detainees or prisoners who are military personnel may be held in a barracks or military establishment, or, in the case of officers, in their own homes. Law No. 18431 of August 23, 1985 extended this privilege to retired generals and civilians who had military status at the time of commission of the offence. Law No. 18472 of November 23, 1985 excused generals on active service or in retirement from the obligation to testify in court, and permitted them to testify at home or in a place designated by them. Judge Carlos Cerda was obliged to question General Manuel Contreras in the Ministry of Defense as a result of the hurried passage of this law.

The investigation conducted by the special investigating judge into the "Quemados" (Burnt Ones) case illustrates the pressures on judges to accept the "official version" without serious examination of the evidence provided by representatives of the victims. According to more than a dozen witnesses and other forensic evidence, Rodrigo Rojas Denegri and Carmen Gloria Quintana were deliberately doused in petrol and set on fire by a military patrol in 1986. Rodrigo Rojas died in hospital of his burns a few days after the incident, and Carmen Gloria Quintana was left severely disfigured.

The special investigating judge, Alberto Echevarría Lorca, charged the officer responsible, Pedro Fernández Dittus, with unintentional homicide because he had failed to provide prompt medical attention to the two victims. Without stating his grounds, he rejected substantial evidence that they had been deliberately burned. Judge Echevarría and the military judges who inherited the case all preferred to believe the stories of soldiers under Fernández' command, who claimed that Carmen Quintana had caused the fire by accidentally setting alight an incendiary device they said she had been carrying. In August 1989 Brigadier General Carlos Parera Silva gave Fernández a suspended prison sentence of 300 days, and on January 4, 1991 the Corte Marcial absolved him of any offence against Carmen Quintana.

Judges, lawyers and witnesses were often at risk. Luis Toro, one of the lawyers in the *Quemados* investigation narrowly missed kidnapping by the agents responsible for the murder of journalist José Carrasco Tapia on September 8, 1986.⁸² Several of the witnesses in the case were detained, harassed and intimidated. Judge José Cánovas was pursued at high speed by anonymous cars, threatened by telephone and had his home broken into and documents stolen from his desk during his investigation of the *Degollados* case.⁸³ Judge Rene García Villegas was repeatedly threatened when investigating torture allegations against the CNI in 1986 and 1987.⁸⁴

Three Santiago judges, José Benquis Camhi, Rene García Villegas and Dobra Luksic, gained public recognition for their tenacious investigation of torture cases. Such investigations were often frustrated by the difficulty of obtaining medical evidence of torture, due to the refusal by the CNI to admit doctors to carry out examinations. Even when this was obtained, it was difficult to establish the true identity of the CNI officials responsible, who routinely presented themselves to court under false identities (chapas). The transfer of such cases to military courts and the frequent unwillingness of the Supreme Court to approve appeals challenging the decisions of these military tribunals further complicated the efforts of these judges. 85

⁸² See footnote no. 39.

⁸³ Interview with the author, November 1990.

See Centre for the Independence of Judges and Lawyers (CIJL) of the International Commission of Jurists: Attacks on Justice: The Harassment and Persecution of Judges and Lawyers, July 1989-July 1990 Edited by Reed Brody.

When judge García Villegas protested the transfer to a military court's jurisdiction of a torture case he was handling, he was admonished by the Supreme Court for publicly expressing his concerns. He had said:

[&]quot;As has become evident in previous cases, transferring to military courts the investigations carried out by civilian judges relating to incidents denounced as crimes allegedly committed by members of the security forces has resulted in those investigations being definitively paralysed and abandoned in the prosecutor's office, which means impunity for those incriminated."

A notable exception to this rule, which nevertheless illustrates the problems involved, concerns the case of Mario Gilberto Fernández López, a transport driver and member of the Christian Democratic Party, who died in hospital on October 18, 1984 after being subjected to brutal torture in a CNI detention centre. The internal injuries he received were so severe, according to an autopsy report, that "there must have been an extraordinarily intense and brutal beating or physical punishment, because injuries of this type are generally found only in serious accidents like falls from a great height or major automobile accidents".

Judge Hernán Bücher gathered enough evidence to issue charges against two CNI officers, who had identified under the aliases of Marcos Belman Oyarce and Miguel Escobar Sanguinetti. He then declared himself incompetent and the case was passed to a military judge who confirmed the remand order, having established the real identity of the two men. But this judge was taken off the case, which was then passed to a special military prosecutor. In December 1985 the prosecutor dismissed the charges against the two, asserting that there was no fault or abuse deserving disciplinary action. On March 13, 1986 the *Corte Marcial* upheld the decision, but on June 25 the Supreme Court ruled against the *Corte Marcial*, reinstating the remand order. The two men were detained and formally charged in July.

This was one of the very few cases in which a criminal prosecution had been opened for the crime of torture. However, in early 1990 the two agents charged – Carlos Herrera Jiménez and Armando Cabrera Aguilar – were granted provisional release by the Military Judge of La Serena, and on March 7, the decision was upheld by the *Corte Marcial*. In July 1991 they each received a 540-day prison sentence for the crime which was deemed to have been already served when they stood trial. ⁸⁶

⁸⁶ See the Epilogue, for more recent developments on this case.

PART 3 Confronting the Past

Chapter 5

The Discovery of the Graves

The first year of the Aylwin government was a period of intense reflection and debate as the Chileans, by tradition an orderly and peaceable people, sought to discover the roots of the violent division of the past and the intolerance and inhumanity they generated. For the first time, the gravity and extent of human rights transgressions became a matter of undisputed historical fact.

Many sectors of the public contributed to this process. The press published a stream of exposés and testimonies. Graphic narratives of the horrors of the military coup's aftermath became national best sellers and were on sale to passers-by in Santiago streets. Survivors of Villa Grimaldi and other DINA torture centres established contact with one another and visited the site of their ordeal, where they were photographed against the buildings, now reduced to rubble or reconverted into offices. Victims, witnesses and even former members of the security forces came forward or were sought out, were interviewed and their stories told. Journalists were admitted for the first time to the *Colonia Dignidad*, a secretive German immigrant community in southern Chile, which was widely alleged to have been used as a DINA base and torture centre.

President Aylwin recognized the inevitability and necessity of this hunger for the facts. Meeting the objections of those who spoke of morbid obsessions or reopening "healed wounds", he stressed the need for a national effort to confront the truth, both as a form of symbolic reparation to the victims and as a necessary condition for "national reconciliation" and "forgiveness".

There were three separate elements in this endeavour The first involved cataloguing individual violations on the basis of diverse forms of evidence, so as to form an objective global picture of their extent, the circumstances in which they were committed, and the agencies responsible. This was a major part of the task entrusted to the National Commission of Truth and Reconciliation (the Rettig Commission). Its purpose was to establish these facts as part of the national patrimony, placing them beyond the reach of contingent political disputes. A second related element was to discover the fate of the hundreds of individual victims of "disappearances" whose bodies had never been discovered.

Thirdly, the government believed that the truth must be confronted by Chilean society and its moral and political lessons assimilated. Expressed in terms of the Christian moral values which infused the debate, it was a moment for self-examination, public contrition and rectification of the suffering caused, as far as this was possible. Only on this basis, in the government's view, could the nation's wounds be healed.

In the first of these tasks, the government's accomplishment was clear and widely recognized. The Rettig Commission performed the task of documentation with professionalism, assiduity and speed. In the wake of public discussion over the Commission's findings in April 1991, there were few prepared to challenge their veracity. Those that did, like the former director of the DINA, retired General Manuel Contreras, were met with public incredulity and derision, and were questioned even by conservative former supporters of the military government.

With regard to the third objective, the government recognized from the outset the impossibility (as well as undesirability) of seeking to "impose" a consensual attribution of moral responsibility in a society still deeply divided over the causes of the official violence unleashed after the coup. The spate of discoveries of clandestine graves in mid-1990, however, aroused intense media interest and provoked a national debate about responsibilities which continued for several months.

While some sectors of the conservative parliamentary parties publicly acknowledged blame for disbelieving the allegations of human rights violations or failing to use their influence to halt them, others merely replayed old arguments about the responsibility of the left wing parties for initiating a rhetoric of violence and bringing the country to the brink of civil war during the Allende government. This was a responsibility that exponents of the "reformed" currents of Chilean socialism were prepared to publicly acknowledge, while they pointed out vehemently that it did not excuse or mitigate the responsibility of the immediate authors of the crimes.

However, official statements by representatives of the forces most consistently implicated in human rights violations – the army and the political intelligence agencies of the former government – resorted to euphemisms and military justifications. Indeed, those most ready to acknowledge fault often seemed to be those with least reason to do so. The unrepentant attitude of the military, and the government's powerlessness to challenge it by judicial action, remained a serious obstacle to reconciliation. Had the army, for example, recognized blame publicly and expressed a determination to avoid a repetition of similar crimes whatever the circumstances, it might have made the lack of prosecutions more acceptable.

As it was, the attitude of the security services was impeding the achievement of the government's remaining objective: finding the "disappeared" or locating the sites where their bodies were disposed of. As in every country in which "disappearances" became a systematic method of repression, obstacles were emerging to clarification in a great majority of cases. No one knows or will publicly state what records, if any, exist in the files of

the security services. Those in a position to know, such as Manuel Contreras and former DINA members who now hold high-ranking positions in the army, deny the crimes or have remained silent. Yet the mute testimony of the clandestine graves discovered in 1990 in scattered sites up and down the country bore witness to episodes of fratricidal violence of which the nation had been only dimly aware. A combination of the patient efforts of relatives and human rights organizations, plus sheer chance, led to their discovery.

Some of these sites had been known to local people for years, although their precise location had been difficult to verify. This was partly because relatives feared that the military authorities would bar them access and dispose secretly of the evidence, or because fear prevented witnesses from coming forward. The advent of democracy was thus followed by a stream of denunciations of cases of illegal and clandestine burial of people secretly executed during the military government.

Most of the investigations that followed were begun by local assisted by teams of forensic anthropologists, archaeologists and human rights lawyers, who worked closely with the relatives in locating the sites and carrying out the excavations. The most dramatic cases. however. subsequently assigned to special investigating judges (ministros en visita). Identification of the remains was aided by the extensive medical data and dental records painstakingly collected by relatives' associations and the Vicaría de la Solidaridad, which played a vital role in this work. Some of the victims were identified by still recognizable clothing or personal objects, such as watches or belts which were discovered with the bodies.

In most cases the press was allowed controlled access to the excavations, which were also visited by parliamentarians, political leaders and local people. After identification had been completed (it sometimes took several months), the victims' remains were buried in simple funeral ceremonies often attended by thousands. These emotional scenes attested to the deeply felt

human need of the relatives to find and "account for" their dead through the social act of burial, putting an end to the permanent anguish of uncertainty. The refusal of the military authorities to return the bodies of the dead to their next-of-kin, and the falsification of official documents to conceal their anonymous disposal, were considered an affront to civilized values by almost every section of Chilean society.

No satisfactory explanation was offered by those who had given the orders. In an official statement issued as its reaction to a discovery at Pisagua, the army used war-time analogies:

"It is well known that when there is a wish to disparage the victors, they are blamed for cruelty, criminal excesses and above all with inflicting punishment disproportionate to the offensive capacity of the vanquished forces. In our case, we are convinced that the victory of liberty would not have been possible without the severe dissuasive actions carried out by the Armed Forces and Carabineros."

President Aylwin called on the army to cooperate fully with the investigations, so that as many as possible of the victims might be found. Although the army formally expressed its "will to collaborate", in fact it did not, and no burial site was discovered as a result of official army disclosures.

Like the discovery of clandestine graves in earlier years under the military government, the burial sites uncovered in 1990 corresponded to extrajudicial executions carried out by the military and police in the months immediately following the 1973 coup. This had been a time of massive repression but involving little central coordination. Many bodies were dumped in rivers or in mass graves in local cemeteries, with little serious effort at concealment. The pattern of systematic "disappearances" that later emerged with the growth of the DINA, however, has still yielded hardly any clues as to the whereabouts of the missing bodies.

The first discovery in 1990 was the only exception, and it occurred purely due to chance. On March 21 construction workers excavating a site in Colina, about 12 miles north of Santiago, discovered three human skeletons buried between the stones of a boundary wall they were about to demolish. The site had been part of the Peldehue army base until 1980, when the land



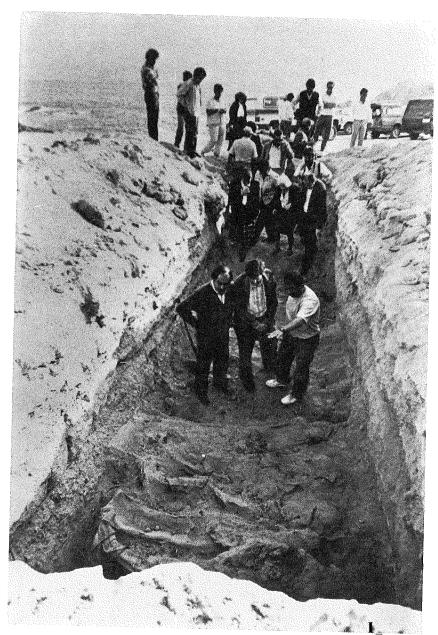
Funeral of Vicente Atencio and Eduardo Canteros, June 1990

was sold to a private company. The bodies still wore fragments of clothing and were bound at the hands and feet with nylon cords.

After a judicial investigation lasting more than one month, relatives identified two of

the bodies as those of Vicente Atencio Cortés and Eduardo Canteros Prado, both former members of the Communist Party. Atencio, a trade unionist and member of the Chamber of Deputies under the Allende government, disappeared on August 11, 1976; Canteros a construction worker, on July 23 of the same year. The third body could not be identified. The men were believed to have been detained by the Combined Command, which had used the Colina base as a secret execution site, according to the testimony of Andrés Valenzuela Morales.⁸⁷

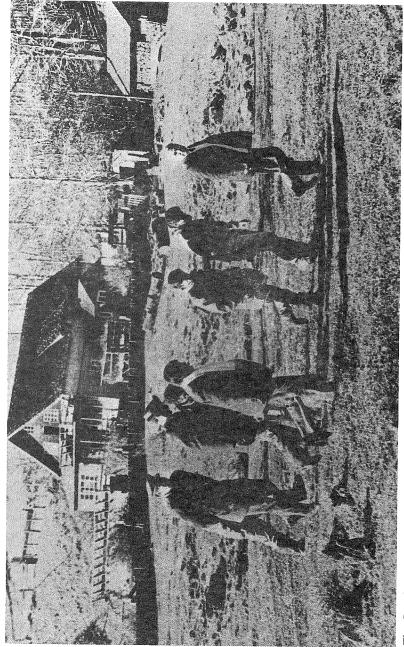
For further details of Valenzuela's testimony, see Chapter 3. Peldehue was also linked to earlier executions: more than 20 members of former President Allende's inner circle who were detained in the Moneda Palace on the day of the coup and subsequently "disappeared" are believed to have been taken to Peldehue and executed there. In July 1990 the Presidents of the Chamber of Deputies and of the Senate pointedly declined an invitation to attend an army display at the base.



Members of the Chamiber of Deposites visit Pistelli



Pisagua, June 1990



The Casa Patronal at Chihuío. Judge Harold Ríos leading the way



Funeral wallk for victims of Chilhuin, June 1990



The discovery of the graves at Chihwio, August 1990

A string of discoveries of clandestine burial sites began in June, 1990 when 19 mummified bodies were unearthed from a trench close to the cementery of Pisagua, a small town on Chile's northern Pacific coast. The town had served as the site of a concentration camp in 1973–1974 and as a place of internal exile for political opponents banished there in the 1980s. The bodies, stacked in layers, were still preserved due to the mineral content of the desert soil, and their clothes, personal objects, blindfolds and the cords with which they were tied were still intact. Bullet holes were clearly visible in their clothing. Pictures of the contorted, lifelike faces of the corpses suggested eerily that the events had occurred months, rather than nearly two decades, before. These harrowing images, contrasting with the stark beauty of the desert site, covered the front pages of all the newspapers.

Hundreds of political prisoners were held at Pisagua between September 1973 and July 1974 in grossly overcrowded conditions, where they were subjected to torture and ill-treatment. About 30, including many regional leaders of the Socialist Party, were executed there, 12 of them after summary trials by consejos de guerra. All of the 19 bodies found at the site were forensically identified, although fragments belonging to several other bodies could not be. Thirteen of the bodies belonged to victims of summary executions, of whom only eight had received a "trial" (five were "shot while attempting to escape"). While these deaths had been officially recorded at the time, this was not the case with the remaining six victims, common prisoners accused of drug offences who had "disappeared" after the army announced their "release".

In 1973 Pisagua camp and the Consejos de guerra which acted there had been under the command of the 6th Army Division Commander, General Carlos Forestier, now retired and a senior company executive. The current regional army authorities were said not to have cooperated with the judicial investigations, and records of the proceedings of the

Consejos could not be traced.⁸⁸ Jurisdiction over the investigations was nevertheless transferred to a military court in November 1990.

In July another mass grave was discovered in Chihuío, a remote wooded spot on the slopes of the Andes 140 miles from the southern city of Valdivia. Unlike at Pisagua, the remains discovered here were incomplete, consisting of small bones, shreds of clothing, buttons, zippers, parts of watches etc. However, forensic anthropologists working under the direction of a local judge concluded from the numerous kneecap bones that the grave had once contained up to 20 bodies.

The site, located close to the landowner's house on a private rural estate, had been known for years to local people, who were said to have named the spot "the valley of the widows". From 6–9 October 1973, a military convoy from the Hunters Regiment in Valdivia visited several small towns and hamlets in the lakeside area of Futrono, detaining 17 peasants in their homes and places of work and taking others from police stations. The peasants, who appear to have been pointed out as leaders of *La Esperanza del Obrero* (The Worker's Hope), an agricultural union, were bundled roughly into the trucks and taken in a heavy downpour to Chihuío, where they were held overnight on the patio of the landowner's house. Testimonies indicate that in the early morning the prisoners were butchered with knives and bayonets. A 17-year-old witness saw the pile of mutilated bodies the following morning covered with branches.

Although death certificates stated that the victims had died by shooting and were buried in the cemetery of Valdivia, local witnesses stated that they had been secretly interred on the estate by a military burial party, and that in late 1978 or early 1979 they had been secretly dug up in the night and removed.

The Rettig Commission, in its account of the Pisagua case, stated that the army's explanation was that the records had been incinerated in a terrorist attack in November 1989.

The Valdivia Hunters Regiment was under the command in 1973 of Santiago Sinclair Oyaneder, former vice-commander-in-chief of the army and currently an appointed senator. Questioned by journalists, he denied the involvement of either himself or the Hunter Regiment in the massacre. Yet the apparently falsified death certificates were said to carry the signed affidavits of two members of his regiment. The case had been briefly investigated by a military judge in 1973, but was shelved for "lack of evidence". According to local military officials, the record of the investigation was incinerated in a November 1989 "terrorist fire". The Chihuío case was transferred to a military court by a Supreme Court decision in early 1991.

Other investigations during 1990 revealed concrete evidence of the massacres perpetrated in September and October 1973 by the military task-force known as the Caravan of Death. In July, 13 bodies were exhumed from a common grave in Copiapó and were swiftly identified as being those of prisoners executed on 16 October after being removed from the local prison by members of the task-force. The victims, killed "while attempting to escape" according to the official explanation of their death given at the time, had been hastily and illegally buried in the cemetery on the orders of the local military commander.

A few weeks after the Copiapó exhumations, partial remains of 26 prisoners executed under similar circumstances on October 19, 1973 in Calama were found scattered at a desert site some 10 miles from the town. This was a particularly notorious incident, due to testimonies by participants in the military party which described the sadistic way the victims had been killed. It was reportedly one of these repentant former soldiers who identified the site where the victims had been hastily buried. However the investigators found that the grave had been subsequently clumsily reopened and, as in the Chihuío case, the bodies secretly

⁸⁹ "Tribunales militares acumulan casos de fosas clandestinas", La Nación, January 23, 1991.

removed and possibly dynamited. From a finger fragment forensic experts were able to identify only one of the victims as Haroldo Cabrera Abarzúa, a former official of the Chuquicamata copper mine and member of the Socialist Party who had given himself up to the military authorities on the day following the coup, apparently believing (as did many others) that he was safe in the hands of the Chilean army. Cabrera was serving a 17-year prison sentence when he was executed. All that could be found of the 26 victims of Calama was buried in a single coffin in a funeral ceremony in February 1991.

Another case in which patient investigative work produced results was that of Paine. In September 1990 the bodies of 13 "disappeared" persons and one executed prisoner were identified after they had been kept sealed in a bag for 17 years in the Santiago morgue. The victims were peasants from the El Escorial estate, who were among a group of 20 who had been detained by police and soldiers from the San Bernardo Infantry School, then tortured and executed in September and October 1973. The bodies were reportedly buried under stones and detritus in a deserted spot and were taken to the morgue by police after some relatives had discovered them. Seven other bodies of persons executed or "disappeared" in Paine were identified after being recovered from common graves in local cemeteries. In September 1991, investigations into graves marked "NN" (name unknown) in Patio 29 of the Santiago Cemetery led to the exhumation of some 130 illegally buried bodies, including some children. Twenty-five had been identified at the close of this study victims extrajudicial being of executions "disappearances".

Another Chuquicamata official who gave himself up to the authorities, was convicted, sentenced, and later abducted and secretly killed, was David Silberman. See Chapter 4.

While the cases described above were the most important discoveries, other remains were discovered in a disused mine in Tocopilla, and in unmarked graves in cemeteries in Concepción, Coronel, Talca and Temuco. There were also many false leads, and despite prolonged efforts, attempts were unsuccessful to find traces of the many bodies recovered in late 1973 from the Mapocho river in Santiago by local people and nuns, and which were buried along its banks.

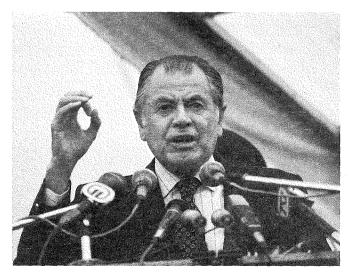
Chapter 6

The Rettig Commission

Mandate and Powers

The National Commission for Truth and Reconciliation (the Rettig Commission), established by Supreme Decree No. 355 on April 25, 1990, represented the Aylwin government's most important initiative in its strategy for confronting the legacy

of past human rights violations. The idea the commission. which to the government assigned the task of establishing a basis for justice and national reconciliation. was personally championed by President Aylwin himself. He consulted widely over its formation and mandate,



President Patricio Aylwin Azócar

and was said to have personally drafted Decree No. 355, and announced both the formation of the Commission and its results in televised broadcasts to the nation.

In the first of these addresses, on April 23, 1990, President Aylwin spoke of the country's "profound yearning" for peace and mutual understanding. Peace, he added, was not a synonym for silence and immobility.

"To close our eyes to what has occurred and to ignore it as if nothing had happened would be to prolong indefinitely a lasting source of pain, division, hatred and violence in the heart of our society. Only clarification of the truth and the search for justice create the moral climate indispensable for reconciliation and peace."

Public affirmation of the truth, he stated, was a way of reaffirming the dignity of the victims, and in itself was a form of moral reparation.

The terms of Decree 355 clearly delimited the Commission's mandate and powers. The Commission was assigned four tasks:

- to give as complete an account as possible about past human rights violations, their causes and circumstances;
- to assemble data to establish, if possible, what had happened to each of the victims;
- to recommend measures of reparation and rehabilitation to restore the dignity of the victims in the eyes of society;
- to suggest legal and administrative measures to prevent the systematic human rights violations of the military government from ever being repeated.

It was not the purpose of the Commission to substitute for the courts. Fears that it would sit in judgement on individuals, without their having the right to a legal defence or the right of reply, had been a constant theme raised by opposition leaders in the

private conversations held prior to the Commission's formation. In its electoral programme the government had explicitly rejected the establishment of special courts to try those responsible for human rights crimes. Nor was it the government's intention to substitute purely moral judgement – which could only have an exhortative impact – for the deterrent effect of a criminal trial. The Commission could draw on court records in the conduct of investigations and was required to submit new evidence it uncovered to the courts.

In fact, the Commission was formed, as stated in one of the preambular paragraphs of Decree 355, because of the urgency of creating an undisputed official record of the human toll taken by state and anti-state violence under the military government, and in response to the need for a concerted effort to clarify the fate of each of the victims, particularly the "disappeared". The "report in conscience" by a group of persons "of recognized prestige and moral authority" would allow public opinion to "form a rational and well-founded conception of what took place", and provide the elements for possible measures of reparation.

The Aylwin government was also concerned that without rapid intervention on the human rights issue, recriminations could repolarize the country and undermine the consensus on which the transition to democracy was based. For this reason, the Commission was given a short period – six months, extendible to nine – to complete its information-gathering and deliver its report to the President.

The Commission's mandate was restricted to "grave violations of human rights" committed from September 11, 1973 to March 11, 1990, i.e. the period of military government. These included executions, "disappearances" and cases of torture resulting in death perpetrated "by agents of the state or persons acting in their service". Due to limitations of time and to practical considerations, it excluded torture which did not result in fatality, as well as other abuses such as unfair trials or administrative punishment. The mandate however did include under "grave

violations" kidnappings and killings perpetrated by individuals "acting on political pretexts" (i.e. members of organizations which had taken up arms against the military government). This required the Commission to focus its investigations even-handedly on both the official security forces and on armed opposition groups.

The Commission was charged with collecting information directly from victims or their relatives, from human rights organizations and from other national bodies, including political parties, professional associations and trade unions. Although government departments were required to submit information requested, the Commission was given no special legal powers to compel witnesses to testify. The effectiveness of the Commission depended on the *moral* authority it commanded, as well as on the guarantees of confidentiality it assured to those willing to testify before it. The Commission was not mandated to pass judgement on the guilt – or possible guilt – of individuals; all of its information-gathering was to be kept confidential, and its deliberations were to be conducted without publicity.

President Aylwin worked hard in the weeks preceding the announcement of the Commission, to ensure that its composition was carefully balanced, in order to avoid any appearance of bias. The panel of eight members was presided over by Raúl Rettig Guissen, a distinguished former President of the Chilean Bar Association and former Radical Party senator, and it included a former Supreme Court judge, Ricardo Martín, who had served on the official Commission of Human Rights under the military government.⁹¹

Its other members were Jaime Castillo Velasco, lawyer and President of the Chilean Commission of Human Rights; Gonzalo Vial Correa, a historian and writer; Mónica Jiménez de la Jara, lawyer and former director of the School of Social Work of the Catholic University; Laura Novoa Vásquez, a lawyer; José Luis Cea Egaña, a professor of constitutional law, and José Zalaquett Daher, former legal advisor to the Comité de Cooperación para la Paz (the forerunner of the Vicaría de la Solidaridad) and former Deputy Secretary General of Amnesty International. Jorge Correa Sútil, Dean of the Law Faculty of Diego Portales University was appointed Secretary.

Initial Political Reactions

In the early weeks of the Commission's activity, it was by no means certain that the body would command the broad support so essential for its credibility. Senior *Renovación Nacional* lawyers declined invitations from the President to sit on the Commission, and despite his wide consultations with the parliamentary opposition beforehand, the announcement of the body's creation unleashed a polemic about its ulterior political motives and impartiality. This was intensified by General Pinochet's attempts to stall the initiative and by the army's public statement condemning it in May. One senior RN senator, Miguel Otero, subsequently denounced the Commission as a "masquerade".

Both the Renovación Nacional and Unión Demócrata Independiente considered the government's intention to restrict the focus of the Commission's work to the period 1973-1990 as evidence of its intent to put the military government "on public trial". They esteemed that if the purpose of the Commission was to analyse the root causes of human rights violations, these should be sought in the erosion of the rule of law under the Popular Unity Government, and even in early agrarian reform measures under the presidency of Eduardo Frei. The government resisted this attempt to dilute the Commission's focus. Yet the Commission's report ultimately provided a detailed account of the circumstances of political polarization and the growing climate of violence in the pre-coup years.

In addition, as mentioned above, concern was expressed that the Commission might be converted into a special tribunal infringing explicit constitutional provisions against the creation of special courts. The wording of Decree 355 made it clear that the Commission had no judicial powers or competence, even forbidding it to name those implicated in the crimes. The Commission scrupulously observed this rule during its investigations and in its final report, even at the cost of criticism from relatives of the victims and from the Left.

Thirdly, the government appears to have considered the including of killings by armed opposition groups under the rubric of human rights violations as another condition imposed by the need to generate a broad political consensus over the Commission's mandate. From a legal and philosophical point of view, however, their inclusion was questionable. Most of these crimes had already been widely publicized, and many of their alleged authors had been detained and prosecuted with the full rigour of the law, whereas the stated purpose of the Commission was to throw light on crimes long shrouded in official secrecy and impunity. In the end, the government seems to have followed a pragmatic course and sacrificed conceptual rigour in the interests of securing political backing for the project.

In general, opposition spokesmen criticized the President's intention to "dig up the past", which they considered had already been laid to rest by the 1978 Amnesty Law. They viewed this as a reopening of old wounds, the antithesis of reconciliation. The government rejected this argument: indeed it considered the effects of the Amnesty Law⁹² as one of the pressing reasons for the establishment of a body like the Rettig Commission. Furthermore, the prohibition against the Commission expressing judgement about individual responsibility, or naming those implicated, had been adopted to avoid accusations of "trial by publicity" and the possible exposure of citizens to acts of vengeance.

This debate was overshadowed in June by the wave of public revulsion which followed the discovery of the graves at Pisagua. During the second half of 1990 further media revelations about comparable crimes increased public recognition of the Commission's importance. Its activities were conducted quietly and efficiently and with scrupulous care for confidentiality. This gained the Commission almost universal political respect. By the

⁹² These effects are analysed in the preceding chapter.

end of 1990, further criticism was muted while all parties anxiously awaited its report. 93

Publication of the Report

President Aylwin received the six-Commission's volume report on deadline from Raul Rettig in a televised ceremony attended by the Commissioners and staff on February 8, 1991. After retiring on holiday to study document. he the further held round of meetings with representatives of human rights organizations, relatives' groups, political parties and



President Aylwin receiving the report of the National Commission for Truth and Reconcilation from Raúl Rettig, its President, February 1990

the armed forces, to deliver the Commission's findings and recommendations.

⁹³ Sergio Diez, Senator for RN and former ambassador to the United Nations, praised President Aylwin for his choice of members and acknowledged that the Commission had acted so far with "exemplary tact and judgement." Sergio Diez explicó que nadie en Chile pensó en el magnitud de atropellos a los Derechos Humanos." La Epoca, June 9, 1990.

On March 4, the President presented the report to the public in a televised address. After finishing his summary of the findings, President Aylwin said that both the State and society as a whole were responsible for what had taken place. Pausing, and visibly moved, he asked the relatives of the victims for forgiveness. ⁹⁴ He then called on the armed forces, and all those involved in the violations to "carry out gestures of recognition of the pain caused, and collaborate to diminish it."

After months of expectation, the report was available on the following day in serialised newspaper supplements.

Context and Standards of the Report

Before reviewing the methodologies of the Commission and the substantive findings as presented in the report, it may be useful to briefly examine some of the normative standards and human rights concepts on which the Commission based its work. One of the unusual merits of the report is that it lays these concepts open for inspection and outlines in detail the methodology and standards of judgement employed. ⁹⁵ It might further be helpful to outline some of the main areas of focus as well as issues of contention with which the Commission was confronted in its deliberations.

The Commission drew its standards from the rights proclaimed by the Universal Declaration of Human Rights and by related pacts and treaties. It viewed the right to life and the inherent dignity of the person as the most fundamental of these, and their

[&]quot;Chilean society is in debt to the victims of human rights violations...that is why I, as President of the Republic, venture to assume the representation of the nation as a whole in begging the forgiveness of the victims' families in its name." Discurso de S.E. el Presidente de la República, Don Patricio Aylwin Azócar, al dar a conocer a la ciudadanía el Informe de la Commission de Verdad y Reconciliación. Santiago 4 March 1991.

Informe de la Comisión Nacional de Verdad y Reconciliación Santiago, February 1991, Vol. 1, Part 1, Chap. 2: B.

violation the gravest infringement of human rights. While recognizing that torture must be considered a grave violation, it justified the President's decision to omit consideration of individual cases of torture as imposed by limitations of time and practical difficulties. It resolved nevertheless to deal with torture as a general issue.

Opposition group abuses

Although the Commission also refers to the 1949 Geneva Conventions and international humanitarian law as relevant standards, these are only rarely invoked in the report, reflecting the Commission's view that a state of internal war or civil conflict had not existed during the period covered. Nevertheless, the use of a single normative standard to deal alike with abuses by government and insurgent or terrorist groups is strictly appropriate only in situations of recognized armed conflict.

The characterization of opposition group abuses as "violations of human rights" is an innovation which departs from the accepted principles of international human rights law and the mandate principles which regulate the major intergovernmental organizations in this field, non-governmental organizations such as the International Commission of Jurists or Amnesty International, and indeed the views of Chile's own human rights bodies. Juridically and historically the concept of human rights is linked to the notion of "social contract". States are obliged under international law not to use the monopoly of force entrusted to them by their subjects to violate their fundamental rights. The assertion of a false "symmetry" between the State and its subjects has often been used by governments to justify or explain human rights violations as a necessary measure to counteract such "violations" by their opponents.

While citing these arguments, the Commission chose not to enter this debate. It maintained, however, that the "orthodox" conception of human rights had been eroded in practice by public opinion, and that to limit the expression "violation of human rights" to acts of the State "is interpreted by public opinion more often than not, as an attempt to condone or justify abuses or atrocities which certain political opposition groups may commit." Such opinion, argues the report, rejects violence and atrocities on both sides: there are certain "profoundly intuited" human values (deriving in part from human rights concepts, in part from humanitarian law) which must be respected by all political actors, as well as the State.

The adoption of this "balanced" perspective is controversial however. It takes a position implicitly opposing the justification of violent resistance to the military government, while at the same time the Commissioners avoided adopting any stance on justification of the coup. In addition, it dilutes the important legal distinction between criminal or terrorist actions committed by individuals, and those committed by agents of the State carrying out public responsibilities, who are entrusted with the monopoly of force and with the capacity to conceal their actions.

Moral or legal responsibility

Decree 355, in establishing the mandate of the Commission, refers to "acts which involve the moral responsibility of the State". The Commission was careful to distinguish this more diffuse concept of "moral guilt" from criminal and legal responsibility. The working definition given for moral responsibility is:

"the responsibility which sound reasoning indicates is held by the State for actions of its agents (or of persons in their service) carried out in furtherance of policies or orders of the state; or for actions carried out without reference to specific policies or orders, if the agent of the state enjoyed express or tacit support of the organs of the state, or the protection or inaction of

the latter in such a manner as to leave the crime unpunished"

Clearly such moral responsibility neither implies nor excludes criminal responsibility. The Commission accepted the point repeatedly made by the opposition parties that criminal responsibility could be attributed only to individuals, not to institutions. Nevertheless, it argued, institutions may be held *morally* accountable for their actions, and ultimately cannot evade such judgement by seeking to dissociate themselves from the criminal deeds of their members. According to the Commission:

"Just as we have spoken of the historical or moral responsibility of the State, which would be inconceivable if the acts of its officials could never affect it, so it is also possible to speak properly of the moral or historical responsibility of political parties, others institutions and sectors of national life and of society as a whole. The Armed Forces are no exception."

This paragraph is cautiously worded, presumably to avoid creating the impression that the armed forces are being singled out for blame and instead placing them alongside other social institutions indirectly responsible to a greater or lesser extent for the occurrence of human rights violations. Editorials and comment in the conservative press during the year had made much of this idea that all of Chilean society was "morally responsible" to some degree. However politically or morally justifiable, from a human rights perspective this "balance" strikes an artificial note. The notion that the armed forces were one out of many institutions which had their "quota" of moral responsibility hardly stands up beside the report's own analysis of the

⁹⁶ Ibid; Vol. 1, Part 1, Chapter 2: B.

systematic policies implemented by the DINA, its extreme centralization and the direct subordination of its Director to the Presidency.⁹⁷ Such language is nevertheless explicable as an effort to avoid widening the rift between the armed forces and the rest of society.

Human Rights and Political Polarization

Despite the restriction of the Commission's mandate to the period of the military government, the Commissioners devoted a section of their report to an analysis of the political crisis which led to the military intervention in September 1973. 98

This section of the report adresses the highly sensitive issue of responsibility for the ideological polarization and climate of violence which preceded the coup. A large quota of responsibility is laid at the door of those political parties in and outside of the Popular Unity coalition who, according to the Commission, adopted an increasingly confrontational posture, disparaging the parliamentary system, encouraging the law to be flouted and contributing to a dehumanising spiral of violence. The report also noted the bitter resentment and increasing use of force by extreme right-wing civilian groups frustrated by the impotence of the police and courts to defend property owners from illegal expropriation.

In analysing the factors which led to the crisis of September 1973, the Commission concluded that a "climate objectively propitious for civil war" existed at the time. A war psychosis developed

The trial of the nine members of the Military Junta in Argentina for crimes committed in the "dirty war" against subversion in the late 1970s is an example of successful criminal prosecution of military leaders for presiding over a centralized plan of extermination of political opponents. See Amnesty International: Argentina: the Military Junta and Human Rights, Report of the Trial of the Former Junta Members, Amnesty International Pulications, London, 1987

⁹⁸ Informe de la Comisión Nacional de Verdad y Reconciliación: Vol. 1, Part 2, Chapter 1: A.

among the armed forces, who had convinced themselves that "powerful and well-trained armies with abundant weapons were ready for combat." For months after the coup, the armed forces were "immersed in their own mentality and climate based on an alleged war". Nevertheless, the Commission pointed out that the coup was met with no significant armed resistance, and that the decree laws on which the establishment of the consejos de guerra was based "never invoked or sought to base their decisions on the existence of militarily organized rebel or seditious forces". Indeed, the Commission dismissed the idea of an "internal war" repeatedly cited by the armed forces in their own defence.

Critique of the Judiciary

A special chapter of the report was devoted to the Commission's conclusions on the role of the judiciary under the military government. The Commission considered that "serious defects in the laws and the judicial system" only partly explained the ineffectiveness of the courts in protecting human rights. The "weakness and lack of zeal of many judges" were also responsible.

The Commission focused on three areas in which the court's role had had particularly grave effects: its denial of judicial protection to victims of illegal arrest, many of whom disappeared; its failure to pursue energetic investigations of human rights crimes and to bring those responsible to justice; and its abdication of its responsibility to admit appeals against the verdicts of the War Councils.

In the case of *amparo*, the Commission acknowledged grave defects in the relevant legislation, such as the prescript preventing judges from ruling on the legality of the motives for

⁹⁹ Ibid; Vol 1, Part 2, Chapter 3.

an arrest under emergency provisions, which was later explicitly incorporated into the 1980 Constitution. Nevertheless, argued the Commission, existing rules gave the courts powers to act which were not exploited. Time-limits for the hearing of *amparo* appeals were not respected, arrests carried out without arrest warrants were not challenged, and post-dated orders were routinely accepted. Furthermore, no action was taken to prevent the use of clandestine detention centres or prolonged administrative incommunicado detention.

Finally, the Commission pinpointed three areas in which the action of the courts had contributed to the impunity of human rights violators: First, the adoption of particularly rigorous formal standards of evidence in cases in which state officials were accused of human rights crimes — this often resulted in the dismissal of well-founded charges issued by lower courts. Second, the courts' passivity in accepting without serious investigation the evidence or statements given by the accused, while failing to adequately corroborate official information. And third, the "extension" of the amnesty law to cover cases in which the investigation of the facts had not yet been completed.

The Commission's Methodology and Findings

In the course of its formidable task of building up a reliable record on thousands of individual cases, the Commission interviewed many hundreds of witnesses in every part of the country and also abroad. It began its work by registering cases within its mandate – 3,400 in all – on the basis of information provided by relatives during a preliminary interview. This information was then matched with lists provided by relatives' associations, human rights organizations, political parties, trade unions and the armed forces. Information on victims of attacks by armed opposition groups was similarly obtained from their relatives, and from the *Corporación Nacional Pro-Defensa de la Paz* (CORPAZ), an organization representing the relatives of victims of terrorism.

In a second phase, further meetings were held with the relatives in Santiago and the provinces, in which they were interviewed by members of the Commission's legal staff after having been assisted by social workers to confront the trauma of their ordeal. The Commission corroborated the testimonies with biographical information and other data from official sources and began to follow up leads and witnesses.

Information was also requested from the commanders-in-chief of the armed forces regarding cases in which military personnel were implicated. The army replied to more than two-thirds of these requests, but in most cases declared that the relevant files had been destroyed or incinerated "in accordance with normal procedure". The same response was "almost invariably" given by the *Carabineros*. Some valuable information was received from the Air Force and, in particular, from the Navy. The Commission however was unable to obtain copies of the trial dossiers of prisoners sentenced to death by *Consejos de guerra*.

In general, the armed forces refused to submit information on their participation in the security services, arguing that they were legally prohibited from divulging intelligence-related information. Despite more than 160 written requests addressed to the Commanders-in-Chief to allow military personnel implicated in violations to testify before the Commission, only two officers appeared, though some agreed to testify in writing. The response of former members of the military, now retired or in other occupations, was more encouraging. Contributions received included dramatic new evidence from former DINA agents.

In December 1990, at the end of the data-collection phase of its work, the Commission sent letters to all the branches of the armed forces and the agencies implicated in "disappearances" urging them to disclose the whereabouts of the remains of the victims.¹⁰⁰

¹⁰⁰ Ibid., Vol. 1, Part 1, Chapter 1. The Commission gives an account of its methodology and safeguards which is unusually thorough for such a report by an official government human rights body in Latin America.

Structure of the Report and Statistical Findings

The resulting report is a massive document of nearly 2,000 pages divided into two volumes, the second of which contains an alphabetical list of all the victims, with brief biographical details and a summary of each case. The longer first volume divides the period of military government into three phases and analyses each in turn. ¹⁰¹ The discussion of each period includes a description of the agents responsible for human rights violations, the types of violations committed and the methods used. Each case is described, often with a wealth of detail.

A concluding section looks at the reactions to human rights violations of different sectors of society, including the government, the Church, the judiciary, media, political parties, professional groups, human rights organizations and the relatives of the victims. One section, written solely in the form of extracts from interviews with relatives – and without comment or analysis – gives a tragic and deeply moving picture of the desolation of the families.¹⁰²

The statistical findings provide data on the kinds of cases documented, the different definitions of victims of human rights violations or "political violence", the number of persons killed in each category etc. Some of the major data may be resumed as follows:

See Table on the following page.

¹⁰¹ September 11, 1973 - December 1973; 1974 - August 1977; August 1977 - March 1990.

¹⁰² Ibid., Vol. 1, Part 3, Chapter 4: "Family and Social Effects of the Gravest Human Rights Violations".

| Number |
|--------|
| 3, 400 |
| 2,920 |
| 2,115 |
| 164 |
| 641 |
| |

| Cases of Killings | Number |
|--|--------|
| | |
| Total number of cases treated by the Commission | 2,115 |
| "Enforced disappearances" | 1,068 |
| Executed after sentence by Consejos de Guerra | 59 |
| Killed during street protests | 93 |
| "Killed while trying to escape" 105 | 101 |
| Other extrajudicial executions or death by torture | 815 |
| Killed in actions by armed opposition groups | 90 |

[&]quot;Victims of human rights violations" included victims of "enforced disappearance", judicial and extrajudicial execution, unjustifiable use of force or torture resulting in death, "attacks on life with a fatal outcome, committed by individuals on political pretexts, including acts of indiscriminate terrorism", and suicide "resulting from physical or psychological torture, or conditions of imprisonment or any other situation under the responsibility of the state which itself violates the victim's human rights."

[&]quot;Victims of political violence" were distinguished from victims of violations of human rights. Their death, while directly related to a situation of political conflict, was not legally speaking a violation of human rights. Typical cases involved victims on either side who were killed or committed suicide during armed clashes and exchanges of gunfire; accidental killings of bystanders in armed clashes; and those killed defending themselves against possible arrest and torture.

¹⁰⁵ The Commission concluded that the phrase "killed while trying to escape" was a military euphemism for summary execution.

In general, the Commission's findings corroborated information processed and published previously by the *Vicaría de la Solidaridad*, the Chilean Commission of Human Rights and other domestic human rights groups. Nevertheless, important additions were made. The methodology used enabled reports from different organizations to be cross-checked, and inconsistencies explored. Many new witnesses were located and interviewed, and – particularly in rural areas – relatives of victims came forward who had never previously announced their case. Thus there was much new information provided on violations committed during the first few months of the military government, when human rights organizations were still embryonic.

The Role of the DINA

Much information concerning the various organs of the security forces was previously available in a range of published and unpublished sources. The Rettig Report however made some important additions to this information, particularly regarding the sinister role of the DINA.

The Commission detected the existence within the armed forces as early as September 1973 of a small but cohesive army counterinsurgency group, motivated by extreme anti-communism, a belief in the necessity of "unconventional methods" in combatting insurgencies ("dirty warfare") and a willingness to subjugate elementary moral principles to the imperatives of "national security". According to the Commission this group was a "determining factor in the problem of human rights".

The group had its roots in the so-called "Committee of Colonels", which was based in the Military College in September 1973 and in the "Commission DINA" which began to operate in November of that year. Early evidence of the operation of the group concerns its participation in the mass executions carried out in October 1973 by the "Caravan of Death". All but one of the participants in that task force later became prominent DINA members.

In addition to detailing the methods and targets of the DINA, the report describes how the group achieved absolute pre-eminence in the first four years of the military government, elbowing aside many senior army officers who opposed it, and operating with total licence. While the Commission pointed out that it was not the only group with fanatical anti-communist views, or solely responsible for grave human rights violations, the report's analysis supported the view that the number of military personnel consistently implicated in human rights violations was comparatively small.

The eclipse of the DINA was accelerated by the international scandal surrounding the assassination of Orlando Letelier in Washington in 1976. But many former DINA officers were subsequently transferred to the CNI, and they continued to exert influence in key positions of the army. 106

"Disappearances"

The term "disappearances" was used to describe what in the Commission's view were two quite distinct phenomena: the indiscriminate and clumsily concealed killings in the first three months after the coup, and the systematic, centrally coordinated policy implemented from 1974-1977 by the DINA. Of the latter, the Commission stated that it had reached the conclusion "that a purpose of extermination lay behind them, politically motivated and directed at certain categories of people."

During this period, the absolute licence given the DINA, its clandestine methods, enormous resources and ruthless efficiency created the conditions for the torture and secret elimination, one by one, of government opponents considered particularly dangerous. The report gives a harrowing account of the methods used by the DINA to exact information from its victims, and lists

¹⁰⁶ Ibid., Vol. 1, Part 3, Chapter 2.

more than 20 secret detention centres used by the DINA, the SIFA and the *Commando Conjunto*..¹⁰⁷

The Commission left no room for doubt about the fate of the "disappeared": "For this Commission, the fate of both categories of victims, executed or "disappeared" remains the same. The difference lies in that in some cases the remains of the victims were found, and in others, not." Based on the sites in which the bodies of "disappeared" prisoners had been uncovered and on the testimonies of former members of the intelligence services, the Commission concluded that most of the "disappeared" were killed after being taken out of secret detention centres to remote sites, where they were executed and buried. Testimonies indicated that others were drugged, bundled into helicopters and dropped into the ocean. In some rare cases the DINA sent bodies to the morgue or even handed them over to their relatives.

Executions

The majority of extrajudicial executions recorded in the report occurred during the first three months following the military coup. As noted in the chart above, 59 prisoners were executed after being sentenced to death by *Consejos de Guerra*. The

¹⁰⁷ These centres were equipped for torture which was normally carried out by specially trained personnel. The methods habitually used included: "la parilla" (the application of electric shocks to the bodies of prisoners strapped to a metal bed-frame); suspension by the wrists and knees for long periods (this torture was often accompanied by beatings and the use of electric shocks, or guards would hang on to prisoners to increase the pressure on their joints); submarino (the submersion of the head in filthy water to the point of near-asphyxiation), or the use of a plastic bag placed over the head to produce the same effect (submarino seco); beatings producing severe internal injuries, etc. Other methods, used when these failed to bring results, included psychological torture such as threats to detain or torture family members in front of the victim, or the torture of one detainee while another was forced to watch. In some centres, though not all, rape and sexual abuse was practiced. Ibid., Vol. 1, Part 3, Chapter 2.

¹⁰⁸ *Ibid.*, Vol. 1, Part 1, Chapter 2: B.2.

Commission declared itself "morally prevented from accepting" that in any of these tribunals in 1973 the defendants had had a fair trial. It described some killings as the result of "unnecessary or excessive use of force", and detected personal motives or revenge behind other cases.

In every case the Commission rejected official versions that victims had been shot "while attempting to escape" or had themselves tried to disarm or attack their captors, as was officially claimed in many cases. For other victims there was no official explanation of the death, either at the time of the killing or in reply to the Commission's queries. In some cases records in the Civil Register had been falsified.

Most of the killings that occurred in the final period of military government (1977–1990) were carried out by members of the security forces in the context of operations against clandestine armed opposition groups. Many others took place during street demonstrations and anti-government protests. There was also a small number of executions which could be characterized as political assassinations unrelated to counter-terrorist operations.

Many killings had officially been described as having taken place in combat, during shoot-outs with the security forces. The Commission concluded however that in a large number of these cases "such clashes had never taken place, and the version given by the authorities was a means of denying the State's responsibility." ¹⁰⁹ The Commission reached this conclusion after a case-by-case study. In 63 cases from November 1977 – March 1990, the Commission determined that the victims of such "shoot-outs" were summarily executed, either after their detention or while otherwise unable to defend themselves.

¹⁰⁹ *Ibid.*, Vol. 1, Part 3, Chapter 3: A.2(a).

Victims of Political Violence and Armed Opposition Actions

Finally, the report provided various statistics concerning "victims of political violence" or of "human rights violations by individuals acting on political pretexts." The latter formula was intended to refer to persons killed as the result of terrorists attacks or other armed opposition actions.

The Commission's analysis of this data confirmed that intentional security force killings or killings resulting from terrorist attacks far outweighed in number those resulting from violent confrontations.

Recommendations

The Commission's recommendations were contained in two chapters of the final part of the report, which dealt respectively with measures of reparation for the victims and the prevention of human rights violations in the future.

Reparation

The recommendations for reparation included proposals for symbolic rehabilitation of the victims, such as construction of public monuments or parks in their memory, and the introduction of a special simplified legal procedure for certifying "presumed death" in the case of the "disappeared". In terms of concrete welfare measures, the Commission recommended the provision of a uniform compensatory pension for relatives of the victims listed, and made proposals to remedy the special health problems and educational disadvantages of the victims' family members and children.

¹¹⁰ See charts above.

Establishment of a Human Rights Foundation

At the conclusion of its labours, one of the Commission's preoccupations was the fact that so little progress had been made in discovering the whereabouts of the bodies of the "disappeared". The Commission made two recommendations:

- Of particular importance was its recommendation that a public corporation be established, one of whose principle purposes would be to contribute to further investigations into the fate and whereabouts of the "disappeared". The Commission acknowledged that despite its efforts, it had not been able to clarify more than a handful of the hundreds of cases which remained unsolved, and it considered the continuation of this task an essential obligation of the government.

The Commission proposed that the Corporation be given powers to make itself party to judicial investigations. It would also house an archive of the materials accumulated in the course of the Commission's work, provide advice and support to relatives of the victims, and advance proposals for educational materials on human rights.¹¹¹

After the release of the report, the government drew up proposals for legislation to follow up the Commission's recommendations on reparation of the victims and for further steps to clarify the fate and whereabouts of the "disappeared". In their original form the proposals, which were drafted by an inter-ministerial committee, fell short of the expectations generated by the Commission's recommendations, and were strongly opposed by the relatives.

The disagreements touched on the norms proposed for the calculation of pensions, and on the government's proposal to simplify procedures to register the victims' "presumed death" (the relatives felt this put a seal on the fate of the victims before investigations had been completed, thus releasing the state from its obligation to continue them). The strongest objection concerned the terms of reference and powers of the *Corporación Nacional de Reconciliación*, which the government proposed to establish following the recommendation of the Commission. This body was conceived to offer assistance to the relatives, but was not given an active role in the investigations, and its mandate excluded cases on which the Commission had been unable to make a determination. Most of the relatives' objections, however, were met in the final draft of the proposals, which was passed on January 31, 1992 as *Ley No. 19.123*. (See Epilogue)

- The Commission also suggested that a law be introduced to penalise the withholding of information from the courts on the whereabouts of the remains of "disappeared" prisoners, and that those who contributed such information should be relieved of criminal responsibility for their possible commission of crimes.

Prevention

The Commission's recommendations for preventative measures were based on a critique of diverse aspects of the Chilean legal system – in particular the application of military justice – and of existing constitutional guarantees. In addition the report proposed several educational reforms designed to increase awareness of human rights.

- The Commission recommended that Chile ratify the Optional Protocol to the International Covenant on Civil and Human Rights, 112 carry out a "careful review" of the reservations accompanying ratification of other international human rights instruments, and examine relevant domestic legislation to ensure its compatibility with these instruments. To avoid legal ambiguity regarding the pre-eminence of such norms over domestic law, the Commission proposed an interpretative clause of the Constitution to reaffirm this principle.
- The Commission also called for a thorough reform of the judicial system, including changes in the format and content of the training of judges, the introduction of human rights chairs in law faculties, and the modification of what it considered to be an overly formal and positivistic approach to law training.

¹¹² Chile's ratification of the Optional Protocol would enable citizens whose human rights under the Covenant have been violated and who have exhausted domestic remedies to present their case to the Human Rights Committee established under the protocol. The Committee makes a decision in such cases, which is communicated to the government, and may call on the government to implement its resolutions.

Changes in the procedures for appointment of Supreme Court judges as well as evaluation of the judges' performance were also advocated.

- Diverse recommendations were made on penal procedures. Notably these included a constitutional reform to further restrict the competence of military courts, limiting their jurisdiction to strictly military offences, and a measure to preserve the right to habeas corpus under states of emergency, in line with the advisory opinion of the Interamerican Court of Human Rights. Other reforms proposed included annulling the evidentiary value of extrajudicial confessions, unless supported by statements in court; modifying rules governing incommunicado detention and the secrecy of judicial investigations to ensure the defence adequate access to prosecution evidence; and strengthening defence rights.
- Referring to the armed forces, the Commission called for the introduction of human rights teaching into military training, study of the concept of "National Security" to ensure its consistency with human rights, and careful review concerning use of the principle of "due obedience", among other measures.

Reactions to the Report

If the core of the Rettig Commission's task was to establish the transcendence of fundamental human values over political conflict, and recognition of such values as the basis of national reconciliation, initial reactions to the report were a mixed success.

¹¹³ In January 1987 the Interamerican Court of Human Rights issued an advisory opinion on *habeas corpus* which upheld the view that *habeas corpus* may not be suspended, even during states of emergency.

While maintaining their reservations about the Commission's historical focus, the parliamentary opposition parties accepted its methodology, its findings about human rights violations and the justification of its recommendations concerning measures of reparation to the families of the victims. In responding to the objections of the opposition parties to the "one-sidedness" of the Commission's historical interpretation, President Aylwin had emphasized that whatever divergence of views existed about the legitimacy of the coup, "no opinion in this respect can erase the fact that the human rights violations described in the report were committed." The situation leading up to the coup may have "placed human rights at risk and made their violation more probable, but in no case did it justify such violations", 114 he said.

This position was reaffirmed by all the parliamentary sectors, including the party most closely identified with the military government, the UDI. Within days of the publication of the report, both the Chamber of Deputies and the Senate unanimously declared their support for the Commission's work and their adhesion to the President's call for reparation for the victims.

On March 27, the National Security Council met at President Aylwin's request to receive the observations of the armed forces concerning the report. Full statements were published afterwards by the Army, Navy and *Carabineros*. The Air Force, which had already commented publicly on March 8, issued no further statement.

The Air Force declaration, which was read personally to the press by its Commander-in-Chief, General Fernando Matthei, had been conciliatory in tone, and the only one to express sorrow and regret. Reaffirming his commitment to the legitimacy and

¹¹⁴ Discurso de S.E. el Presidente de la República, Don Patricio Aylwin Azócar, al dar a conocer a la ciudadanía el Informe de la Comisión de Verdad y Reconciliación, Santiago, March 4, 1991.

goals of the military regime, General Matthei nevertheless stated that "the civilian and military victims of those unfortunate times represent a burden of the strongest emotions on our conscience, with the painful consequences incurred for a nation when it abandons coexistence based on reason and makes necessary the use of force." As Commander-in-Chief he accepted full responsibility for what had taken place in the air force, "as the law states and my soldier's honour demands."

Carabineros issued two separate statements, and while the first was judged by government ministers to be "positive and balanced" because it stressed the will of the police force "to contribute to reconciliation", the second asserted that the Commission's findings were only "one version" of the truth, and as they had no legal force their acceptance could not be made obligatory. The core of Carabineros' position, however, was an ad hominem argument apparently seeking to justify possible "excesses" by referring to the "worse" crimes of the extraparliamentary left and terrorist groups. This argument clouded matters by confusing the issue of justification of the security forces' battle against such groups – which the Commission had never disputed – with that of justification of the methods used.

The statement also revealed concern that aspersions cast on the police by the moral verdicts of the Commission could undermine its legitimacy and effectiveness in the battle against crime and terrorism. Taking issue with the notion that actions by individual members of the force should be allowed to affect the moral integrity of the institution as a whole, the statement expressed fear that the wide publicity given to the report could create an "anti-police mentality", especially with young people. Many of the report's recommendations for reforms to police practice and penal procedures were rejected as unacceptably restrictive.

The statements released by the Navy and Army focused primarily on the motives and justification of the military coup, omitting any direct reference to human rights violations. Neither accepted any degree of responsibility or moral culpability, and neither explicitly acknowledged that actions taken in defence of the State were subject, like any others, to ethical restraints. Both reaffirmed the "state of war" thesis to rationalize or justify the measures used. Both refused to contemplate gestures of moral reparation for the victims or to entertain any innovation in their training programmes to incorporate basic human rights principles. In addition, both institutions accused the Commission of exceeding its responsibility, and of unilaterality and lack of objectivity in its conclusions.

The statements of retired military officers published during the same week were similar in logic, if franker. Retired Vice-Admiral Fernando Navajas Irigoyen wrote in an article published in *El Mercurio*:

"The absolute truth will never be discovered, since the fight against terrorism is a dirty underground war in which there are no rules, and in which the criminals and subversives leave no trace and neither do those who repress them. However abominable it may appear to some, this is a fact and is the case in any country of the world which is fighting terrorism. The rest is ignorance or hypocrisy." 115

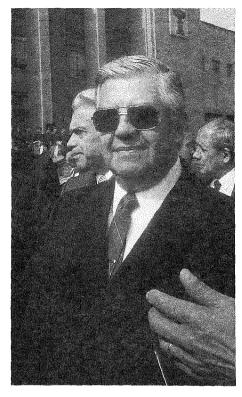
An identical view was expressed by retired General Manuel Contreras Sepúlveda, former Director of the DINA, in a televised interview on March 27:

"There are no 'disappeared detainees' in a war of subversion...those who still think that war is a sightly affair with pretty gentlemanly uniforms and white gloves, with a declaration of war from the last century, are out-of-date. And that is the case with the Rettig Commission."

¹¹⁵ El Mercurio: "Informe Desafortunado", March 23, 1991.

General Contreras went on to deny outright any responsibility of the DINA for "disappearances" and torture. His denials were greeted with derision or disbelief by political sectors, but there were striking similarities between his position and that of other retired generals — and, indeed, of the command itself. Army high Reading the army's official **Pinochet** statement. General referred to the persistence of a war of subversion, stating, "from the point of view of any serious armed institution, when one is faced by a situation of war, only total victory is possible."

The language of the Army's televised declaration, which was delivered by General Pinochet in a hectoring and aggressive tone, was reminiscent of similar declarations in earlier years of



Manuel Contreras Sepúlveda, former Director of the DINA, in 1991

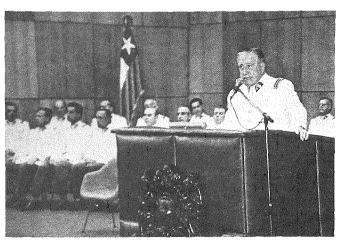
the military government. It revealed no signs of a change of heart or any sensibilization to the theme of human rights, and it contained no firm public undertaking to ensure that similar methods would not be used again in comparable future circumstances.

The Guzman Assassination

The public debate on the Rettig report was cut short when on April 1st, terrorists allegedly belonging to the "Autonomous"

fraction of the FPMR shot dead UDI senator Jaime Guzmán Errázuriz as he was leaving the Catholic University after giving a law class. Guzmán, who had been a Pinochet advisor and one of the architects of the 1980 Constitution, was a figurehead of the *Pinochetista* right and had emerged as a highly effective parliamentary critic of the government's penal reforms.

The killing, which occurred only three days after the army had delivered its counter-attack on the Rettig report, instantly shifted the focus of public discussion to the theme of left-wing violence The right-wing parliamentary opposition, which initially had been subdued in its criticism of the report, went back on the offensive,



Pinochet delivering the army's opinion of the Rettig Report (March 1991)

arguing that terrorism was the "real issue", that the government had failed to take proper steps to protect public order, and that the attack had "buried" the Rettig Report. 116

In his annual address to the nation on May 22, President Aylwin stressed

that no sector now questioned the truth of the events catalogued in the Rettig report, and that the government must respect the right

Within the space of a few weeks the government had made itself party to the investigation into the Guzmán assassination, and named a Santiago street in his memory. No street in Santiago yet bears the name of Salvador Allende, the only president in Chilean history to be deprived of this public recognition.

of different sectors of the population to dissent over their interpretation. Yet the abrupt shift of attention provoked by the Guzmán attack brought fresh talk of the "continuity" between current left-wing political violence and the armed challenge faced by the military government. A strong impression was left that the army had had the final say.

PART 4 Government Policies

Chapter 7

The Political Prisoners and the Cumplido Laws

The immediate legacy of the militarization of state security under the previous government was the existence on March 11, 1990 of more than 300 political prisoners. About 75 per cent of these were currently under trial by military courts. The proceedings of these courts had been subject to multiple violations of due process, and in most cases the defendants' "confessions" submitted to military prosecutors had been obtained under torture and coercion.

The government's electoral undertaking was to exempt from penal responsibility and pardon all prisoners except those who had committed homicide, serious wounding, kidnapping or abduction of a minor. The cases of prisoners facing trial for any of these offences would be transferred to civilian courts with guarantees for a fair trial. In all cases, penalties on conviction would be mitigated to compensate for the "inhuman conditions" suffered by the political prisoners.

The number of prisoners who might benefit from presidential pardons was limited by constitutional restrictions. Article 9 of the Constitution declared those convicted for terrorist offences ineligible for individual pardons, which in any event could only be extended to prisoners who had already received a final sentence. Taken together these restrictions eliminated all but

about 50 of the political prisoners from consideration. Within days of taking office, President Aylwin announced pardons for 47 prisoners convicted under the Arms Control Law, the Law of State Security and the Military Penal Code. However all but 19 of the beneficiaries were already out on parole, or on Sunday or daily release. The great majority of the prisoners therefore would have to await legal reforms for their liberation.

Indeed a longer-term objective, seen by the government as intimately related to the situation of the political prisoners, was to reform legislation currently in force to combat offences against the State and armed opposition activity. The new government combined these twin objectives of reform and redressing the plight of political prisoners in a single parcel of laws introduced to Congress within days of its taking office.

The three laws¹¹⁷ (popularly known as the "Cumplido Laws" in recognition of the dogged exertion of the Minister of Justice, Francisco Cumplido, in steering them on their difficult passage through Congress) included measures for:

- abolition of the death penalty;
- restoration of civilian jurisdiction over politically motivated crime;
- reductions in penalties for these crimes;
- new norms protecting procedural guarantees;
- legislation tightening the definition of terrorist crimes;
- restoring fair trial rights to those awaiting trial or convicted by military courts.

Laws Nos. 19,029 and 19,027, which would finally be adopted in January 1991, dealt respectively with the death penalty and amendments to the 1984 Anti-Terrorist Law. Law No. 19,047 introduced modifications to the 1972 Arms Control Law, the 1958 Law of State Security, the Code of Military Justice, the Penal Code and the Code of Penal Procedures. It also included eleven "transitory articles" which dealt exclusively with those political prisoners (and those released on bail) who were convicted or were facing charges for politically motivated offences committed prior to March 11, 1990.

The Death Penalty (Law No. 19,029)

Since total abolition of the death penalty required a constitutional reform for which the government lacked the needed two-thirds majority in the Senate, it chose instead to introduce ordinary legislation eliminating the death penalty from the penal laws.

The Concertación had adopted a position of principle against capital punishment, and also saw its abolition as a symbolic measure of pacification. On one hand, at the time of the parliamentary debate military prosecutors were asking for the death penalty against more than 20 political prisoners accused of "terrorist" offenses. On the other hand, the advent of democracy also raised the spectre of possible calls for the death penalty against those convicted of serious human rights violations under the military government. As President Aylwin indicated in the preamble to Law No. 19,029, "We cannot believe that it is constructive to confront our people with more violence and death." 118

The Government sought to replace the death sentence with life imprisonment for those military crimes in the Military Penal Code to which the death sentence was still applicable, such as espionage, high treason, desertion and abandonment of duty. The death sentence was also to be rescinded for crimes of political violence and terrorism as well as for ordinary crimes under the Penal Code.

The government's proposals were carried in the Chamber of Deputies on May 9, 1990, but drastic modifications were introduced by the opposition parties in the Senate. A majority of the five-member Constitution, Legislation and Justice Committee (on which the opposition had a majority) voted to retain capital punishment for more than 20 offences under the

Mensaje de S.E. el Presidente de la República con el que modifica diversos textos legales a fin de garantizar en mejor forma los derechos de la persona, Santiago, 11 March. 1990.

military and ordinary penal codes, including for some serious terrorist crimes. In the final debate on the floor of the Senate the retentionists gained further ground. Capital punishment was retained for 37 offences.

A compromise proposal retaining the death penalty solely for war-time military offences was approved by the Chamber of Deputies by a large majority. But this was again rejected by the Senate in December 1990, after the appointed senators voted *en bloc* with the opposition parties against it. Although no death sentence had been carried out in Chile for more than 10 years, the death penalty remained on the statute books for 37 offences, of which eight were common or terrorist crimes.¹¹⁹

Individual Rights and Penal Reforms

Laws Nos. 19,027 and 19047, although submitted to Congress separately for constitutional reasons, both involved substantial amendments to the existing legislation on crimes of political violence, as well as to articles of the ordinary and military penal codes dealing with jurisdiction and penalties. The overall objective of both laws was to bring domestic legislation into line with the standards of international human rights treaties ratified by Chile.

Military Jurisdiction

One of the purposes of Law No. 19,047 in its original draft was to re-establish civilian jurisdiction over all politically motivated offences committed by civilians, restricting the competence of military courts solely to crimes perpetrated by military personnel.

Following the final Senate vote, the government announced that it would use its constitutional powers of clemency to commute future death sentences. As explained below, under a reform of Article 9 of the Constitution in April 1991, these powers were extended to include terrorist offences.

The changes would have principally affected the Arms Control Law, the Law of State Security and the Military Penal Code. However, the government did not propose to alter the existing rules in the Code of Military Justice which gave military courts jurisdiction over common crimes committed by military personnel during service or on military premises. This omission – however explicable politically – meant that the law failed to address one of the major reasons for the failure of investigations into human rights crimes.

Another proposal included in the draft was to alter the composition of the military appeals courts (Corte Marcial and Corte Naval) to provide some safeguards of independence. The army and police appeals courts still had three military members – all officers on active service – and two civilian members, who were judges on the Santiago Appeals Court. This composition, and the fact that the military members were serving officers, ensured the prevalence of the military view on the courts. The government proposed to shrink the courts to three members, two of whom would be Appeals Court judges and the third a military justice official in retirement.

The much criticized institution of the ad hoc military prosecutors and the office of the Military Public Ministry were also to be abolished.

Other provisions in the draft sought to end legal privileges of military personnel which infringed the constitutional principle of equality before the law, such as the right of military officers and retired generals in detention to opt for house arrest. The immunity enjoyed by military personnel carrying out policing operations was to be abolished, and police immunity or mitigation in fatalities resulting from law-enforcement activities was to be made subject to the principle of reasonable and proportionate use of force.

 $^{^{120}}$ The Naval Court had two naval military justice officials.

Due to the dilution of the proposals in the Chamber of Deputies and their radical modification in the Senate, these objectives were only very partially achieved. On the positive side, provisions of Law No. 19,027 awarded jurisdiction over *all* crimes under the Anti-Terrorist Law to the civilian courts (they had previously been under military jurisdiction if the victim was a member of the armed forces). Offences under the Military Penal Code involving "insults" to members of the armed forces or police – a provision which had led to the prosecution of numerous journalists for critical articles on human rights – were also passed to ordinary courts. Yet the most serious crimes of political violence, such as belonging to or assisting an armed group, having prohibited weapons or perpetrating armed attacks on military personnel, remained under military jurisdiction. ¹²¹

Under such circumstances, the existence of an impartial appeals court with built-in guarantees of independence takes on special importance as a safeguard against unfair trial. But the government's proposals for restructuring the military appeals courts were also altered in the Senate, which retained the five-member structure, though it did add a requirement giving the military judges on the panel tenure for their three-year period of service, during which they were to be relieved of other service responsibilities. Notwithstanding this formal safeguard of independence, the civilian judges remained in a minority on the courts.

The government's other proposals had mixed success in their passage through the Congress. 122

¹²¹ These provisions fell under the Arms Control Law (belonging to or assisting an armed group, having prohibited weapons) and the Code of Military Justice (armed attacks on military personnel). Other crimes under the Law of State Security also remained under military jurisdiction.

¹²² The ad hoc military prosecutors were replaced by others who could be appointed by a presiding judge to take over "delayed" cases. They were drawn from lists selected annually by the military appeals courts. The special privilege of officers in preventative detention to choose house-arrest was also abolished. But penal benefits for military and police personnel responsible for deaths during law enforcement activities were retained, such as the right of exemption in cases of "legitimate defence".

The Debate over Penalties

In the government's view, successive modifications of the Law of Internal State Security and the Arms Control Law under the military government had created an excessively harsh system of penalties which were unjustifiable under a democratic government. The Minister of Justice described the intent of the measures as to restore a "rational" system of penalties, generally in line with those that existed before the military coup.

However, most of the reductions of penalties proposed by the government also met determined opposition in the Senate and even provoked misgivings in the government's own ranks. The debate over the issue was profoundly affected from the outset by repeated armed attacks by extreme left-wing opposition groups on police and former members of the security services. In May 1990 three *Concertación* members of the committee considering the proposals broke ranks and sided with opposition members in rejecting the reductions. Although the Chamber of Deputies eventually endorsed the government's proposals in August, they were subsequently rejected by the Senate almost in their entirety.¹²³

Penal Definitions and Presumptions of Guilt

Laws No. 19,027 and 19,047 also tackled the substance of the "special laws", seeking to eliminate offences which had led to prosecutions for crimes of opinion and others whose loose or ambiguous wording had lent themselves to arbitrary presumptions of guilt by military courts.

- Among the reforms to the *Law of State Security* which were approved in Law 19,047 was the elimination of the so-called "anti-protest" article, introduced by the military government at

Among the exceptions was the reduction from five to three years of the maximum penalty for the crime of "insults" (*injurias*) against the armed forces and police. A provision preventing penalties from being raised automatically under states of siege was also approved, such increases being limited to situations of "external war".

the height of the street protests in October 1983. This article had criminalized the holding of unauthorized meetings and demonstrations in public places, if they were considered to "facilitate the alteration of public tranquility".

However, other amendments approved in the Chamber of Deputies were rejected in the Senate: these included removal of the offence of "incitement" in strike activity and elimination of a provision authorizing the closure for up to 10 days of printed and broadcast media who offended against the law.

- The only significant amendment to the *Arms Control Law* concerned the language of Article 8, which had been widely abused by military prosecutors to implicate government opponents in the activities of armed opposition groups. Article 8 penalized those who "organize, belong to, finance, equip, assist, instruct, incite or induce the creation or functioning of private militias, combat groups or militarily organized parties." Criteria for determining involvement in armed groups were tightened, and the concept of "assistance" was explicitly made to denote "conscious" assistance. ¹²⁴
- The government made no proposal, however, to remove Article 284 of the Military Penal code referring to offence or insults to the armed forces, despite the fact that even under the Aylwin government this norm continued to be used by military prosecutors to invade press freedoms. Following the above-mentioned change of jurisdiction for this offence from military to civilian courts, it was left to the latter to ensure that the application of the law did not conflict with constitutional guarantees of free expression. 125

¹²⁴ Under Article 292, para. 2 of the Penal Code, which was introduced by the military government in April 1979, any member of a group could be prosecuted for "illicit association" if one of its members had committed an offence against state security. This provision was also eliminated.

Another provision left intact by the government which was potentially injurious to rights of freedom of expression was Article 6(f) of the Law of State Security, which criminalised the advocacy or dissemination of "doctrines, systems or methods which incite crime or violence in any of its forms as methods to achieve political, economic or social changes or reforms."

- Reforms of the Anti-Terrorist Law were made the subject of Law 19,027. Its purpose was to establish a new definition of terrorism, distinguishing terrorist crimes from ordinary offences or other political crimes on the basis of intent and the methods used. "Terrorist" intentions were to be presumed from the use of explosive or incendiary devices, heavy weapons, toxic substances and letter bombs.

A rigorous definition was essential for the protection of human rights, since terrorist crimes were subject to stiffer penalties, and investigative procedures involved the possibility of longer periods of police detention (up to 10 days) and the curtailment of ordinary civil liberties. Furthermore, Article 9 of the Constitution deprived those facing trial for terrorist crimes of provisional release on bail, and those sentenced for such crimes of the possibility of pardon or amnesty.

The government's original draft of Law 19,027 was amended substantially after the Chamber of Deputies Committee received the detailed opinions of leading criminal lawyers from a wide political spectrum. By common consent, consultations on this law led to a final text which was better framed than the draft, and did not sacrifice the government's basic objective of preventing the blanket use of terrorist charges to penalise political offenders.

Individual Rights and Guarantees

In general the least controversial of the government's proposals were amendments to the Code of Penal Procedures designed to strengthen procedural rights and fair trial guarantees. However, these also underwent numerous changes and incorporated some

The key criterion for defining "terrorist" crimes was "intent to produce in the population or a part of it a justified fear of falling victim to crimes of the same type, either as a result of the nature and effects of the methods used, or by evidence that the crime responds to a premeditated plan to attack a specific category or group of people".

additions in the course of their passage through the legislature.

The government's original proposals included:

- abolishing the power of judges to extend police detention for up to five days (this was to be restricted to a limit of 48 hours);
- tightening requirements for the admissibility of confessions, and invalidating those obtained as the result of pressure, ill-treatment or torture, or following excessive incommunicado detention;
- strengthening the constitutional right to provisional release during judicial investigations and trial proceedings;
- establishing the right to a retrial if a conviction was based on an invalid confession, or the defendant had been deprived of the opportunity of a defence.

The final text of Law 19,047 maintained the power of judges to extend police detention for up to five days (or ten in the case of offences under the Anti-Terrorist Law). However the Chamber of Deputies introduced a new requirement that in ordering an extension beyond 48 hours, judges must ensure that detainees are examined by a doctor independent of the authority responsible for the detention. Detainees in police custody were guaranteed access to a lawyer, but such interviews were to be held in the presence of a police or prison official. Incommunicado detention was limited to a maximum of 10 days and persons in such detention were also ensured access to a lawyer.¹²⁷

The law assigned a new burden of responsibility to the judiciary in monitoring interrogation practices. Judges were required to satisfy themselves that defendants giving confessions had not been subjected to torture or the threat of torture, on pain of sanctions if they neglected this duty. The right to provisional

¹²⁷ See Chapter 8, infra, for a discussion of the protection of individual guarantees since the introduction of these reforms.

release pending judicial investigations was reinforced, and the circumstances in which it may be denied were restricted. However, the government's proposal for a right to a legal review of sentences if due process had been violated was rejected in the Chamber of Deputies.

Political Prisoners and the Transitory Provisions

At the time of the installation of the Aylwin government in March 1990, there were approximately 335 political prisoners in detention and approximately four times this number of persons

awaiting trial for politically motivated offenses after being released on bail. Nearly three-quarters of those in prison were still awaiting completion of their trials by military courts, many after years of detention. Most of these cases involved



Visiting day at the "Cárcel Publica"

charges under the Arms Control and Anti-Terrorist Laws.

Many of the longest-serving prisoners were members of the MIR, who had returned clandestinely from exile and had been detained for crimes committed in the course of attempts to consolidate a nucleus of armed opposition to the military government in the early 1980s. These offences included bank robberies to obtain funds, armed assaults on the security forces,

bomb explosions and some political killings. Many of the prisoners were charged with illegal entry to the country, as well as security-related offences and common crimes.

Most of those detained from 1985 to 1990 were members of the Chilean Communist Party and its Frente Patriótico Manuel Rodríguez (FPMR), especially the latter's "Autonomous" faction, which split with the party in 1986 over the decision to abandon armed struggle. In addition to bombings, armed attacks against police personnel and other violent actions, the FPMR-A claimed responsibility for some kidnappings and for selective killings of military personnel linked to human rights

violations.

Political prisoner on hunger strike is taken to hospital, November 1991

The eleven "transitory articles" in Law which No. 19.047. applied only to committed crimes prior to March 11, 1990, established mechanisms for the transfer to civilian courts of all cases under military jurisdiction. They also included measures for the acceleration of pre-trial investi-

gations, the release on bail of those accused and concession of early release benefits to convicted prisoners. Those held on "terrorist charges" were automatically excluded from these benefits however.

Cases under military investigation without result for more than one year were to be handed over to appeals court judges. Investigations were to allow the defendant to make a new statement which would be given equal weight should the accused retract or contradict an earlier declaration.¹²⁸ In cases which had reached the plenary or verdict stage the military judge was given 30 days to pronounce a verdict, failing which the case was also to be transferred to an appeals court judge.

A government proposal in an early draft of the law to give convicted prisoners the right to appeal to the Supreme Court for a special review on grounds of unfair trial, was rejected by the Senate. Nevertheless, those convicted under the Arms Control Law, the Code of Military Justice and the Law of State Security could be granted benefits of remission (*libertad vigilada*) even if this was denied in the sentence.¹²⁹

Due to resolute opposition in the Senate to these and other measures denounced by the RN and UDI as "favouring terrorism", a different solution to the problem of "terrorist" prisoners was finally adopted following negotiations between the *Concertación* and RN in December 1990. This involved a reform of Article 9 of the Constitution allowing the President to pardon prisoners convicted under the Anti-Terrorist Law, or mitigate or commute their sentences. Law No. 19,055 of April 1, 1991, modifying Article 9, contained a special "transitory" clause to this effect, limited to prisoners whose cases dated from before March 11, 1990. 130

¹²⁸ The original *Concertación* proposal had been that judges give *prima facie* credence to new statements unless the earlier ones could be shown to have been given freely.

¹²⁹ Measures of penal "compensation" for the "inhumane conditions" (notably torture and prolonged incommunicado detention) suffered by the prisoners, although promoted and finally approved in the Chamber of Deputies, were also rejected by the Senate. Among these was a proposal to commute sentences on the basis of three days for each day spent in captivity (under this rule a prisoner sentenced to nine years who had already been in prison for three would be eligible for immediate release). This was the solution incorporated in Law 15,737 of March 8, 1985 in Uruguay vis-a-vis those prisoners excluded from the benefits of an amnesty (persons who had committed homicide) "in view of the inhumane conditions of their detention and prison".

¹³⁰ The amendment also conceded the right to bail to indicted prisoners, although this could only be granted on the unanimous vote of all the titular members of a higher court.

The Parliamentary Debate and the Spectre of Terrorism

The issues under discussion in the Cumplido Laws were the subject of intricate and often heated political negotiations in the Chamber and Senate committees, before the full parliamentary debate was opened on the floor of the two houses of Congress. The deliberations were a marathon affair, marked throughout by fundamental and often angry disagreement.

The government found itself confronted by conflicting pressures. On one hand, the political prisoners, their relatives and sympathizers outside parliament kept up a constant campaign for their immediate release. The campaign was punctuated by hungerstrikes, prison occupations and demonstrations, some of which were violently repressed by the police. The prisoners also had their champions inside the parliament, notably the Christian Democrat Lawyer Andrés Aylwin, brother of the President and chairman of the committee considering the Cumplido Laws, who frequently acted as a mediator and spoke eloquently on their behalf.

On the other hand, the unbroken string of violent attacks perpetrated by the FPMR-A and the Lautaro Youth Movement, created a growing national concern about public security and gave the parliamentary opposition powerful weapons with which to attack the government's proposals for clemency. Often these attacks – which included political assassinations and killings of police – occurred at critical moments of the debate on human rights reform, throwing the government on the defensive and even undermining the commitment of some *Concertación* deputies to the government's measures. ¹³¹

¹³¹ The attempted assassination by the FPMR-A of Retired Generals Gustavo Leigh and Enrique Ruiz took place less than two weeks after the Aylwin government assumed office, and only days after President Aylwin had announced that he would pardon 46 prisoners not directly involved in acts of violence. The killing of former DICOMAR chief Luis Fontaine Manríquez occurred at the height of the debate over penalties for offences of political violence. At the moment of the release of the Rettig Commission's report, an army doctor, Carlos Pérez Castro – alleged to have been implicated in torture – and his wife were shot dead, a senior officer of the Investigaciones was ambushed and killed, and an FPMR-A plot was uncovered to attack members of the Supreme Court.

At issue were fundamental differences over the nature and causes of the political violence. The opposition questioned the use of the term "political prisoners" to describe those charged with crimes of political violence under the military government, and saw a direct connection between their ideology, methods and tactics and those of the "terrorists" of the present. The *Concertación*'s proposals on the other hand were premised on the belief that past violence was in essence an understandable, if morally questionable response to the repression of the dictatorship, and that it would wither away with the restoration of justice and democratic channels of expression. 133

The human rights organizations which had most consistently defended the political prisoners, and which supported their demands for exoneration of criminal responsibility, argued that it was illegitimate to use the moral yardsticks applicable in democracy to judge the actions of those who took up arms against the dictatorship. As the year progressed and terrorist attacks did not abate, however, this thesis lost ground. The situation was further complicated by some political prisoners supporting left-wing terrorist attacks, and by the failure of the Communist Party (from which the FPMR had originally sprung) to unequivocally condemn armed violence.

¹³² There were also those on both sides who questioned the government's use of the term "prisoner of conscience" to describe the beneficiaries of government pardons and to distinguish them from those directly implicated in acts of violence. The opposition argued that indirect accomplices in violent acts were as criminally liable as their direct authors.

¹³³ In a speech in January 1989, for example, José Galiano, President of the Group of Lawyers of Political Prisoners, declared that terrorism "will disappear on the very day democracy is established in Chile, because the Chilean people never had a tradition of this kind... there is NO political extremism in Chile." José Galiano: "Justicia a los Presos Políticos" in Como Hacer Justicia en Democracia, Segundo Encuentro Internacional de Magistrados, Comisión Chilena de Derechos Humanos, Santiago, 1990.

The Abortive "Global Agreement"

The parliamentary opposition's rejection of measures to benefit political prisoners was not solely based on a principled defence of public security, however; a strong element of opportunism was also present. This became clear in May 1990 when RN and UDI committee members in the Chamber of Deputies sought to exploit the stalled negotiations on the transitional articles of Law No. 19,047 to obtain political agreement for a solution involving partial impunity for human rights violators.

The essence of this so-called "global agreement" (acuerdo marco) was to trade off reductions in sentences for the political prisoners against comparable measures of clemency for military personnel guilty of human rights violations under the previous government. In effect, the "global agreement" proposed an across-the-board reduction of penalties for all politically motivated crimes committed before March 11, 1990, with the exception of first-degree murder (homocidio calificado) and other serious crimes listed in the agreement. Offences carrying lesser penalties (implicitly including torture) would be exempt from criminal investigation. 134

The proposal was adopted by the Constitution, Legislation and Justice Committee on June 5th for discussion with the government and the political parties. It had earlier won the support of several of the *Concertación* members, although it was consistently opposed on moral grounds by the Committee's chairman, Andrés Aylwin. Several weeks of intense political discussions ensued, involving President Aylwin, government ministers, opposition and *Concertación* deputies and party leaders. Despite insistent advocacy of the agreement by the RN and the UDI, the *Concertación* negotiators abandoned it in June after an outcry from human rights organizations, the political prisoners

¹³⁴ Cámara de Diputados: Marco Político Acordado por los Miembros de la Comisión de Constitución, Legislación y Justicia para ser sometido a la consideración del Gobierno y de los Partidos Políticos. June 5, 1990.

and their relatives, and the declared opposition of President Aylwin himself.

Although the Transitional Articles were finally approved in the Chamber of Deputies on August 2, 1991, the abandonment of the "global agreement" was resented by the Opposition, and provoked a renewed onslaught against the Cumplido Laws in the Senate. The deadlock would not be broken until December 1990, when RN leader Sergio Onofre Jarpa proposed – over UDI objections – the above-mentioned reform of Article 9 of the Constitution, under which the President would be given powers to pardon those charged with terrorist offences committed before March 11, 1990. This measure, which transferred to the government sole political responsibility for the release of these prisoners, was welcomed by *Concertación* legislators as a final way out of the impasse.

Effects of Government Measures: Release of Prisoners

It is difficult to gauge the effects that the passage of Law 19,047 has had on prisoner releases, since the provisions of the law affect the situation of individual prisoners in various different ways. In general, the procedures for reconsideration of cases have been tortuously slow.

- Of the 335 political prisoners still incarcerated on March 31, 1990, approximately 250 were released during the 18-month period up until the close of September 1991. Some 80 of these prisoners were pardoned by President Aylwin, while a majority of the others left on bail, were paroled or saw the charges against them dismissed.
- Under Chilean law presidential pardons can be granted only to convicted prisoners, who made up only 13 per cent of the total in March 1990. As more cases went to trial in the course of the 18month period, more prisoners became eligible for pardons and the number of pardons granted increased correspondingly. Apart

from unconditional release, presidential pardons may include reductions of sentence, day-time release, release on probation or parole, and the commutation of a prison sentence to exile. The numbers released unconditionally were low in comparison with those in which parole requirements and other restrictions were imposed.

- There was a steady if undramatic rise in the number of releases over the period in question. This included an increase in beneficiaries of bail, reflecting the effects of the transfer of cases from military to civilian courts following the entry into force of Law No. 19,047 in February 1991. However, during this period only a handful of prisoners had their cases come to trial by civilian courts or had the charges against them dismissed. The main effect of Law 19,047, therefore, appears to have been to facilitate the provisional release of prisoners awaiting trial. It does not appear to have contributed greatly to expediting the trials themselves.
- Under the provisions of Law 19,047, hundreds of cases still in the investigative (sumario) phase in military courts were transferred to the Appeals Courts upon expiry of the set deadlines. But transfers were done on the basis of the case dossier number, without prioritizing the cases of those defendants who were still in prison. The result was that the Appeals Courts were flooded with cases, many of which include former prisoners who are already at liberty. This meant a massive increase in the work-load of the ordinary courts at a time when they were simultaneously being called on to reopen cases of human rights violations. ¹³⁵
- Prisoners charged in more than one case could expect extra delays. Detainees had to be "cleared" for release on all their

¹³⁵ In December 1990, the Supreme Court warned Congress that the transfer of cases to the civilian courts would lead to long delays rather than expedite trials. The Court estimated that more than 4,000 pending cases would be affected, and of these about 3,500 would fall to the Santiago Appeals Court.

cases, before their exoneration or release on bail for any one offence could lead to their excarceration. In June 1990 there were about 80 prisoners in this situation, and in June 1991 it had only dropped to 63.

- Additional problems were created by jurisdictional disputes after the military courts refused to transfer cases, or ordinary courts declared themselves incompetent to accept them.
- The release on bail of prisoners held or sentenced under the Anti-Terrorist Law presented other difficulties. The law amending Article 9 of the Constitution which entered into force in April 1991 required bail appeals to be approved by the unanimous vote of all the titular members of the Appeals Court, a requirement making bail more difficult to obtain. Despite these obstacles, a number of political prisoners held on terrorist charges were released on bail.

President Aylwin used his powers to pardon prisoners with great caution. Many of those who were released under government pardons were required to sign a statement renouncing violence, and most were placed under the supervision of the parole board (*Patronato de Reo*), were required to sign in every month and not allowed to leave the country. The amendment to Article 9 of the Constitution also required that all pardon decrees relating to prisoners convicted under the Anti-Terrorist Law be submitted to the Senate stating the grounds for the measure. ¹³⁶

The statistics cited in this section are drawn from the quarterly bulletins published by the Fundación de Ayuda Social de las Iglesias Cristianas (Social Assistance Foundation of the Christian Churches — FASIC): Presos Políticos del Régimen Militar: Nóminas y Cuadros Estadísticos, from March 1990 to June 1991.

Chapter 8

Political Violence and Public Order: the Government Response

Setting Priorities

Faced with rising levels of violent crime and unabating terrorist activity, the Aylwin government found itself under increasing political pressure to take firm hold of public security. The CNI had been disbanded in February 1990 and its equipment and files, as well as many of its personnel, transferred to Army Intelligence. But despite the challenge posed by the deteriorating security situation, the government held firmly to its commitment to confine law enforcement to the two institutions established for this under the Constitution: the uniformed police force Carabineros and the independent criminal investigations branch Investigaciones.

Carabineros, always a poor cousin of the Army, had fallen far behind in manpower and resources. *Investigaciones*, despite its technical equipment and experience, was besieged by allegations of corruption, extortion, drug-trafficking and human rights abuse under its former Director, General Fernando Paredes. Measures would obviously have to be taken to improve the capacity of the two institutions to police public security.

The government gave its first priority to expanding the manpower and technical capacity of Carabineros. It announced

that 4,400 new members of the force would be recruited over a four year period, and in April 1991 accelerated the recruitment so that all the new members would be added to the force in 1992. Also in May 1990, the Director General of *Carabineros* announced the formation of a specialized new police intelligence unit, the *Dirección de Inteligencia de la Policía de Carabineros* (DIPOLCAR), whose functions were described as "providing the necessary information on criminal activity in general, and on public and internal security in particular." The new unit was not, according to its Director, permitted to engage directly in operational law enforcement activities or make arrests. ¹³⁷

Meanwhile, Retired-General Horacio Toro, appointed by President Aylwin in March 1990 to replaces Paredes at the head of *Investigaciones*, announced his intention to carry out extensive internal investigations and clean up the organization. He also promised a thorough investigation into human rights abuses: 55 *Investigaciones* personnel were still under investigation for human rights violations, in particular torture. With the establishment of DIPOLCAR, however, *Investigaciones* began to play a secondary role in criminal investigations of terrorist suspects.

The murder of Senator Jaime Guzmán on April 1, 1991, caused a feverish political debate over the effectiveness of these measures and led to renewed calls from the parliamentary opposition for

¹³⁷ This restriction was in contrast to the role of the unit's predecessor, DICOMCAR, which was disbanded in 1985. From that date to 1990 police intelligence functions were carried out by the Department of Internal Affairs (OS4). Current operational functions are said to be carried out by the Sub-Directorate of Special Police Activities, especially by one of its branches, the *Grupo de Operaciones Policiales Especiales* (GOPE). However, it is reported that DIPOLCAR members sometimes participate in arrests.

¹³⁸ See "Algo huele mal en Investigaciones", Apsi, May 23 – June 5, 1990. Twenty-five chiefs and senior officers were sacked by General Toro in April 1990 and a further 36 in September. In May the General stated publicly that all the political intelligence files had been incinerated before he took over.

military involvement in counter-terrorist operations. The government responded by announcing a combination of political, penal and policing initiatives, whose purpose was to isolate the armed groups politically, encourage them to renounce armed activities and streamline and coordinate the police response.

On April 18 the government announced the formation of a Coordinating Office on Public Security (Officina Coordinadora de Seguridad Pública) headed by Mario Fernández, a former Under-Secretary of the Air Force. The armed forces were represented on an advisory intelligence commission, which could be convened at the request of Fernández or the President. The functions of this new civilian body were to coordinate the counter-terrorist activities of Carabineros and Investigaciones and formulate policy on public security. The

On April 9, legislation was hurriedly introduced to amend the Penal Code, ostensibly to make police investigations more effective. The reform had three objectives: to increase police powers, to reinforce public cooperation with the police, and to provide mechanisms and incentives to encourage terrorists to renounce their activities. The legislation included provisions:

- to allow *Carabineros* and *Investigaciones* to raid premises without a search warrant, if there were well-founded grounds to believe suspects were present in the building;
- to introduce into the Penal Code a new crime of "omission" to penalise those with knowledge of criminal activities who withhold information from the police;

¹³⁹ Fernández' deputy is a prominent Socialist Party leader, Marcelo Schilling.

¹⁴⁰ The government also made formal charges against the FPMR-A (the prime suspect in the Guzmán killing) for breaches of the Law of State Security, and requested the courts to appoint a ministro en visita to carry out the investigation of the group. In October 1990, the government had taken similar action against the Movimiento Juvenil Lautaro.

- to establish new norms protecting the anonymity of witnesses who come forward with information on criminal or terrorist activities;
- to modify Article 4 of the Anti-Terrorist Law to allow judges to reduce sentences for those accused of terrorist offences who contribute significant information on terrorist operations, who collaborate with police investigations, or who renounce membership in terrorist groups, provided they have not participated in crimes. 141

Guaranteeing the Rights of Detainees

The government has repeatedly affirmed its commitment to eradicate torture and to guarantee due process rights of detainees. It has withdrawn Chile's most important reservations to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and has accepted the jurisdiction of the UN Committee against Torture. Similar reservations to the Inter-American Convention to Prevent and Punish Torture have also been withdrawn, and the government has accepted jurisdiction of the Interamerican Court of Human Rights, although only with respect to cases dating from after March 11, 1990.

Reforms of the Penal Code protecting detainees' rights and safeguarding against torture were included in Law No. 19,047, which came into force on February 14, 1991. These reforms included:

- Limiting administrative detention to a maximum limit of 48 hours. Upon the request of the police, however, once the detainee has been brought before him, the judge may extend

This constituted an important innovation in Chilean penal law, which hitherto had not accepted evidence based on plea-bargaining.

this period for up to five days, extendible once for a further five days. In the case of terrorist offences, judges may order detainees to be held incommunicado for ten days, extendable once for a further ten days.

- Requiring judges who order an extension of incommunicado detention to appoint a doctor to carry out a medical examination of the suspect. The doctor must be independent of the authority responsible for the arrest or detention, and must carry out the examination and give his report to the judge on the same day.
- Guaranteeing detainees held incommunicado the right to see a lawyer. Prison authorities may not refuse a detainee's request to confer with his lawyer in their presence for up to 30 minutes a day "exclusively in regard to the treatment received, the conditions of his detention and the rights which may assist him".
- Explicitly requiring judges to satisfy themselves that the detainee has not been subjected to torture or threats before giving his statement, and to ensure that he is protected from abuse.

Allegations of Torture

Despite the government's stated commitment to eliminate torture and its introduction of the specific measures cited above, cases of such treatment continued to be reported in Chile. The great majority of documented instances concerned criminal suspects detained for politically motivated offences in the context of continuing armed opposition activities by the FPMR-A and the MAPU- Lautaro.

In general the practice of torture was alleged to occur with greater frequency in police stations of the *Carabineros* than in those of *Investigaciones*. More than 40 criminal complaints of torture were presented during the first 18 months of the Aylwin administration, but little advance has been reported in judicial investigations of these allegations. This has led the government

to publicly question their veracity. Nevertheless cases exist in which medical reports have confirmed injuries consistent with

detainees' allegations, and in any event certain forms of torture leave no physical trace, those responsible having adopted precautions to prevent obvious physical damage to the victim.

A review of testimonies in more than 30 cases indicates that in virtually



A group of alleged FPMR members are exhibited to the press before being brought before a judge

all of these cases the detainees were subjected to abuse that constitutes cruel, inhuman and degrading treatment and which borders on torture. This includes prolonged handcuffing, the use of blindfolds and hoods, enforced standing in uncomfortable postures for long periods, deprivation of food and sleep, insults, and beatings.

However there were also allegations of gross physical torture, involving techniques used routinely under the military government, including the *teléfono* the *pau de arara*, the *submarino*, ¹⁴² suspension by the wrists for long periods, and sexual

¹⁴² In the teléfono the victim is struck simultaneously on both ears with cupped hands. The pau de arara (Portuguese for "parrot's perch") was used frequently in Brazil under the military government: the victim's wrists and ankles are fastened together and he is suspended for long periods from a wooden or metal bar inserted between the knees and arms. The submarino, a technique which causes temporary suffocation, has several variants: submerging the victim's head under water, tying a bag or hood over it, or squirting jets of liquid up the victim's nostrils, while his mouth is obstructed.

abuse. Mock executions and threats of death or disappearance against the victim or members of his family were reported. In a number of cases, detainees alleged that they were subjected to torture with electricity, an earlier specialty of the CNI.

The detention centre cited most frequently in the allegations was the Third Police Station (*Tercera Comisaría de Carabineros*) situated in downtown Santiago a few blocks from the presidential palace. This is said to be the operational headquarters of DIPOLCAR, and many suspected terrorist offenders are brought there for interrogation from other police stations in the capital or from the provinces. The following examples are drawn from a list of cases in which criminal complaints were made by prisoners with the assistance of the *Comité de Defensa de los Derechos del Pueblo* (CODEPU), an independent human rights organization:

Fernando Moreno Vega, a 28-year-old insurance clerk, was detained with *Jorge Espínola Robles*, aged 24, by plain-clothes *Carabineros* on May 18, 1990, while they were trying to escape by taxi after a thwarted robbery on a shoe factory in Santiago.

According to his testimony, he was beaten following his arrest and was later transferred to the Third Police Station. There he was made to stand for long periods handcuffed and blindfolded and was repeatedly struck on the chin, ears and forehead. His hair was pulled and his head banged against a wall. He was also subjected to the *teléfono*. At one point his wrists were bound with tape, his handcuffs were replaced and he was made to stand on a chair with his arms stretched above him. The chain connecting his handcuffs was then placed over a tubular bar projecting from the wall, leaving him hanging by the wrists for about 10 minutes. According to Moreno, Espínola Robles was subjected to similar treatment. Both men described being forced to declare in front of a video camera that they had not been beaten. 143

¹⁴³ The allegations were restated by both men in an interview with the author in San Miguel Prison in October 1990.

Alvaro Rodríguez Escobar, a driver, was detained by plain clothes *Carabineros* on August 9, 1990 and was taken to the Third Police Station. He alleged that during the journey a hood was placed over his head, the vehicle stopped and he was threatened with immediate execution.

While in the Third Police Station, Rodríguez said he was slapped repeatedly in the face and hit in the stomach and testicles. He was stripped to the waist and forced to remain standing for the rest of the night and through the following afternoon. On three consecutive days he was tortured with electric shocks while under interrogation, at one point after being placed under a shower. During this electric torture he was examined by a woman he took to be a doctor. He alleged that he was also suspended by his handcuffs from a staircase close to his cell, beaten until he was unconscious, and was subjected six times to the *submarino*. He was given no food for four days, and was threatened that his mother and brother would be tortured if he did not cooperate.

Jaime Célis Adasme, Magdalena de los Angeles Gallardo Bórquez, Patricio Gallardo Trujillo, Manuela Mardones Pacheco, Patricia Martínez Zapata, Julio Prado Bravo, Jaime Pinto Aglioni and Marisa Rojas Bórquez were detained between 6–10 July 1991 in Concepción and accused of belonging to a MAPU-Lautaro cell responsible for the murder of Investigaciones Prefect Héctor Sarmiento on March 15th.

In their testimonies Jaime Célis, Patricio Gallardo, Marcela Mardones, Jaime Pinto and Julio Prado all said they had been tortured with electric shocks while under interrogation at the *Investigaciones* headquarters in Concepción. They also said they had been threatened with death or "disappearance" and that their spouses would be tortured or killed if they did not confess. Prado said he was arrested when he arrived at the home of Jaime Celis and Marisa Rojas, which was occupied by police for several days and where Rojas was being held with her two children.. He alleged he was taken upstairs and tortured

with electricity in a bedroom. One of the children, aged six, witnessed part of the torture, he said.

Incommunicado Detention

Periods of incommunicado detention permitted under Chilean law are already long, but in practice they often exceeded the maximum period allowed. Although detainees must be presented to a judge within 48 hours, the magistrate who first hears the case may order the incommunicado period to be extended for up to a maximum of ten days. However the actual period may exceed this limit considerably if other judges have competence in the case.

For example, a military prosecutor with competence over violations of the Arms Control Law who takes on a case from a civilian judge may order a new period of incommunicado detention without taking into account the period already served. Since most of those detained for politically motivated crimes may be charged simultaneously or successively under separate jurisdictions, the potential for abuse of incommunicado detention is considerable. In practice, periods of one to three weeks were not uncommon.¹⁴⁴

In general judges appeared to be carrying out their responsibility to ensure that detainees receive medical examinations when a period of incommunicado detention is extended. Most of the doctors called upon by the courts to perform this duty are from the staff of the *Instituto Médico-Legal*, Chile's Forensic Medicine Institute.

One prisoner, Julio Ricardo Bravo, was reportedly held incommunicado from the moment of his arrest on July 10, 1991 until August 12 – a total of 34 days – on the successive orders of a ministro en visita and two military prosecutors.

Access to Lawyers

Several cases were reported in which lawyers had to complain to judges after the police refused them access to detainees held incommunicado. More serious still were cases in which *Carabineros* refused to state whether they were holding a prisoner, or denied that he or she was in detention. In general, however, reports indicated that *Investigaciones* has largely complied with the new regulations, whereas *Carabineros* had repeatedly tried to deny access.

An additional problem is the lack of confidentiality of the interviews, which must be held in the presence of a police official. A lawyer who has conducted interviews in the Third Police Station reported to the author that detainees often appeared scared and revealed no details of ill-treatment in such interviews, although after their transfer to prison they provided detailed testimonies. Some detainees however took advantage of the guardian's temporary absence from the room to mention mistreatment to which they were subject.¹⁴⁵

Judicial Investigations

Cases of torture were almost impossible to prove in court under the military government and the experience to date under the Aylwin administration shows no great change from this pattern. Of the 38 cases of criminal complaints on which information is available, one had been closed by a military prosecutor and the

Many of the approximately 80 persons charged with violent offences since March 11, 1990 are reported to be without defence lawyers. Until now, the human rights organizations which defended political prisoners under the military government – principally FASIC and CODEPU – have been unwilling to take up the defence of members of armed opposition groups following the change of government, although they have often lodged *amparo* petitions on their behalf. Individual lawyers however have taken up some of these cases.

remainder had apparently stagnated at the early investigation phase. 146

The Government Response

In a submission to the United Nations Committee Against Torture in April 1991, the government acknowledged that 35 complaints of torture had been received since March 11, 1990. Earlier, in January, the Human Rights Commission of the Chamber of Deputies denounced the existence of an alleged "torture centre" in the Third Police Station, citing details of five torture complaints. The information on which the Commission went public had been submitted earlier by the non-governmental Chilean Commission of Human Rights, which had also raised cases directly with the Ministry of the Interior.

Although the government promised to take up the charges with the *Carabineros*, remarks by the Minister of the Interior show some scepticism about the reports. *Carabineros* reacted with indignation at the action taken by the Chamber of Deputies Commissioners, stating that all of the five alleged victims had received medical examinations upon entering and leaving the police station, and none had shown injuries consistent with torture.

While there are reports of internal investigations and dismissals in *Investigaciones* as a result of torture complaints, little has been made public about any internal inquiries conducted by *Carabineros*, or their results.

¹⁴⁶ In the case of Rodrigo Morales Salas, who was arrested on July 30, 1990 and repeatedly beaten while being held incommunicado for 26 days, the military prosecutor closed his investigation of a torture charge although a medical report ordered by the prosecutor himself had shown signs of torture.

Chapter 9

The Amnesty Law, the Government and the Courts

Although the *Concertación* parties shared a moral opposition to impunity of human rights violations, and were committed to the right of the victims and their relatives to justice and reparation through the courts, no human rights trials had been completed at the close of the period covered by this study. Although no legislative measures have been taken to foreclose such trials, their future remains uncertain. The government consistently avoided direct intervention on the issue, and the Supreme Court for the most part remained entrenched in positions which have obstructed investigations and shielded the guilty. Despite this, dramatic advances were made by specially appointed magistrates in a number of key cases.

The *Concertación*'s electoral programme pledged the government to "procure the judgement, according to the penal laws in force, of violations of human rights after 11 September 1973 involving atrocious crimes against life, liberty and personal integrity." Five measures were proposed:

- repeal of penal laws introduced by the military government

¹⁴⁷ Bases Programáticas Político-Institucionales, Documentos La Epoca, 1989.

which hindered effective investigations or gave military personnel arbitrary penal advantages;

- steps to ensure that all information necessary to make judicial investigation possible was collected, and that cases were presented to the courts;
- legislation to create a system of mitigation in the case of those responsible for human rights violations who cooperated in establishing the truth;
- introduction of a period of one year during which cases could be reopened for which the statute of limitations had lapsed without investigation under the military government;¹⁴⁸
- legislation to promote the repeal or annulment of the Amnesty Law to ensure that it not constitute an impediment to establishment of the truth and investigation and prosecution of grave human rights violations.

In the event, little of the human rights legislation introduced by the Aylwin government had a direct bearing on the issue of criminal prosecution of former human rights crimes. ¹⁴⁹ One particularly important omission – excluded even from the new government's electoral programme – was the traditionally wide area of military jurisdiction over crimes committed by members of the armed forces and the police. As is repeatedly argued, this had contributed greatly to the impunity of human rights crimes.

The government abandoned early on its intentions to alter the Amnesty Law. By the end of its first year in office, the possibility of indictments or even full investigations of human rights crimes committed before 1978 seemed as remote as ever. The

According to Article 94 of the Penal Code, statutes of limitations apply in 15 years to crimes punishable by the death penalty or life imprisonment, and in 10 years for lesser crimes.

The only notable exception was a provision of the Cumplido Laws which allowed the transfer to civilian courts of the investigation into the 1976 assassination of former Foreign Minister Orlando Letelier.

government evidently reconciled itself to the impossibility of establishing a consensus on legislative measures to reverse, or even limit, the effects of the law, and it was unwilling to face a politically costly parliamentary confrontation on the issue. The Supreme Court meanwhile, in its first such ruling, pronounced the application of the Amnesty Law constitutional in a test case, and reaffirmed its previous broad interpretation of the law.

Despite these limitations, the work of the ordinary courts in pursuing forensic investigations following the discovery of the concealed graves was impressive and earned wide public recognition. Due to their efforts and the painstaking work of the forensic teams involved, it was possible to identify many of the bodies recovered. Nevertheless, the possibility of criminal prosecutions was obstructed in most cases by the transfer of these cases to military courts, leaving little hope of a successful investigation concerning how and by whom the crimes had been committed. In effect, the expectations of those who had hoped the restoration of democracy would end their long quest for justice remained unmet.

The Debate over the Amnesty Law

The effects of the Amnesty Law had been denounced in opposition and human rights circles for years under the military government. The law had been decreed by the Junta without any form of popular consultation; and because its principle purpose was to shield agents of the State from criminal prosecution, it could only widen rather than heal the rifts in the society.

The United Nations Special Rapporteur on Chile had observed in one of his reports that the law benefited principally those "responsible for assassination, torture and other offences committed during the administration of the Junta, rather than granting a genuine amnesty to political opponents." Another

¹⁵⁰ UN Doc. A/33/331, p. 68, para. 273 and Annex XXVII.

UN report pointed out that the Chilean amnesty law served as the direct model for the so-called "Pacification Law" promulgated by the Argentinian military junta in September 1984, which was repealed by the new democratic government as one of its first acts.¹⁵¹

The inclusion of reform of the Amnesty Law in the Concertación electoral programme - although incorporating several possible options for its application - sparked off an immediate reaction from the armed forces and the pro-military political parties. The amnesty law was an insurance policy against a possible wave of recrimination and reprisals against the armed forces and their civilian supporters. Furthermore it was a cornerstone of the institutional edifice bequeathed by the former government, and had already wrought effects in numerous cases which were considered to be legally irreversible. Following the release of the July 1989, General Fernando programme in Commander-in-Chief of the Air Force, angrily denounced the proposed measures as "special laws against the armed forces", and warned that their passage would have the "gravest consequences". 152

In the wake of this controversy, the *Concertación* assigned some experts in its Commission on Justice and Human Rights the task of assembling and debating several alternative approaches to the Amnesty Law. The opinions of leading experts were consulted and position papers were produced and discussed. The options that emerged included annulling the law (i.e. declaring it without

See Study on amnesty laws and their role in the safeguard and promotion of human rights. Report by Mr. Louis Joinet, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN/Sub.2/1985, p. 9.

[&]quot;Un rocket contra la Concertación", El Mercurio, July 30, 1989. Matthei said: "I just want to warn very seriously of the consequences this revanchist attitude will have. This is the most I can do. It would cause profound indignation, if tomorrow they are going to try to put us in the pillory, as in Argentina, it is going to have the gravest consequences."

legal effect), repealing it, or introducing legislation to interpret the law so that its application was consistent with the state's obligation to guarantee constitutional rights. There were marked differences of view on the legal validity of these alternatives:

- According to one view, declaration of the law as null and void was the only effective way to prevent its use as a cover for impunity and to ensure investigation of human rights crimes. ¹⁵⁴ Yet strong doubts were raised about the viability of annulling established legislation. The Supreme Court was known to favour a comprehensive application of the Amnesty Law and was considered likely to rule unconstitutional any legislative attempt to nullify it.
- Others advocated the repeal or partial repeal of the law.
 Alfredo Etcheberry, president of the Chilean Bar Association and a leading criminal law expert and member of the International Commission of Jurists, argued that amnesties applied generically to crimes prior to their judicial investigation were susceptible to derogation.

Opponents of repeal had maintained that this amounted to a breach of the principles of the non-retroactivity of penal laws and application of the law most favourable to the accused. Etcheberry asserted that these principles were applicable only if the accused had already been identified by a court and amnestied after being convicted. He advocated partial derogation to ensure that the gravest human rights crimes, such

The issues were summarized in a paper presented to the Human Rights and Justice Commission by lawyer Roberto Garretón: Amnistía y Prescripción, Comisión de Justicia y Derechos Humanos, Concertación de Partidos por la Democracia: Documentos de Trabajo, November 1989.

See, for example, Jorge Mera: Ley de Amnistía y Derechos Humanos, Colección Reflexión y Debate, Serie Político, August 1989.

See the interview with Etcheberry published in El Mercurio: El Crimen y el perdón, August 6, 1989. Interviewed by the author a year later, Mr. Etcheberry said his views had not changed.

- as "disappearances" and extrajudicial executions, could be investigated and judged.
- The third option discussed by the *Concertación* involved legislation to interpret the amnesty law so as to limit the circumstances under which it could be applied by the courts. Two different types of interpretation had been suggested. The first involved defining the moment of judicial proceedings at which the amnesty could be applied, to prevent the law being used to close investigation of a crime before the truth had been established and those responsible identified.

The second type of interpretation sought to exclude certain grave human rights crimes altogether from the scope of the Amnesty Law. According to this argument, the 1978 amnesty brought to a close a period legally defined by Decree Laws No. 3 and No. 5 as one of internal armed conflict. The declaration of a state of siege had provided the legal basis for the application of war-time penal procedures and penalties. It followed, therefore, that the state was also bound by the international rules governing armed conflict, in particular Common Article 3 of the Geneva Conventions of 1949, which Chile had ratified in 1951. This article prohibits attacks on the life or physical integrity of those placed out of combat, including the murder, torture or humiliating or degrading treatment of prisoners. Under various instruments of international humanitarian law, states are not only obliged to respect these standards, but also to ensure that infractions amounting to grave violations or crimes against humanity are punished.

The purpose of the interpretive law was to introduce this prohibition into domestic law, by excluding crimes of the type listed in Common Article 3 from the terms of the amnesty. In its other provisions, such as those which had benefitted government opponents, the amnesty would remain in force except where such crimes were involved. This argument gained further force from the fact that the constitutional reforms of August 1989 had included an amendment to Article 5 which

made compliance with international human rights treaties a constitutional obligation of the organs of the State.

In the event, however, the government discarded all the alternatives. The Minister of Justice, Francisco Cumplido, took the position that legislation was unnecessary since the reform of Article 5 of the Constitution already implied a "tacit derogation" of the Amnesty Law in relation to grave human rights crimes, giving the courts a legal basis to continue investigations.

The motivation for the government's reticence was evidently a matter of political calculation. This was expressed in statements of ministers as a desire to avoid an "accumulation of conflicts". The armed forces were nervous about anti-military witch hunts, the government's parliamentary opponents were united in opposition to any tampering with the Amnesty Law, and the Supreme Court's established jurisprudence favouring impunity was well-known.

Discussions in the *Concertación*'s policy-making bodies before the elections had already identified a division between "purists", who considered the principle of judgement and punishment unnegotiable, and "pragmatists" who viewed the establishment of the truth as the paramount priority and considered that it might be placed at risk by confrontational policy. The government seems to have followed the view of the "pragmatists" that it was preferable to find an alternative vehicle to establish the "truth" and leave "justice" to what the courts could achieve, knowing that the results might be minimal. In repeated speeches President Aylwin talked of the government hope that justice would be done "as far as possible" (*en lo posible*). 156

¹⁵⁶ The government refused to back initiatives by *Concertación* deputies to raise the law's repeal in Congress. A proposal for an interpretive law, based on a draft submitted earlier to the Minister of Justice by FASIC, was presented to the Chamber of Deputies by six left-wing members in early June. The proposal was that cases involving violations of humanitarian law should be reopened by the courts de oficio. This initiative also failed to gain official support.

Impunity Ratified: The Supreme Court Decision

While human rights groups and relatives of the "disappeared" waited in vain for a government initiative on the Amnesty Law, the Supreme Court was mustering its arguments for a definitive pronouncement on its constitutionality. In January 1990, lawyers had lodged an appeal to the Supreme Court claiming that application of the law to a case involving the "disappearance" of 70 persons between 1974 and 1976 was unconstitutional. The appeal was based on many of the legal grounds outlined above and also argued that if the courts were prevented from investigating the crimes and establishing responsibilities, the appellants were also effectively denied their right to compensation through civil actions.

Initial expectations were that the Court would declare the appeal inadmissible on the grounds that it was not competent to pronounce on the constitutionality of a law which came into force before the Constitution of 1980. This would have left it up to the original court to decide whether or not to consider the law as tacitly derogated and therefore without legal effect. In the event, the Court admitted the appeal in a divided vote and against the opposition of its President, Luis Maldonado. Subsequently, on August 24, 1991, it ruled unanimously that application of the Amnesty Law to the case of the 70 was constitutional.

- The Supreme Court decision validated the courts' controversial practice of applying the amnesty before the facts of a case had been clarified and those responsible identified. Although technically speaking the ruling was binding only to the case under review, the message to the judiciary was clear. There would be no legal obstacle to individual judges continuing to investigate, but they could hardly do so without giving weight to the Supreme Court's position, and to the likelihood of decisions being reversed on appeal.
- The Court also countered the argument that the law was inconsistent with the state's obligation to respect international

human rights standards. It argued that the International Covenant on Civil and Political Rights was not in force in Chile during the period in question, pointing out that although the Covenant was promulgated in 1976, the relevant decree was not published in the Official Gazette until April 29, 1989. This was a repetition of an argument used on numerous occasions in the past to reject appeals claiming the binding nature of the Covenant. 157

- Both these positions on judicial investigations, and on the applicability of human rights law were consistent with the Court's past decisions. However, the Court also stated that the provisions of Common Article 3 of the Geneva Conventions could not be considered applicable in Chile, on the grounds that no state of "internal armed conflict" existed during the period concerned. This was in evident contradiction with the position adopted by the Court during military rule, when it repeatedly cited Decree Laws Nos. 3 and 5 as grounds for rejecting competence to oversee the *Consejos de Guerra*, and to reject *habeas corpus* appeals.
- The Court furthermore discounted the argument that the law deprived the victims' relatives of the possibility of civil actions for

With respect to individual rights the Court maintained an artificial distinction between the state's obligations under domestic laws and those deriving from international treaties, giving precedence invariably to the former. In other areas of jurisprudence, the Chilean judiciary has traditionally given precedence to international law obligations. See Jack Detzner, **Tribunales Chilenos y Derecho Internacional de los Derechos Humanos**; Comisión Chilena de Derechos Humanos, Santiago, 1987.

¹⁵⁷ The Covenant was signed on September 19, 1971, ratified on February 10, 1972 and promulgated on November 30, 1976. In 1976 the Supreme Court upheld decisions of the Santiago Appeals Court denying judicial protection (amparo) to victims of expulsion orders. In 1984 the Appeals Court rejected an appeal on behalf of exiles banned from returning, against the dissenting vote of one judge, Carlos Cerda, who cited articles of the International Covenant in defence of his view. The Supreme Court again upheld the ruling. In 1986 the Supreme Court upheld another verdict in which the Appeals Court had argued it lacked powers to compel the government to publish the Covenant, as the plaintiffs had requested.

damages or compensation. It maintained that this right was left unaffected by application of the Amnesty Law, which was limited to penal responsibility.

The government made no secret of its unhappiness with the Amnesty Law decision, but went no farther than urging the Court to "clarify" several "grave" aspects of the ruling, including its position on the "state of internal war". ¹⁵⁸ The verdict was condemned vigorously by the *Vicaría de la Solidaridad* and the non-governmental Chilean Commission of Human Rights, which had campaigned for years to create an opening in the courts for human rights investigations. However appeals for clarification by the appellants were discarded by the Supreme Court, and a plea for reconsideration was unanimously rejected.

Nevertheless, the verdict did not bring to an end the battle over interpretation of the Amnesty Law, and strong differences of opinion subsisted in the judiciary. Four *Corte Marcial* rulings in September and November 1990 on appeals against final closure of cases of "disappearance" were in favour of the appellants, but in at least three cases the final closure was subsequently upheld. Lawyers were expected to lodge appeals with the Supreme Court. ¹⁵⁹

The issue resurfaced with the publication of the Rettig Commission report. As required by its mandate, the Commission presented to the courts new evidence on some 220 cases, including many "disappearances" which had not previously been denounced. All of the cases dated from the period covered by the amnesty. In his public address presenting the report, President Aylwin pointed out that the truth established in the document was incomplete, because the Commission had lacked the means to clarify the fate of the majority of the "disappeared". This, he said,

¹⁵⁸ Press conference on August 28, 1990 by the Minister of Justice.

The cases in which the Corte Marcial reversed decisions to close were those of four "disappeared" prisoners: Guillermo Jorquera Gutiérrez, Albano Fiorazo Chau, Claudio Venegas Lazzaro and Sergio Riveros Villavicencio.

was a matter for the courts, and he added, "I hope that they duly carry out their function and carry out an exhaustive investigation, to which, in my view, the amnesty law in force is no obstacle." ¹⁶⁰

While human rights lawyers have praised the cooperation of lower court judges, progress on these cases has been very slow. The courts in Chile are notoriously overworked – judges have to handle hundreds, sometimes thousands of cases – and long delays are routine. While the Supreme Court has complied formally with the President's request, it has taken no special steps to streamline or resource the investigations. These are carried out, moreover, in the dispiriting knowledge that however well the case might be developed, it would eventually be transferred to a military court, which would promptly close it under the Amnesty Law.

Judicial Investigations of Clandestine Burials

The discovery in 1990 of burial sites, in which the remains of victims of extrajudicial executions had been secretly disposed of following the military coup, led to the opening of judicial investigations by the ordinary courts to exhume and identify the bodies, clarify the circumstances in which the victims had met their deaths, and establish responsibility for their illegal burial.

Discurso de S.E. El Presidente de la República, Don Patricio Aylwin Azócar, al dar a la ciudadanía el informe de la Comisión de Verdad y Reconciliación, Santiago, March 4, 1991.

Prior to the release of the report, President Aylwin wrote to the President of the Supreme Court, Luis Maldonado, stating that in view of the gravity of the crimes and their impact on public opinion, he felt "morally obliged" to request the Supreme Court to instruct the courts to pursue the pending cases "with the greatest diligence". He said that his conscience would not let him rest if he did not impress on the Court his conviction that the Amnesty Law should not be allowed to interfere with these investigations, and that all the organs of the state were constitutionally bound to uphold the right to justice. Although even this exhortation was immediately denounced by the opposition parties as "undue interference" in the judiciary, "the Supreme Court complied with the President's request and ordered the lower courts to reopen the cases.

Following earlier discoveries of clandestine graves under the military government, in judicial investigations had been transferred in every case to military courts. Identified culprits were amnestied, or cases were closed on the mere presumption that military personnel were involved. Military courts continued to claim jurisdiction in such cases following the change of government. Civilian judges contested these claims, and the disputes were referred to the Supreme Court. In a series of rulings, the Court upheld the claims of the military courts, returning the cases to these courts despite their record of having closed investigations without results.

A good illustration of the military's determination to keep such cases out of the civilian courts involves the clandestine burial site at Calama. Investigation of the Calama executions began in January 1987, when a complaint was presented to a local court alleging the illegal burial of seven bodies. The local judge was declared incompetent and the case was transferred to an Antofagasta military court, which in June 1987 declared the case closed under the Amnesty Law. The decision was confirmed by the *Corte Marcial*. Following the discovery of human remains in Calama in July 1990, a further appeal was made to the Supreme Court to revoke the decision and reopen the case.

In a surprise ruling on April 2, 1991, the Supreme Court admitted the appeal and returned the case to the military court, ordering it to continue the investigation. But this was not the end of the story. The Military Public Ministry appealed for the ruling to be quashed on the grounds that the vote of its representative on the

 $^{^{161}\,}$ Lonquén in 1978, Patio 29 in the Santiago Cemetery, Yumbel and Mulchen in 1979.

¹⁶² In 1990 the Supreme Court upheld a request from the military judge of Arica for jurisdiction in the Pisagua case; in February 1991 a military judge in Iquique closed the case in application of the Amnesty Law. A similar ruling was made in January 1991 with respect to the special investigation being conducted by judge Nibaldo Segura into the clandestine graves in Chihuío; the cases was transferred to a Valdivia military court. The ruling was made despite the fact that in April 1974 a military court had previously closed investigation into the disappearance of the peasants.

court, the Military Auditor Fernando Torres Silva, had not been officially recorded. A different panel of judges, which included Torres Silva, then accepted the complaint and on April 18 annulled the Court's earlier decision, rejecting the appeal against the Amnesty Law.

The Letelier Case

The Amnesty Law of 1978 expressly excluded one case from its provisions: the assassination on September 21, 1976 of Orlando Letelier, former Minister of Foreign Affairs and of Defence under the Allende government. Letelier was killed in the embassy district of Washington D.C. when a bomb placed under his car exploded, mutilating and killing him and one of his passengers, Ronni Moffit, a co-worker at the Institute of Policy Studies in the city. Moffit's husband Michael, who was also travelling in the car, was wounded but survived.

In its analysis of the case, based on a study of the investigations conducted by both U.S. and Chilean courts and on direct testimony, the Rettig Commission concluded that Orlando Letelier and Ronni Moffit were "victims of an act of terrorism committed by agents of the Chilean State, specifically by the DINA, who conceived the terrorist act and carried it out with the help of other persons." It also concluded that the "highest authorities" of the DINA were responsible.

The evidence on which the Commission based its conclusions had been before courts in the U.S. and Chile for more than 12 years. By May 1991, U.S. authorities had arrested seven persons in connection with the crime, and courts had convicted six, including two DINA agents. In 1978 a US grand jury concluded from FBI investigations that the bomb had been prepared and activated by anti-Castro Cuban exiles, but that the crime had been carefully prepared beforehand by DINA agents acting incognito in the United States and on higher orders. A US court issued warrants for the arrest of five Cubans, including two who

were suspected of having prepared and detonated the bomb, and indicted four DINA members. The four included *Michael Townley*, an American-born DINA agent resident in Santiago, *Armando Fernández Larios*, another DINA agent, the operational chief of the DINA, *Pedro Espinoza*, and its Director, *Manuel Sepúlveda Contreras*.

Michael Townley was expelled to the US by the military government to face trial in April 1978. Armando Fernández had been detained that year in Chile for questioning, but was released for lack of evidence. Apparently oppressed by guilt, he gave himself up to the US authorities in February 1987. Both men confessed to their role in the crime. A US government request for the extradition of Espinoza and Contreras was rejected by the Chilean Supreme Court in October 1979, and both men were released without charge from Santiago's military hospital, where they had been held in preventive detention.

Legal Moves

For more than a decade, the judicial investigations begun in Chile in 1978 stagnated in military courts. Much of the effort of the Letelier family and their lawyers was spent on seeking to reverse the decisions of military courts to suspend investigations by declaring the case *temporalmente sobreseído* (temporarily closed). In 1987, for example, the family's lawyers were unsuccessful in an appeal to a military judge in Santiago to reopen the investigation to take into account the court confessions of Armando Fernández Larios in the United States. The Corte

¹⁶³ The legal argument of the judge – similar to that used by the Supreme Court to deny the U.S. extradition requests – was that Fernández's confessions were inadmissible because they were the result of a plea bargaining arrangement unrecognized under Chilean law. Military authorities were apparently determined that Fernández Larios' affidavits should not reach Chilean courts. Fernández himself testified that General Héctor Orozco, the military prosecutor who had conducted his interrogation in 1978, had burned those parts of his testimony in which he described his mission to the United States to prepare the ground for the assassination. (The Rettig Commission also referred to testimonies indicating that court confessions had been destroyed).

Marcial and the military judge of Santiago continued to reject such appeals and recursos de queja (complaint appeals) were equally unsuccessful.

Soon after the change of government, the Ministry of Foreign Affairs launched an administrative inquiry into the forging and falsification of official passports by Ministry officials acting on DINA orders between 1975 and 1977. This was directly relevant to the Letelier case, since the implicated DINA agents had used false documents supplied by the Ministry to travel to the United States. 164

Later in April, a Santiago newspaper tracked down and published an extended interview with Luisa Monica Lagos, who admitted to having been a DINA agent and the mysterious escort "Liliana Walker", who had accompanied Fernández Larios to Washington on his surveillance mission. Although the case was reopened by the Supreme Court to allow the military prosecutor to consider her evidence, the military judge, having interviewed Luisa Lagos, closed the case again without further investigation. The court did not accede to the request by the Letelier family lawyers for a summons to be issued for questioning of Espinoza and

The case was known to the Chilean courts as the "Passports Case". Press interviews with Ministry officials conducting the investigation revealed in July 1990 that 35% of official, diplomatic and special passports had been altered, and 200 such documents forged.

The official ledger registering the names of agents on confidential missions who had been issued passports was removed from the Ministry, according to a Ministry official cited in the press in April 1990. The Director of the Consular Service in 1976, Carlos Guillermo Osorio, died under suspicious circumstances at his home in October 1977, shortly after the "passport case" had been opened. The official report said he committed suicide, but on the express orders of an army general, his body was buried hurriedly and without an official autopsy. The suicide version is not believed by members of his family, who are convinced that he was silenced because of his information and reputation for honesty. Two other Ministry officials subsequently met mysterious deaths, one in a traffic accident and another in a street assault. "La mano del General Forestier: revelación del caso Osorio", Apsi, July 4–17, 1990.

Contreras, and Luisa Monica Lagos was released unconditionally. 165

In June the Supreme Court turned down on technical grounds a further request that it appoint a *ministro en visita* to take over the case. At that time two separate appeals against the military court's closure decision were awaiting a ruling by the *Corte Marcial*.

The Aylwin government was in principle committed to the full investigation of the Letelier case by Chilean courts, and in this matter affairs of state weighed heavily, since normalization of relations with the United States and the renewal of military aid suspended after the killing were dependent on the Chilean courts making a genuine effort to bring the DINA planners of the crime to justice. The legal impasse into which the case had sunk was overcome by two provisions of Law 19,047 (the third of the Cumplido laws), which entered into force in February 1991.

- Under the first of these provisions, cases involving the use by military personnel of falsified passports were to be transferred from military to civilian courts.
- The second provision stipulated that crimes which "affect the international relations of the Republic with another state" should be placed directly under the Supreme Court, which might appoint one of its members to investigate. 166

In March 1991 the government requested the Supreme Court to make such an appointment. Rather than responding immediately, however, the Court referred the case back to the *Corte Marcial* for a final ruling on the appeal against the military judge's

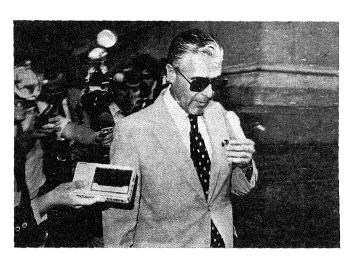
The newspaper responsible for the Liliana Walker scoop was **La Epoca**. The military prosecutor, having released Monica Lagos, began an inquisition against **La Epoca** staff, accusing them of holding Lagos against her will. Manuel Salazar, its national editor, was detained incommunicado by the prosecutor overnight and released following a public outcry.

¹⁶⁶ Article 7 of Law 19,047.

definitive closure of the case. The Corte Marcial ruled that the final closure was premature, since the investigation was still incomplete. The Supreme Court finally appointed Justice Adolfo Bañados to take over the investigation. After considering the new evidence available, Judge Bañados reopened it. 167

The Letelier family were now faced with a race against time. On September 21, 1991, under the 15-year statute of limitations applicable to serious crimes under Chilean law, the Court might

declare the case closed unless suspects had been indicted. 168 In order to forestall this possibility, they presented to the Court in August detailed accusatory dossiers against Contreras and Espinoza, requesting that the judge issue Judge Adolfo Bañados iniunctions



preventing both men from leaving the country. Judge Bañados agreed to their requests. On September 23, 1991 Contreras and Espinoza were both arrested and confined in military

¹⁶⁷ Adolfo Bañados, the only Aylwin appointee to the Supreme Court, had been responsible as ministro en visita for the criminal investigations following the discovery of the body of victims of extrajudicial executions in a disused mine at Longuén in 1978. His investigation, which resulted in the prosecution of the military and police personnel responsible and their subsequent release under the Amnesty Law, was widely praised as professional and meticulous.

 $^{^{168}}$ The interpretation of the precise procedural stage at which crimes can be declared to have lapsed is a matter of legal debate.

establishments on charges of first-degree murder (homicidio calificado). The arrests were apparently made within hours of the possible entry into force of the statute of limitations. It was commented that Judge Bañados had succeeded in doing in a month what Chilean justice had been unable to do in 15 years.

Investigations into Human Rights Violations Committed after 1978

No investigation into a serious human rights crime committed since 1978 had led to a conviction at the time of writing. In most instances the courts were unable to assemble enough new evidence against the individuals responsible to initiate prosecutions. Even in cases in which they had apparently done so, the Supreme Court ruled the evidence insufficient to press charges and ordered the suspects released. However, dramatic developments in two of the cases listed below, the murder of Tucapel Jiménez and the **Degollados** Case, occurred in 1992. These are discussed in the Epilogue to this report.

- During 1990 and 1991 financial fraud rather than human rights violations was the main focus of criminal prosecutions of former members of the security services. In November 1990 several former CNI agents were detained in connection with the investigation into the "La Cutufa" money-running operation. According to an official army investigation, more than 100 army officers, including three retired generals, were implicated in the financial scandal. One of the former CNI agents, Patricio Castro Muñoz, who had been charged with the murder in July 1989 of a former partner in the illegal loan company, was arrested after being deported from Paraguay. 170

^{169 &}quot;La Cutufa" was the name given to a secret CNI-run loans company.

¹⁷⁰ The charges against Castro for the murder of Aurelio Sichel were dropped by the Supreme Court on November 29, 1990, in a decision which the lawyer representing Sichel's widow described as "a spectacular triumph for the CNI".

- The "La Cutufa" investigation also led to the arrest on fraud charges of two other prominent CNI agents, Alvaro Corbalán Castilla and Francisco Zuñiga. Both men, together with Vargas Bories, were accused of the fraudulent bankruptcy of a truck business, which was alleged to be a paper company financed in part by loans from the State Bank and used to pay the wages of Corbalán's personal bodyguards. Corbalán, who had been the operational chief of the CNI, was alleged to have masterminded the so-called Albania Operation in June 1987, in which nine FPMR suspects were killed in false "shoot-outs". Zuñiga had been detained in 1977 for the alleged murder of a drug-trafficker, and convicted in 1984 for beating journalists covering a demonstration. In March 1991 Corbalán was released on bail on the fraud charge.
- In December 1990, Aquiles Rojas, the special judge investigating the kidnapping and murder of four members of the Communist Party and the MIR in September 1986, brought charges against a former agent of the CNI, now employed by the Army Directorate of National Intelligence (DINE). The agent, Jorge Vargas Bories, was charged with the kidnapping and murder of one of the four victims, journalist José Carrasco. Although the indictment order was subsequently confirmed by the San Miguel Appeals Court, in May 1991 the Supreme Court dismissed the charges on appeal, claiming the evidence to be unreliable, and ordered the release of Vargas.
- In March 1991 the first Criminal Court of Concepción reopened investigations into the killing on August 23, 1984 by CNI agents of two members of the MIR, Nelson Herrera Riveros and Mario Octavio Lagos Rodríguez. The two men were shot while getting off a bus, the former wearing handcuffs and the latter with his hands up in surrender, according to witnesses. The case had been closed by a special military prosecutor on the grounds that the agents had acted in self-defence. It was

 $^{^{171}}$ This investigation has failed to progress, although it has been in the courts for years.

reopened after the court received new evidence from the Rettig Commission in February.

- Another case reopened was that of the abduction and murder of trade union leader Tucapel Jiménez Alfaro on February 25, 1982. The judicial investigation had been suspended by the special investigating judge Sergio Valenzuela Patiño in 1985, a decision confirmed by the Santiago Appeals Court in September 1986. However the case was reopened by Judge Valenzuela in July 1990 after new evidence was presented by the lawyers representing the family. 172
- New elements were also being reported in the investigations into the abduction and murder on March 29, 1985 of Juan Manuel Parada Maluenda, Manuel Guerrero Ceballos and Santiago Nattino, the "degollados" case. In January 1987 the investigating judge, José Cánovas, had suspended the investigations. He had established the involvement in the crime of agents of DICOMCAR, the police intelligence unit, but the charges against those arrested were dismissed by the Supreme Court. In June 1987 the Supreme Court ordered the investigations to be continued and in May 1989 the case was passed to Judge Milton Juica, who was said to have "reactivated" the investigation in March 1990. A year later it was reported that two men, including a former member of DICOMCAR, César Adolfo Miranda Gálvez, had been arrested. Miranda was said to have been charged subsequently with kidnapping and murder and was being held in the Third Police Station in Santiago.

This reportedly included the identification of several new suspects, part of a revolver said to be the murder weapon, and the location of a disused mine where the conspirators allegedly met after the crime. There was also reported to be new evidence directly linking the murder of Jiménez with that of a carpenter, Juan Alegría Mondaca, whose death had been dressed up to look like a suicide. (Beside the body a note had been found "confessing" Jimenez's murder). A special homicide team of the *Investigaciones* police was assigned to the case. According to a source close to the investigation in August 1990, ballistic tests had confirmed the calibre of the murder weapon, and the identity of the suspected culprits was already known.

Chapter 10

Judicial Reform

Although criticisms of the judiciary were widespread – including from the pro-military parties – and its public prestige was low, the Aylwin government proposed no immediate measures, direct or otherwise, to alter the composition of the courts.

Intervention in the judiciary by the executive or legislative branches is alien to Chilean traditions. The 1980 Constitution preserves these traditions by jealously guarding the judiciary's functional autonomy. Although the President is responsible for all appointments of judges, the pre-selection of candidates is the exclusive preserve of the judiciary alone. Under Article 75, the President must appoint members of the Supreme Court from a list of five candidates selected by the Court itself. The Supreme Court is also responsible for the pre-nomination of candidates for the appellate courts, which in turn pre-select candidates for lower-level appointments. The legislature is excluded altogether from any participation in the selection procedure, and in effect is limited in its oversight of the judiciary to the extreme measure of impeachment. ¹⁷³

¹⁷⁷³ Chile's system of judicial self-selection is unique in Latin America. Although procedures vary, in most Latin American countries higher court judges are appointed by the legislature. Argentina, Paraguay, Haiti and Mexico have systems of presidential appointment, but unlike Chile, they require the consent of the Senate as a counterbalance. See Keith Rosenn, op. cit., pp. 20-30.

In theory the mechanism of impeachment of judges "for gross abandonment of duty" could have allowed the Congress to remove and replace some, if not all, of the Supreme Court justices. ¹⁷⁴ In September and October 1990, the Socialist Party and the youth wing of the Christian Democrats tried to garner support for the introduction into the Chamber of Deputies of such an impeachment motion, specifically directed against nine Supreme Court judges, whose names were published. ¹⁷⁵ However the initiative was significant only as a symbolic gesture. There was no possibility of parliamentary support for an impeachment motion, and the government was anxious to avoid "politicizing" its proposals for judicial reform.

On the other hand, piecemeal replacement of Supreme Court judges when they reached retirement age could have only very limited effects. At 75, their compulsory retirement age in the Chilean Constitution is higher than in most Latin American countries. Furthermore, a provision in the Transitory Articles exempted the Supreme Court justices already in service at the time of its entry into force from any retirement age limit, with the result that for much of the 1980s the average age of the judges topped 80.

Since the decease or retirement of many of these judges was to be expected within a few years, the then Minister of Justice, Hugo Rosende, devised an insurance policy obviously intended to limit the number of new judges who could be appointed by the elected government. The so-called "Rosende Law" allowed Supreme

When Uruguay emerged from the dictatorship to return to a democratic system in 1985, all of the judges on the Supreme Court were dismissed by the Parliament, because they had been named by an illegitimate authority which had usurped power.

Article 48 (2) of the Constitution provides a mechanism for "constitutional" accusations against magistrates of the higher courts for "gross abandonment of their duties". If the charges are upheld by the Chamber of Deputies, they are adjudicated by the Senate acting as a court. This impeachment procedure may result in the dismissal of judges and their banning from further public office for five years.

Court judges past the age of 75 to retire with a compensation of 14 million pesos (approximately US \$ 50,000), ¹⁷⁶ provided that they took up the offer within 90 days. Seven judges on the Court did so and were replaced by younger men. With the exception of one Aylwin appointee, Justice Adolfo Bañados, the composition of the Supreme Court remained unaltered from the period of the military regime. ¹⁷⁷

Rather than tinker with the composition of the Supreme Court, the *Concertación* has instead proposed a comprehensive set of reforms which amount to an overhaul of the justice system, and which are intended to be long-lasting. Their purpose is to restore the effectiveness of the judiciary as an independent branch of government capable of acting as an effective watchdog on individual rights. The reforms aim to professionalize and modernize the judiciary, and to ensure access to justice for the mass of the population.

The measures proposed were based on analyses conducted over the years by opposition jurists of the *Grupo de los 24* (Group of 24), a Christian Democrat body set up during the military government to monitor constitutional reforms, and by other opposition academic centres, such as the *Academia de Humanismo Cristiano*. These studies concluded that the failure of the judiciary to safeguard basic human rights under the military government was caused, at least in part, by built-in structural defects, beginning with the constitutional arrangements governing appointments to the Supreme Court.

¹⁷⁶ The elected government proposed a similar measure, but applicable to the judiciary as a whole and without time limits. However no steps had been taken to implement the proposal by May 1991. See Epilogue.

Fourteen of the present 17 members of the Court were appointed by General Pinochet, and all but five were appointed between 1985 and 1989 through the intervention of a single Minister of Justice.

Legislative proposals to alter these as well as other institutional mechanisms require constitutional reforms. Their approval is subject to a three-fifths majority vote of the deputies and senators holding seats in the Congress – a higher majority than that required for the passage of ordinary laws. Conscious of these requirements, the government deferred introduction of its proposals to parliament until March 1991, with debate in the legislature beginning in the congressional committees only in September of the same year.

The government's diagnosis and concrete proposals are examined in the final part of this chapter. But to appreciate the context in which the debate is taking place, it might be helpful to first look briefly at the relations between the Aylwin government and the Supreme Court as the new administration moved to confront the legacy of human rights violations.

The Government and the Supreme Court

While the government was careful to observe the requirements of judicial independence, it made no secret of its criticisms of the Supreme Court's earlier record. These were voiced firmly, if diplomatically, by both President Aylwin and the Minister of Justice on several occasions during the first year of their administration.

In the national debate over human rights violations under the military government, the Supreme Court found itself repeatedly the butt of critical comment in the pro-Government press and by *Concertación* politicians. In telling contrast to its silence during the military regime, the Court entered the fray with strongly worded attacks on the government, which it accused of undermining confidence in the law. Although a minority on the Court acknowledged the widely voiced need for reform, as a whole the Supreme Court reacted with defensive indignation.

In a speech on March 1, 1990 inaugurating the judicial year, the President of the Supreme Court, Luis Maldonado, himself pinpointed many areas of necessary reform. His speech called for changes in the procedures for appointment and grading of judges, improved pay and resources, the establishment of a police force responsible to the courts for the implementation of their decisions, and the creation of justices of the peace to provide rapid and accessible mechanisms for the solution of local disputes. The speech was warmly received by the Minister of Justice-designate, Francisco Cumplido, who said he personally shared the analysis.

Yet subsequent events were to prove that Judge Maldonado's views were not shared by most of his colleagues on the bench. Many of the judges profoundly distrusted the government's intentions, which they feared would result in the politicization of the judiciary or an invasion of its autonomy. The Court's hypersensitivity to public criticism became evident during the prolonged polemic about the judiciary during the year.

On March 30, 1990, President Aylwin unveiled his plans for judicial reform at the Annual Magistrates Convention in the southern resort of Pucón.

"No one can objectively deny," he began, "that the administration of justice is experiencing a grave crisis...above all, our citizens consider that the judiciary does not act as if it were a truly independent power of the state. They see it rather as a mere public service, which 'administers justice' in a more or less routine manner, too stuck to the letter of the law, and often docile to the influences of power."

Although the speech was enthusiastically received by the assembled magistrates, three days later the Supreme Court delivered an angry rebuff, denying that the judiciary was in crisis, and insisting that it had always acted with "absolute and total" independence.

As it happened, the drafting of this statement coincided with a noisy protest mounted outside the Supreme Court building by relatives of political prisoners demanding their release. There was uproar outside the courtroom as judges leaving their chambers were confronted and challenged amid ugly scuffles. The police, called in by the Court to restore order, repressed the demonstration forcefully. The Supreme Court issued a formal complaint to the government alleging inadequate protection, and in the soured atmosphere declined an invitation to tea with the President. Government authorities condemned the protest, but a pattern became established in which the Supreme Court and the repeatedly parliamentary would opposition accuse government of colluding in a campaign of aggression against the Court.

Public criticism of the Supreme Court erupted with renewed force as a result of the consternation provoked by the Court's decision in August 1990 confirming the constitutionality of the Amnesty Law. Both the Ministers of Justice and the Interior, while discounting any intervention in the courts, forcefully stated the government's disagreement with the verdict, referring to a "collision" of views between the judiciary and the executive.

Inaugurating the judicial year on March 1, 1991, Judge Maldonado denounced the "campaign of accusations which have been orchestrated...against the Supreme Court". More significant however was his acknowledgement of the shortcomings of the courts in protecting human rights, though he felt it was unfair and unacceptable to single out individual judges for blame.

"If in democracy justice finds itself limited in such fundamental matters as protecting human rights, how much more limited was the judiciary in protecting these rights in the situation we lived through before 1990, in which judicial power was on its own and subjugated in its investigations to another power of state...It must not be forgotten that for 17 years we were ruled by

a government of exception, for which the judicial branch was not constitutionally structured, and which its members were not prepared to confront successfully."

For a Supreme Court President this was a frank acknowledgement, particularly since it admitted that the judiciary had indeed been subservient to the military government, an assertion which the Court had previously always denied. It reinforced the view Judge Maldonado had expressed in his 1990 speech that the judges were obliged to subjugate themselves even to unjust and democratic laws, because it was not their business to interfere with government decisions. President Aylwin, however, in a March press interview expressed the view that institutions were no better or worse than the people who made them up, and that judges had demonstrated a "lack of moral courage" in failing to speak up strongly against the abuses. 179

This was the conclusion of the Rettig Commission, which reserved some of its harshest comment for the judiciary. Within days of the publication of the Commission's report, conflict erupted again between the Supreme Court and the government, this time sparked by information reportedly obtained from an FPMR detainee about an alleged plot to attack two members of the Court. The justices promptly issued a public statement accusing government authorities of creating a climate of "pernicious animosity" and "denigrating the judiciary", linking the alleged "terrorist plan" directly with public criticism of the Court. The

The annual speech of the President of the Supreme Court presents a personal view and does not necessarily reflect agreement of the bench. Indeed on the day of the speech, Judge Enrique Correa, who was to replace Maldonado as President in May 1991, affirmed categorically that the judiciary had enjoyed "total and absolute" independence under the military government.

President Aylwin repeatedly invoked the memory of his father, a distinguished member of the Supreme Court, in his critical comments on the judiciary.

campaign of denigration had reached such levels, said the statement, that it endangered the "stability of the institutional order and the rule of law." A copy of the statement was submitted directly to the Council of National Security, in itself a defiant gesture. Several opposition party spokesmen promptly sided with the Court's position.

President Aylwin issued a counter-statement rebutting the court's charges, announcing measures for increased police protection of the judges, and denying the existence of any threat to the institutional order. But when a home-made bomb was hurled from a passing car at the house of one of the justices, the Supreme Court issued a second statement claiming that the attack fully justified their earlier fears. This was despite the fact that the bomb did little damage, and that there had been previous attacks on Supreme Court justices both prior to and since the change of government.¹⁸⁰

On May 16th the Court issued a vituperative reply to the Rettig Commission's comments on the judiciary. Much of it was devoted to epithets disqualifying the Commission, which it characterized as a "vehicle" of the government. The Commission had "exceeded its powers", making a judgement against the courts which was "intemperate, ill-considered and tendentious", and based on an "irregular and evidently politically biased investigation...which ends by putting the judges' responsibility almost on a par with that of the real authors of the abuses against human rights."

In its defence the Court mustered numerous cases to prove it had continuously used the channels open to it to put an end to "irregularities". It insisted on the absolute obligation of the judges to defer to the written letter of the law, and resented interference by outsiders intent on raking over what it considered sovereign judicial decisions. But the Court showed no signs of

Many felt that the "terrorist plan" gave the Court an opportunity to express the outrage it felt at its treatment by the government and the public.

being troubled by the uncontested facts revealed in the Commission's report, or its own prolonged silence while abuses were taking place.¹⁸¹

Judicial Reform: Diagnoses and Remedies

The Concertación's electoral programme, published in July 1989, promised the adoption of new norms "to guarantee the authentic independence of the judicial power, providing it with broad and sufficient powers to make it into a true guarantor of human rights and public liberties." As noted above, the government's proposals amounted to an overhaul of the entire system of justice. This affected the composition and attributes of the Supreme Court, planning and administration of the penal system, the recruitment and training of judges, penal procedures and relations with the police, and included measures to increase popular access to the courts and to remedy grossly inadequate pay and resources.

Some of the reforms involved amendments to the Constitution. The most important innovations were the proposed formation of a National Council of Justice (Consejo Nacional de la Justicia) and a change in the procedure for the appointment of Supreme Court judges. The Consejo, which was to be composed of representatives of the legislature, the executive and the judiciary as well as members of experts bodies such as the Bar Association and university law faculties, would assume sole responsibility for planning, administration and budgetary control of the judiciary. This would enable the Supreme Court, which under present arrangements carries out all these administrative functions, to concentrate on its judicial tasks. In addition, the Consejo was to be made responsible – instead of the Court – for the selection of the

Raul Rettig, a former President of the Bar Association, was hurt and angered by the Court's statement, as well as shocked at its "virulence". Interview in El Mercurio, May 17, 1991.

¹⁸² Concertación de Partidos Por La Democracia: Programa de Gobierno. La Epoca Documentos, p. 4.

slate of five candidates from which the President makes appointments to the Court.

Measures were also proposed to increase the size and alter the make-up of the Supreme Court, ensuring a balanced composition, including distinguished jurists and lawyers outside the career judiciary. The Court was to be divided into specialized benches, and its attributions were to place a strong emphasis on constitutional jurisprudence and the hearing of annulment appeals (recursos de casación), enabling the Court to develop and unify interpretations of the law on the basis of soundly grounded legal decisions.

Other institutional innovations included the establishment of a school of judges to improve standards of technical and professional training and to contribute to the upgrading of the profession, and the formation of a judicial police force, responsible to the judiciary, to carry out investigations ordered by the courts. The government also proposed to set up a system of local courts equivalent to justices of the peace to provide free, accessible and rapid procedures for the solution of local disputes. Legal assistance services were to be expanded to ensure free access to legal advice and representation for the poor, and a new office of *defensor del pueblo* (ombudsman) was to be created as an additional mechanism against abuses by public officials. ¹⁸³

These ideas had been in gestation for several years. In 1988 the Group of Constitutional Studies – or Group of 24 – elaborated a detailed list of proposals along these lines, which were subsequently adopted by the Bar Association. ¹⁸⁴ In January 1991

A longer-term aim considered by the government involved the establishment of the office of Public Minister (Ministerio Público), to provide a prosecution service in firstinstance courts which would replace the present system by which criminal court judges act simultaneously as investigators and prosecutors.

See Manuel Sanhueza, President, Grupo de Estudios Constitucionales: "Organización y Funcionamiento de Poder Judicial" in Cómo Hacer Justicia en Democracia, Segundo Encuentro de Magistrados y Jueces, Chilean Commission of Human Rights, Santiago, January 1989.

final versions were submitted for consultation to the Supreme Court, the Magistrates Association, the Bar Association and university law faculties. Following these consultations, the government submitted its proposals to Congress on April 1, 1991, contained in two "organic constitutional laws" and a bill amending the Constitution.

It should be stressed that the government was not alone in advocating reforms to the judiciary, In fact, as noted above, dissatisfaction with the functioning of the courts was widely shared and had caused a crisis of public confidence in the judiciary. There were also allegations of nepotism, favouritism and corruption. This widespread sentiment led the government to believe that, given the importance of the issue as a national priority, the legislation from the outset should be negotiated with the parliamentary opposition. However, both the RN and the UDI disagreed profoundly with some of the government's more radical proposals, notably the composition and wide powers of the Consejo Nacional de Justicia and redefinition of the make-up and powers of the Supreme Court.

Both the RN and the UDI expressed solidarity with the Court when it came under attack, refusing in protest to participate in consultations with the government on its reform proposals. Both parties insisted in divorcing the issue of judicial reform from the critique of the actions of the judges under the former government, which they viewed as a political attack.

Meanwhile, working in parallel with the government's advisory committee was an independent study group formed under the auspices of the *Centro de Estudios Públicos* (CEP) and chaired by Eugenio Valenzuela, a former member of the Constitutional Court. Although the general orientation of this group was considered to be right of centre, its membership included experts

Valenzuela played an important role in the decisions of the Constitutional Court which ensured fairness in the procedures for the 1988 plebiscite. See Ascanio Carvallo: La Historia Oculta del Regimen Militar, Santiago, January 1989.

sympathetic to the government's position as well as two well-respected appeals court judges. In April 1991, the group published a lengthy report with detailed diagnoses and proposals, many of which mirrored those of the government. However the CEP disagreed with the creation of the Consejo and proposed an alternative system for the appointment of Supreme Court judges.

Reform of the Supreme Court

Under the 1980 Constitution the Supreme Court has four principle functions:

- to exercise administrative, disciplinary and economic control over all the courts of the nation (Article 79);
- to safeguard respect for personal liberty and individual security, and to protect the legitimate exercise of the rights and guarantees listed in Article 20 of the Constitution;
- to monitor observance of the Constitution and to declare inapplicable those legal precepts which are contrary to it (Article 80);
- to monitor the application of the laws to ensure consistency and correct interpretation.

In the government's view, the present composition of the Supreme Court, the appointments system and the manner in which the Court had come to exercise its powers constituted formidable obstacles to its full effectiveness in carrying out these functions as an independent branch of government. The government argued that in a democratic society judges must play an active and vigorous role in the promotion of justice, rather than limit themselves to a mechanical application of the law.

¹⁸⁶ Centro de Estudios Publicos, **Proposiciones para la Reforma Judicial**, Santiago, April 1991.

It was inconceivable that a judiciary passively administering laws dictated without public consent and which trampled on constitutional guarantees and liberties could be considered truly independent, even if its formal autonomy was respected by the government in power. During the states of emergency, the Supreme Court had argued as if the courts' freedom from political interference by the government was the only litmus test of respect for the rule of law.

The defence adopted by the Court against criticism of its "passivity" in the face of widespread violations of human rights was to declare itself "bound" by the laws in force. Having accepted the legitimacy of the *de facto* government, it refused to risk overstepping its constitutional authority by questioning government decrees, even when these violated existing constitutional guarantees. An example of this attitude was the Court's failure to question Decree Law 788 of December 4, 1974, which allowed the Military Junta to modify the Constitution by simple decree. The effect of this Decree Law was to vitiate any form of effective judicial oversight of constitutional provisions. 187

This "hands off" concept of judicial independence was at odds with the traditional doctrine of the separation of powers, which depends on *reciprocal control* between the various organs of state. The judiciary, like the other powers of state, was answerable ultimately to the people, and more importantly it constituted their only defence and source of redress against violations of their constitutional and human rights. But rather than play an active role in defending these rights, the judiciary

Another aspect of this formalistic and corporative view of judicial independence, one rooted in the national fixation on textual legalism, was the view that to allow judges any licence in "interpreting" the law was to open the door to arbitrariness and bias, undermining social order and the rule of law.

Mario Verdugo M.: La Experiencia Constitucional Norteamericana y Chilena sobre Separación de Poderes, Editorial Ediar Conosur Ltda., p. 69. "It is 'institutional interdependence' rather than 'functional independence' that best summarizes the American idea of protecting liberties by fragmenting power." Tribe, American Constitutional Law, (2nd Ed. 1987), Foundation Press, p. 20.

had transformed itself into a remote and impermeable bureaucracy. 189

The Government's Proposals

The government proposed to increase the number of Supreme Court judges from 17 to 21 and to divide the Court into specialized chambers. At least one third of its members was to be recruited from outside the career judiciary and would include respected lawyers and distinguished law faculty academics. A mandatory retirement age of 70 was to be introduced, applicable to all levels of the judiciary, and the judicial career structure was to be modified so that the most senior post was that of appeals court judge, eliminating the present system of promotion-by-seniority to the Supreme Court. Furthermore, as noted, the selection of the slate of five candidates for Supreme Court posts was to be undertaken by the *Consejo Nacional de la Justicia*. 190

The problems caused by this so-called "bureaucratization" of justice are not peculiar to Chile but affect many other Latin American countries. A seminar of judges and lawyers from Argentina, Uruguay, Brazil and Paraguay, held under the auspices of the International Commission of Jurists and the Centre for the Independence of Judges and Lawyers, concluded that the effectiveness of the judiciary in protecting human rights in those countries was hindered by a series of factors, including: the great social distance between the judges and the majority of their clients, the predominantly formalistic and positivistic bias of their training, the secrecy of judicial activities, and the conduct of trial proceedings in an impenetrable technical-legal jargon. In Chile, the rules governing the composition and appointment of the Chilean Supreme Court have evidently contributed to this functional isolation. La Independencia de los Jueces y Abogados en Argentina, Brazil, Paraguay y Uruguay: Informe del Seminario de Buenos Aires, 21-25 de Marzo de 1988 International Commission of Jurists, Geneva, 1988, pp. 105-106.

¹⁹⁰ The Centro de Estudios Públicos study advocated a different system. The Supreme Court would be enlarged to 31 members, who would be appointed by a 9-member Recruitment Commission. The Commission would be designated every two years by the President with the consent of the Senate (three members), the Chamber of Deputies (three members) and the Supreme Court and presidents of the appeals courts (three members). In addition, the study urged that the present Supreme Court be replaced immediately. Op. cit., p. 56.

The government's proposals also sought to shift the focus of the Court's constitutional functions so that it played a more vigorous role in judgements over constitutionality – establishing uniform jurisprudence in the interpretation of the laws – and safeguarding human rights.

- There was a broad consensus among students of the Supreme Court that its role in setting jurisprudence had been neglected over the years. The functions of the Court had been laid down in two statutes, the Law of Organization of the Courts of 1875 and the Code of Civil Procedure of 1902, which essentially transformed the Supreme Court into a tribunal of cassation. The cassation appeal may invalidate a verdict solely on grounds of law, and without entering into the facts of the case. Since 1969, the Court had dealt with fewer and fewer of these appeals, and had increasingly rejected them on formal procedural grounds.

Part of the explanation for this lay in the widespread abuse of the recurso de queja. Originally intended as a discretionary faculty of the Court to reverse verdicts in which there had been disciplinary faults by court officials, this had been transmuted over the years into a de facto third-instance appeal, since it was possible to use this appeal to invalidate the decision of a lower court. By the end of the 1980s, the hearing of recursos de queja had come to occupy most of the Court's working time.

- The Court's duty to safeguard human rights guaranteed by the Constitution meanwhile is exercised partly through its powers under Article 80 to rule on appeals of "inapplicability of a law on grounds of unconstitutionality" (recurso de inaplicabilidad por inconstitucional). Statistics published for the first time in the Centro de Estudios Públicos report showed that during the 1980s, the Court never ruled on more than 30 of these appeals in any single year and gave only 17 verdicts favourable to the applicants in the whole period. Of every thousand rulings by the Court, only two to six in any year corresponded to recursos

de inaplicabilidad. 191 The pattern reveals the Court's reluctance to enter into the substance of the appeals (a notable exception was the August 1990 decision on the Amnesty Law) and a tendency to declare them inadmissible on grounds of inadequate presentation.

The Career Judiciary: Appointments, Promotions and Assessment

The government's legislative package also contained measures to strengthen and dignify the judicial career. Despite the social importance of their function Chilean judges are generally held in low public esteem, even within the legal profession. Because of this, and due to the low pay and onerous workload, many able young lawyers shun the judiciary for the better financial rewards and conditions of private legal practice. The quality of applicants is therefore often low.

As part of its proposals for improving the professional levels of the judiciary, the government has recommended the introduction of vocational training programmes to be run by a "school for judges" (escuela judicial). Attendance at the school would be made a condition for entry into the judiciary, and it is intended that the school would provide in-career training and refresher courses, as well as other educational services. Such courses would serve the dual purpose of offering specialized training as well as providing an additional "objective" criterion for appointments and promotion. At present, although judges are required to be

¹⁹¹ Op. cit. p. 18.

¹⁹² The Centro de Estudios Públicos report includes the results of a survey of lawyers, which revealed that 70 per cent of the sample found the administration of justice by the higher courts unsatisfactory. A similar percentage found the performance of the lower courts inadequate, and more than two-thirds thought the administration of justice less efficient than other public services. Carlos Peña González: "Los Abogados y la Administración de Justicia: Resultados de una Encuesta sobre Funcionamiento del Poder Judicial" in Centro de Estudios Públicos, op. cit., pp.367–399.

qualified lawyers, there is no specialized diploma or entry certificate requirement for aspirants to the judiciary. 193

Moreover, once they are in judicial service, the advancement of judges is dependent more on the opinion of their superiors than on any other single factor. 194 Judges have traditionally had to curry the favor of members of the higher courts, as well as of government ministers and officials, to gain promotion. Although the Aylwin government proposed no constitutional changes in the mechanisms for appointment to the lower courts, it sought to create a more open and competitive career structure, basing selection on objective criteria as well as on assessments of merit. 195

Assessment as a Disciplinary Power

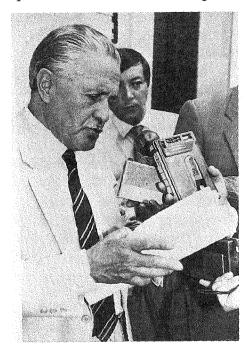
One idiosyncrasy of the appointments system is the weight given to annual assessments of the performance of judges carried out by their seniors in the judicial hierarchy. Each judge is classified into

¹⁹³ The seeds of the idea were planted under the military government when the Magistrates Association opened an "Institute of Judicial Studies" (Instituto de Estudios Judiciales) offering judges their first opportunity to get together to discuss their experiences, hold seminars and workshops and attend lectures by distinguished lawyers and jurists. It is partly due to the work of the Institute, which operated on a shoestring budget and without official support from either the Ministry of Justice or the Supreme Court, that many of the ideas and comments discussed in this chapter had gained currency among the judiciary by the time the Aylwin government took office. The Supreme Court has made it known that it opposes the creation of the escuela judicial.

The ordinary courts in Chile are divided by level into appeals courts and first-instance criminal courts. Appeals court judges are appointed by the President from a list of three candidates drawn up by the Supreme Court. Criminal court judges are also appointed by the President, from a slate of three candidates selected by the specific Appeals Court with jurisdiction.

The Aylwin government's legislative package further contained steps to improve police cooperation with the courts, giving judges enhanced powers of control and monitoring of police compliance with court orders. The introduction of computerization and other modern technical aids (in which the courts lagged far behind most private legal practices) was also considered long overdue.

one of four "lists", ranging from special distinction or merit (List One) to unsatisfactory fulfilment of duty (List Four). Inclusion in List Four signifies expulsion from the judiciary. The assessment is carried out by the senior court in privacy, and the judge in question is informed in writing of the classification made and the



Judge René García Villegas

number of votes for and against. No information is given on the reasons for an assessment or on how individual judges have voted.

The Supreme Court, which assesses the performance of appeals court judges, also exerts great influence in lower level assessments. since it may alter an appraisal made by an without appeals court stating its grounds. This system places high premium on obedience and conformity. It was reinforced under the military government bv the Supreme Court's implacable use of its

disciplinary powers against dissident judges who refused to toe the line. The most notorious example was the dismissal from the judiciary¹⁹⁶ of two judges who took a vigorous stand on cases involving human rights violations: Santiago Appeals Court judge

¹⁹⁶ Under Article 77 of the Constitution, the Supreme Court may also order the expulsion of judges for "bad behaviour". The decision is communicated to the President who must issue the relevant decree.

Carlos Cerda Fernández, 197 and the judge of Santiago's 20th Criminal Court, René García Villegas. Other judges saw their judicial careers broken in similar circumstances.

- In January 1990 the Supreme Court expelled judge García Villegas from the judiciary for "extremely serious breaches of judicial discipline" and "excess committed by him in exercising his right to criticize his superiors". Although, in the view of the Chilean Bar Association, expulsion should be restricted to serious infringements like corruption or prevarication, ¹⁹⁸ the essence of Judge Garcia's offence was that he had repeatedly spoken up in newspaper and television interviews denouncing the CNI's habitual practice of torture. This had already earned him private reprimands from the Court and a temporary suspension on half-salary in 1988. ¹⁹⁹

In his written replies to the Supreme Court, García Villegas said that as a judge, he was required to investigate any case that came to him and uncover the guilty parties, whoever they might be. If it turned out that they were members of the police or military, he could cede jurisdiction to a military tribunal, but not before carrying out his investigation. Despite a wave of

As noted in chapter 4, Judge Cerda was reinstated after he apologized to the Court for his "conduct".

According to the United Nations Basic Principles on the Independence of the Judiciary, adopted at the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders in August/September 1985: "Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to perform their duties."

¹⁹⁹ For two successive years Judge García was placed on List Three in the annual assessments. He was also accused of "delaying" the hearing by the Supreme Court of claims by the military justice authorities for jurisdiction in the torture cases he was investigating. Judge García's book Soy Testigo (Santiago, 1990) describes in detail his battle with the Supreme Court. The cases are also summarized in Attacks on Justice: the Harassment and Persecution of Judges and Lawyers, July 1988—June 1989 and July 1989 — June 1990. Centre for the Independence of Judges and Lawyers of the International Commission of Jurists.

public sympathy in his favour, the Supreme Court turned down his appeal for a reconsideration.²⁰⁰

- Nelson Muñoz Morales, judge of Pozo Almonte in northern Chile, resigned his post in October 1990, for "personal reasons" which he described to a journalist as a "difference of view" over the Amnesty Law. Four months earlier Judge Muñoz had helped locate the concealed grave of the Pisagua victims, and was responsible for the energetic early investigations to establish the identity of the victims and the circumstances of their secret burial. The Supreme Court then took him off the case and put it in the hands of a ministro en visita.

Nelson Muñoz, who began his judicial career in 1982, first ran into trouble with his superiors on the Iquique Appeals Court in 1984, when he accepted an appeal on behalf of detainees banished under the state of siege to the prison camp of Pisagua. He was reprimanded after attempting to gain access to the camp and the prisoners. His annual grading by the court suffered accordingly, and for several years he was placed on List Three. In July 1990 the Supreme Court cited his poor grades in turning down a request by the Ministry of Justice that Muñoz be allowed to join the Ministry's advisory committee on judicial reform. At the moment of his resignation, Judge Muñoz appears to have believed his dismissal imminent.²⁰¹

²⁰⁰ Three distinguished appeals court judges, Gérman Hermosilla (currently president of the Magistrates Association), Hernán Correa de la Cerda (currently director of the *Instituto de Estudios Judiciales*) and José Benguis were sanctioned by the Supreme Court for visiting René García in solidarity. The punishment was duly reflected in their annual assessment.

Asked earlier by an interviewer, to whom he had expressed forthright criticisms of the Supreme Court, whether he was not afraid of facing sanctions for his remarks, he said "It doesn't frighten me, because I'm convinced it's pointless to belong to the judicial power and do nothing to change it." "Conversando con Nelson Muñoz", Análisis, September 24–30, 1990.

The Supreme Court and the Parliamentary Debate

On September 1, 1991, parliamentary debate began on the government's proposals. As had been widely expected, in a detailed commentary published in August, the Supreme Court objected to most of the package. Judge Enrique Correa Labra, who had replaced Luis Maldonado as the Court's president in May, had earlier declared himself an "absolute enemy of the reforms". Much of the Court's criticism was directed at the proposal for the establishment of the Consejo Nacional de Justicia, which it saw as an unwarranted invasion of its traditional powers of supervision and budgetary control over the judiciary, and at the proposals for altering the mechanisms of appointment to the Supreme Court. As noted, the parliamentary opposition also opposed the idea of the Consejo, and the government has now abandoned the proposal.

Chapter 11

Conclusions

The return to democratic government has brought enormous advances for the protection of human rights in Chile. Individual rights and guarantees have undoubtedly been strengthened. Newly found democratic freedoms are exercised in a climate of open and lively public debate. The publication of the Rettig Report has helped to foster an awareness of the indissoluble link between the exercise and defence of these freedoms and respect for human rights. Meanwhile, first steps have been taken to provide some measure of public vindication and reparation for the victims of the past, while ambitious measures are under debate to create a more independent, critical and responsive judiciary.

Nevertheless the future of human rights protection in Chile is by no means assured, and much remains to be accomplished. Publicly at least, the armed forces – and particularly the army – have not yet relinquished a world view rooted in past ideological confrontations, although the political parties claim to be "renovated" or "modernized". As has been noted in this report, the army has made no statement of principle or intent on human rights, and until now its members have enjoyed virtually absolute impunity for past human rights violations.

This is particularly worrying because the continuing activities of armed opposition groups and rising levels of violent urban crime provide the potential for a backslide on human rights. The experience of neighbouring countries shows that democratic institutions in themselves are not sufficient to protect human rights when nations perceive themselves to be under threat, or face acute challenges to public order. The publication of the dramatic facts of the Rettig Report only temporarily halted a prolonged campaign by the parliamentary right for "tougher" measures against terrorists. Legitimate concern about public security can lead only too easily to amnesia, or even to nostalgia for the past. And some of the worst abuses, such as torture have still to be completely eradicated.

A long road lies ahead in the national effort to establish permanent legislation and institutions to protect human rights. We conclude this study with a list of some of the most important issues that must be tackled, many of which were clearly identified by the Rettig Commission in its recommendations.

The protection of fundamental rights under states of emergency

- As the Rettig Commission recommended²⁰² the government should repeal Section 3, Paragraph 1 of Article 41 of the Constitution, which prevents courts from questioning the grounds or circumstances of detentions carried out under a state of siege.

According to Justice Dorab Patel in his summary as Rapporteur on Pressures on the Judiciary, at the International Commission of Jurists Conference on the Independence of Judges and Lawyers (Cararacas, January 1989):

"Pursuant to Article 4 of the International Covenant on Civil and Political Rights, certain fundamental rights are deemed to be

Informe de la Comisión Nacional de Verdad y Reconciliación, Vol 1, Part 4, Chap. 2, B.2(a).

non-derogable even in times of emergency. While the right to due process of law and the right to be heard before an independent tribunal are not expressly contained among these non-derogable rights, it is increasingly obvious that the effective enjoyment of non-derogable rights rests upon the availability of essential judicial guarantees.

In this respect, account should be taken of Advisory Opinions OC-8/87 and OC-9/87 of the Inter-American Court of Human Rights holding that 'essential' judicial guarantees which are not subject to derogation include habeas corpus, amparo and any other effective remedy before judges or competent tribunals which is designed to guarantee respect of the rights and freedoms guaranteed in the Inter-American Charter." ²⁰³

Also relevant to the issue is the Third of the United Nations Basic Principles on the Independence of the Judiciary, which states:

"The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law." ²⁰⁴

²⁰³ Centre for the Independence of Judges and Lawyers Bulletin, Special Issue No. 23: "ICJ Conference on the Independence of Judges and Lawyers: Caracas, Venezuela, January 16-18, 1989" pp.99-100.

Adopted at the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders in Milan, Italy in September 1985, and "endorsed" in November 1985 by the UN General Assembly, which invited governments to "respect them and take them into account within the framework of their national legislation and practice."

Habeas Corpus

- Mechanisms of *habeas corpus* and *amparo* should be reviewed in order to make the remedy more rapid and effective. In particular the courts should have the power to order detainees to be brought before them, or to gain immediate access to detainees in their place of detention. Appropriate sanctions should be introduced in cases of non-compliance by the police or arresting authority.

Due Process Rights and Equality before the Law

- The sphere of competence of military courts should be circumscribed, on the principle that military jurisdiction should be limited to purely military offences (i.e. those committed by military personnel on active service, and which pertain to strictly military activities).

The transfer to the jurisdiction of ordinary courts of common crimes committed by military personnel – whether or not such crimes were committed during active service or on military premises – is essential to ensure the equality of all citizens before the law.

The jurisdiction of military courts lacking the necessary safeguards of independence, impartiality and training, over civilians accused of offences against the state violates guarantees of due process and fair trial The recent modification of the composition of military appeals courts (cortes marciales) is not an adequate safeguard in this respect. The Fifth of the UN Basic Principles on the Independence of the Judiciary states that: "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures."

Guarantees against Torture

- The present periods permitted for incommunicado detention are excessive and facilitate the use of torture or duress. Such

periods should be kept as short as possible and should be subject at all times to review by a judge.

Judges ordering detainees to be held incommunicado for further periods should state their grounds for doing so, and such extensions should be made the exception rather than the norm. In the case of detainees under simultaneous jurisdiction of more than one court, the time period permitted should be based on the detainee in question rather than on the offence, in order to avoid successive extensions of incommunicado detention by different judges or prosecutors.

- New norms should be introduced and enforced to oblige *Carabineros* and *Investigaciones* to promptly inform relatives of a detainee concerning his or her arrest. Relatives should be kept informed of the whereabouts of the detainee or prisoner at all times. It should be made a sanctionable offence for police officers to mislead or misinform when they know of an arrest or detention. As a safeguard, the information should be given to relatives or their representatives in a signed statement fully identifying the officer providing it.
- All complaints of torture or ill-treatment should be promptly and thoroughly investigated, and those about whom there exist *prima facie* suspicions of responsibility should be temporarily relieved of their duties until the investigation has been completed.

Those found responsible for torture following administrative inquiries should be dismissed and barred from any future law enforcement responsibilities. If proven guilty in court, they should receive penalties proportionate to the seriousness of the offence.

- In the past, the investigation of criminal complaints of torture has been hampered by the difficulty of establishing proof concerning the identity of those responsible. The names of persons responsible for arrests or interrogation should be recorded. As an additional safeguard, the date, time, duration and site of each period of interrogation should be listed, as well

- as the identity of those present at the interrogation. Those records should be available for inspection by the courts.
- The blindfolding or hooding of detainees is a form of cruel, inhuman and degrading treatment, and should be prohibited by law.

Accountability of Law Enforcement Agencies

- Carabineros and Investigaciones should be brought under the control of a civilian governmental authority such as the Ministry of the Interior or the Ministry of Justice.

Access to Lawyers

- Rules governing the right of detainees held incommunicado to receive visits from their lawyer should respect the confidentiality of the interview. The Seventh and Eighth of the UN Basic Principles on the Role of Lawyers state:

"Governments shall further ensure that all persons arrested or detained, with or without criminal charges, shall have prompt access to a lawyer, and in any case not later than 48 hours from the time of arrest or detention."

"All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and communicate and consult with a lawyer, without delay, interception, censorship, and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials." ²⁰⁵

In Resolution 45/166 of December 18, 1990, the UN General Assembly welcomed the Basic Principles on the Role of Lawyers, here also inviting governments "to respect them and take them into account within the framework of their national legislation and practice".

This safeguard is of particular importance when the purpose of the interview is to allow the detainee to report any abuse or illtreatment.

- The government should facilitate free legal representation to those prisoners who desire it, independent of the nature of the crime he or she is supposed to have committed.

Presumption of Innocence

- The occasional practice by the security services of exhibiting detainees to the press before or after they have been charged should be ended. This treatment seriously prejudices the honour and reputation of defendants who may subsequently be proved innocent in court.

Judicial Independence

- Reforms are needed to strengthen the independence of the judiciary and to reinforce its effectiveness as a guarantor of individual rights and constitutional guarantees. Particularly important will be to consider introducing changes to the mechanisms for recruitment to the Supreme Court, and for the selection, training and assessment of judges, The United Nations Basic Principles on the Independence of the Judiciary provide a summary of the essential requirements which should be taken into account.

The present system for the assessment and grading of judges and disciplinary control over misconduct requires urgent reform. The dismissal of judges should be governed by the standards established in Nos. 18 and 19 of the above-mentioned UN Basic Principles, namely that

"Judges shall be subject to suspension or removal only for reasons of incapacity, or behaviour that renders them unfit to discharge their duties." "All disciplinary, suspension or removal procedures shall be determined in accordance with the established standards of judicial conduct."

It is to be hoped that the government will view as a top priority for the future the provision of adequate resources to expand the capacity and efficiency of the courts.

Political Prisoners Arrested prior to March 11, 1991

- Urgent steps should be taken to provide the courts with the personnel and resources necessary to expedite judicial proceedings concerning the remaining prisoners detained under the previous government, and to facilitate their early release on bail.

Investigations into the Fate of the "Disappeared"

- The government should continue to commit itself to pursuing investigations into the fate and whereabouts of the "disappeared", as has been undertaken through the establishment by Congress of a National Corporation for Reconciliation as recommended by the Rettig Commission. It should also consider measures to expedite judicial investigations by making itself a party to such inquiries or by requesting the appointment of a *ministro en visita* to coordinate them.

Legislation should be introduced to overcome the legal obstacles to the judicial classification of grave human rights crimes which the 1978 Amnesty Law continues to represent.

Finally, the government should note the opinion of the Rettig Commissioners that:

"From the purely preventative view, this Commission considers that the full exercise by the State of its powers of punishment is an indispensable element for achieving national reconciliation and thus avoiding a repetition of what took place. Complete protection of human rights is only conceivable under the full rule of law. And the rule of law presupposes that all citizens are subject to the law and the courts, which is only possible if the penalties provided for in the penal laws are applied without discrimination to all, including to those who transgress the norms which safeguard respect for human rights."²⁰⁶

Informe de la Comisión Nacional de Verdad y Reconciliación, "Verdad, Justicia y Reconciliación como Medidas de Reparación", Vol. 1, Part 4, Chap. 2, D.

Epilogue:

October 1991 — June 1992

Introduction

This report was completed in October 1991. During the first six months of 1992, the balance of developments was positive for human rights. Judges investigating past human rights violations recorded some notable successes, as they encountered less constraints and pressures and a different attitude in the police in carrying out criminal investigations. The future of the judiciary as a whole, however, remained uncertain after the government's package of judicial reform met strong opposition both in Congress and within the judiciary itself.

The continuing stability and growth of the economy, and the general consensus on economic goals and policy contributed to a stable political atmosphere. Government-military relations continued to ease after the acute earlier tensions. Long parliamentary negotiations bore fruit in a constitutional reform regulating municipal elections. Chile's first such elections for 20 years were scheduled for 28 June, and the campaigning was orderly and peaceful. The President, Patricio Aylwin, declared the "transition" to be over. Some sectors of the ruling Concertación coalition, however, disagreed, since government was still committed to further constitutional reforms. such as the abolition of non-elected seats in the Senate.

Public opinion polls showed that violent crime and personal security remained a widespread public concern. Urban terrorist activity continued in sporadic incidents, but diminished notably in 1992. This was due in large part to efficient police work. Both the FPMR and the Lautaro Movement (MJL) were hit by successive arrests of leaders. A spectacular kidnapping of the son of a prominent newspaper owner on 9 September 1991 was resolved after several months without bloodshed. Five alleged FPMR members were later arrested and charged with the crime. One of

them was also charged with the murder on 1 April, 1991 of Senator Jaime Guzmán, to which he had reportedly confessed.

There were several killings of members of the FPMR, MJL and ordinary criminals, as well as of police, in violent sequels to robberies and terrorist attacks. Guns were frequently used by criminal gangs, as well as left-wing armed groups. Fatal shootings by the police in crime control and counter-terrorist actions were common. In some of these incidents relatives filed accusations against the police that the victims had been unlawfully or deliberately killed when they did not pose a threat.

The debate over judicial reform

The debate over the government's judicial reform proposals continued in Congress. In May 1992 the legislation became stalled in the Chamber of Deputies after more than one year of parliamentary negotiation. The president of the Supreme Court, Enrique Correa Labra, continued to state his implacable opposition to any reform. In January, when judge Correa's utterances provoked a public polemic, the rest of the Supreme Court issued a statement backing him. The statement betrayed concerns which were shared, at least in part, by many other judges. 13 appeals courts expressed their support for Correa, and the Association of Magistrates also issued statements critical of the government proposals.

The main stumbling blocks were the composition of the Supreme Court and the method of recruitment. After the government's initial idea of a National Council of Justice had been abandoned, parliamentary negotiators hit on a compromise formula aimed at strengthening safeguards against executive branch abuse of judicial appointments, and ensuring a more open and representative court. New members of the Supreme Court were to be appointed by the President from a slate of five candidates selected by the Supreme Court itself — as in the current procedure — but with the addition that their appointment was to

be subject to Senate ratification. One-third of the Court itself was to be recruited from outside the judiciary, such as from the legal profession and the law faculties, and would be appointed by the President, also with Senate ratification. This latter idea, in particular, was opposed by many in the opposition parties, and was unpopular in the judiciary.

On 29 April, in a surprise count, the Chamber of Deputies voted down the government on this issue, as the opposition parties sided with the judges. After this defeat, the bill was introduced in the Senate, where the debate was expected to continue after 28 June, in order to avoid the issue interfering with the municipal elections.

The government took steps to replace the most veteran members of the bench by offering them inducements to retire. In February 1992 it passed a law offering judges over the age of 70 a severance payment of 20 million pesos (approximately US \$ 57,000) on their voluntary retirement.²⁰⁷ Although nine of the Court's 17 members qualified, by May 1992 only one had resigned and was replaced by an Aylwin appointee.

Human Rights Investigations

Human rights groups, for the first time in almost twenty years, began warmly praising the work of judges investigating human rights cases. Cases going back to 1973 were reopened or opened for the first time. Several judges ruled against the jurisprudence on the amnesty law of the Supreme Court by accepting appeals for the reopening of cases. With the aid of special homicide teams set up by *Investigaciones*, judges arrested and charged 30 ex-military intelligence and secret police agents with torture, kidnapping and

When president, General Pinochet also used financial inducement to alter the composition of the court (the so-called Rosende Law of 1989). But Pinochet's retirement benefits were conditional on the applicants tendering their resignation within 90 days, so as to enable him to appoint replacements before the change of government. (see chapter 10).

murder. They included César Mendoza Durán, former Director General of *Carabineros* and a member of the first military junta, and Alvaro Corbalán Castilla, the former Chief of Operations of the CNI.

The case of José Manuel Parada, Manuel Gerrero and Santiago Nattino

The most dramatic example was the so-called "degollados" case—the kidnapping and murder in March 1985 of the above three members of the Chilean Communist Party. Following a long and largely secret investigation by *Investigaciones* under the direction of the special investigating judge, Milton Juica, 21 members of *Carabineros* were detained and charged in connection with the crime.

News of the arrest of 16 Carabineros was revealed in a press conference at the Vicaría de la Solidaridad on 2 April 1992, moments after judge Juica lifted reporting restrictions on the case which had been in force since November 1990. Eleven former members of the secret police agency DICOMCAR were charged under the Anti-terrorist Law with forming an "illegal association" for the purpose of carrying out kidnapping and murder. They include four Carabineros intelligence chiefs, retired Major Guillermo Washington González Betancourt, and retired captains Julio Michea Muñoz, Héctor Díaz Anderson and Patricio Zamora Rodríguez. The four were allegedly in charge of a special DICOMCAR unit known as Department 3, which was responsible for operations against political opposition groups, and maintained a secret headquarters in Dieciocho street. The investigations revealed that the three victims had been interrogated in this place before being forced into the trunks of two cars and taken to a deserted spot close to Santiago's airport, where they were brutally murdered. Michea and González were also

 $^{^{208}}$ See chapters 3 and 9 for a summary of the case.

accused, with others, of the kidnapping of five members of the Agrupación Gremial de Educadores de Chile (AGECH), a teachers union of which Manuel Guerrero was president. The five were taken to Dieciocho street on the day before the abduction of the three victims and were tortured there. ²⁰⁹ Also arrested and charged with covering-up the crime, was retired general César Mendoza, former Director General of Carabineros and a member of the military junta which took power on 11 September 1973. He was released on bail at the end of April.

Other arrests followed in May and June. On 29 May five former *Carabineros* — including González and Zamora — and a civilian agent (who is still a fugitive from justice) were charged directly with the murder of Parada, Guerrero and Nattino. According to press reports, their identification was possible due to the detailed testimony of six lower level policemen.

A decisive early moment in the case was the discovery of fingerprints in the AGECH headquarters which matched those of second sergeant César Miranda Gálvez, who was the first of the group to be detained, on 27 March 1991. Carabineros had consistently denied any involvement in the crime. This was by no means the first instance in which police had been charged with serious abuses, but invariably such charges in earlier cases had been revoked on appeal by higher courts, particularly by the Supreme Court. However, on 14 April the Supreme Court upheld Mendoza's detention, rejecting his lawyer's appeal for habeas corpus, despite a defence effort to link the case with the prestige of Carabineros. Within days of this decision, Carabineros announced that it was discontinuing legal aid to the prisoners, and issued a public statement repudiating the "execrable crimes" and declaring the police force to have been "betrayed and deceived". (According to sources close to the case, at no stage did Carabineros carry out an internal investigation, despite its

All four officers had previously been arrested in 1985 and charged for the AGECH kidnapping by judge José Cánovas. They were released after the Supreme Court dismissed the charges in January 1986.

claims to have done so). Under these circumstances, some of those accused chose to collaborate with the investigation.

Whether superior police officials ordered the executions and their subsequent cover-up is a pending issue in the current investigation. One unusual feature of the case is that civilian judges have exercised jurisdiction throughout, despite the indictment of police officers, because *Carabineros* rejected any involvement in the crime. The current charges imply the existence within the police of a criminal association formed by the agents acting outside their official orders. As Chilean penal law currently stands, this is a matter for a civilian court. However, were evidence to prove the contrary, that the middle-ranking officers alleged responsible had received higher orders to carry out the murders, or had carried them out in the course of an official operation, the case could be transferred to military jurisdiction.

The case of Mario Fernández López

Two former military intelligence officers, Carlos Herrera Jiménez and Armando Cabrera Aguilar were sentenced on 17 December 1991 by the *Corte Marcial* to ten years and six years imprisonment respectively for the torture and murder of Mario Fernández López, a transport worker, in La Serena, in October 1984. The *Corte Marcial* increased the charges to "unnecessary violence resulting in death" on an appeal by lawyers for the victim's relatives. This was the first known conviction of torturers by a military court. The outcome of a final appeal against the sentence to the Supreme Court is still awaited.

Carlos Herrera, who had operated under the pseudonyms "Bocaccio" and "Mauro", jumped bail in December 1991, before

²¹⁰ The case is summarized in chapter 4.

This was a unanimous decision by the five-member court. The decision to increase the sentence was taken on a three-two majority.

the appeal hearing, and fled to Argentina, where he was arrested for illegal entry and having false documentation. An extradition request made to the *Corte Marcial* still awaits a ruling. However, extradition proceedings were instituted for Herrera's involvement in the Jiménez and Alegría killings (see below), and it is expected that he will be returned to Chile as soon as he has served his sentence in Argentina.

The case of Tucapel Jiménez and Juan Alegría

Three former army intelligence officers and a CNI chief have been charged with the murder in February 1982 of trade union leader Tucapel Jiménez Alfaro and a Valparaiso carpenter, Juan Alegría. The investigation, like that of the previous case, was conducted by a specially appointed judge working with a special homicide team from *Investigaciones* under cover of press reporting restrictions. The Judge imposed the ban in November 1991 after the press reported that he had issued detention orders against five suspects.

Those charged include Carlos Herrera, currently (as noted) in detention in Argentina and Armando Cabrera, who is detained in a military establishment in Chile. On 12 May 1992 police arrested for murder the former operational chief of the CNI, Alvaro Corbalán Castilla, then on bail pending a court investigation of a fraud charge. The press reported that Corbalán's signature appeared mysteriously in a court register which he was required to sign at regular intervals, although Corbalán himself, who was wanted for arrest, never appeared personally to sign it. Intensive police surveillance, which reportedly included a phone-tap, led to his arrest while driving to a meeting with his lawyer. Oscar Pinchetti, a CNI associate of

²¹² The case is summarized in chapters 3 and 9.

Alvaro Corbalán was implicated in CNI financial rackets as well as other human rights crimes. See chapter 9.

Corbalán's known as Doctor Destiny because of skills at hypnotising detainees, was also arrested and charged with the murder of Juan Alegría.

Alegría 's murder appears to have been committed solely for the purpose of throwing investigators off the track of Tucapel Jiménez's real killers. (His body was found in his home in Valparaiso with his wrists slashed and a suicide note confessing to the murder. Jimenez' documents had been found discarded on a Valparaiso beach). Police were suspicious because the wounds in Alegría's wrists were too deep to be self-inflicted, and subsequent investigations are reported to show that the suicide note was written several days before his death. Corbalán was identified by a Valparaiso woman from a photograph as having asked her directions to Alegría's house days before the killing, and former CNI agents are reported to have helped identify the others implicated in the crimes.²¹⁴

The case of Tucapel Jiménez and the three communists are among the most notorious human rights crimes in the second decade of military rule, and convictions in these cases will have great symbolic value in Chile. *Vicaría de la Solidaridad* lawyers attribute the successes to the diligence of the *Investigaciones* police force, which was thoroughly overhauled by its director, retired general Horacio Toro, and has also been successful in combatting left-wing terrorist groups. They also commend the quality of the judges' handling of the investigations, often in the face of death threats. At all events, the wall of impunity has been

²¹⁴ Press reports cite evidence that Carlos Herrera was also involved in CNI operations against the MIR in Concepción in 1983-1984, using another alias. Several leading MIR activists were killed in extrajudicial executions dressed up to look like shootouts, such as the killing of Nelso Herrera and Mario Lagos, mentioned in chapter 9.

²¹⁵ Horacio Toro resigned during a political scandal when members of his force were accused of spying, in a confused series of events which are the subject of a congressional investigation.

On 10 June a plan to assassinate judge Milton Juica was uncovered by police. Repeated death threats had been issued against him and he was kept under permanent police escort. Judge Bañados and key witnesses in the Letelier case also received deaththreats.

powerfully breached, and it remains to be seen whether, similar advances can be achieved in the numerous other cases which remain unsolved.

The Letelier-Moffit case 217

The trial of former DINA chiefs Manuel Contreras and Pedro Espinoza continues. In October 1991 the Supreme Court confirmed Judge Bañados' jurisdiction against an appeal by the military judge. On 26 December Contreras and Espinoza were given bail when the Supreme Court accepted an appeal by their lawyers against judge Bañados, who had refused it. The Chilean government has made itself a party to the trial, the only human rights case in which it has taken this step. ²¹⁸

The accusations against the former DINA chiefs hinge on the position and connections of Michael Townley, the US-born DINA agent who planted the bomb which killed Letelier and Moffit. Contreras has responded to the charges with counter-accusations. As reported in the press, he has alleged that Townley was a lowlevel agent who had been infiltrated into the DINA by the United States government's Central Intelligence Agency, and that the assination was planned by the Venezuelan president, Carlos Pérez. Letters of exhortation were addressed by the court to the Venezuelan Head of State and to the president of the United States, George Bush, in his capacity as former Director of the CIA. In January the press reported that Contreras had accused Vernon Walters, then deputy director of

The case is summarized in chapter 9.

Under Chilean law, the Council for the Defence of the State (Consejo de Defensa del Estado) may make itself a party to a case when the crimes involved affect public confidence, such as the falsification of documents and illegal arms exports. This enables the government to submit evidence, request that witnesses be called and to lodge appeals. Lawyers for Contreras and Espinoza appealed to the Supreme Court for the Council's exclusion, but the appeal was rejected.

the CIA, of ordering the killings.²¹⁹ In March he claimed that Armando Fernández Larios, a DINA agent who defected to the United States in 1987 and confessed to his part in the crime (implicating Contreras) had been kidnapped in Chile by the FBI.

The central element in judge Bañados' investigation has been obtaining evidence of Townley's high-ranking status in the DINA and the official nature of the work in which he was engaged. The investigation is reported to show that Townley's Santiago home was bought with a cheque personally signed by Contreras, and that it was frequented by high ranking DINA officials, as well as being used for other DINA purposes, including interrogations. To establish these facts judge Bañados is reported to have interviewed scores of witnesses, including dozens of former DINA officials, agents and employees.

The police investigation has revealed evidence that Carmelo Soria Espinoza, a Spanish diplomat abducted and murdered in July 1976 was beaten or strangled to death at the Townley house, and that his murderers then dumped his body in a canal to avoid detection. Other detainees, including a priest and an Italian businessman, who were held at the house, gave testimonies.

The most sinister revelation was that a basement of the house had apparently been used as a laboratory for the development of a lethal chemical agent, Sarin, presumably to carry out undetectable political assassinations. A chemist, Enrique Berrios Sagrado, who was alleged to have been provided equipment and infrastructure to work on the development of the gas, fled the country in December 1991, shortly after reports appeared in the press that there was a warrant for his appearance before the judge.

Among the witnesses produced by Contreras' lawyers was a former Venezuelan military intelligence officer with numerous convictions and a known connection with arms and drugs-trafficking.

The house was also used as a refuge by DINA associates and coplotters in Italian and Cuban right-wing terrorist groups. Members of an Italian neo-fascist group who are believed to have carried out the near-fatal shooting of Christian Democrat leader Bernardo Leighton, and his wife, in Rome on 6 October 1975, are said to have taken refuge there. The current stage of the trial will culminate in judge Bañados' verdict, which is expected in the coming months and which could lead to an appeal to the Supreme Court.

On 10 January 1992 the Bryan Commission fixed compensation to be paid by the Chilean government to the Letelier and Moffit families at US \$2,611,892. The compensation was agreed as not implying state responsibility, since the guilt of Chilean agents acting on official orders was still under investigation by the Chilean courts.

Reparation measures and further government investigations into past human rights violations

The Reparation Law (Law No. 19,123) which came into force on 8 February 1992 provides a legal framework for the implementation of the main recommendations of the Rettig Commission. It established mechanisms to continue the government's goal of identifying each and every victim of a violation of human rights, according to the criteria of the Commission's mandate, and to clarify the fate of the "disappeared". It also provides for financial compensation, medical and educational benefits to the families of the victims (including those whose human rights were violated by armed opposition groups).

²²⁰ The Bryan Commission was set up in June 1990 after the US and Chilean governments agreed to reach a settlement based on the Bryan-Suárez Mujíca treaty of 1919, which provides for negotiations in disputes between the two countries.

The National Corporation of Reparation and Reconciliation

The law establishes a National Corporation of Reparation and Reconciliation, a public body responsible to the Interior Ministry, with a seven-person council and staff of 15. Its president, appointed by President Aylwin, is the former head of the *Vicaría de la Solidaridad*, Dr. Alejandro González. The tasks of the Corporation are:

- to continue investigations into the fate of the "disappeared" and those whose death was recorded but whose remains have not been found;
- to gather information on cases in which the Rettig Commission was unable to determine whether the person affected was a victim of a human rights violation, and on cases which were reported too late for study by the Commission. The new cases had to be registered with the Corporation within 90 days of entry into force of the law, and it was given one year to produce its findings;
- to "make proposals aimed at consolidating a culture of respect for human rights".

The Corporation was appointed for a two-year term, renewable by the President for a further year, if deemed necessary. The definition of its mandate is similar to that of the Rettig Commission. It may not exercise judicial functions, or reach judgements about individual responsibility, and it is required to work in complete confidentiality.

Article six of the law declares the location of the bodies of the "disappeared" and clarification of the circumstances of the "disappearance" or death to be an "inalienable right of the relatives of the victims and of Chilean society".

In addition to its investigative work, the Corporation is intended to develop ideas for expanding consciousness of human rights and safeguards for their protection. This function is defined only in very general terms in the law. The expression "consolidate a

culture of respect for human rights" could be interpreted narrowly as limited to recommendations in the field of culture. education and the arts. However, its scope is evidently intended to be wider than this. As the government publicly acknowledges, the penal reforms introduced in the Cumplido Laws fell far short their initial and objectives. scope Manv recommendations made in March 1991 by the Rettig Commission involve further reforms, some of which require constitutional amendments. Examples are restriction of the competence of military courts to a much narrower category of properly military offences, current rules governing states of emergency and habeas corpus, and the death penalty. It is expected that the Corporation will address many of these issues and make more detailed proposals.

Reparation Measures

Law 19,123 provides for a minimum pension of 140,000 pesos (approximately US \$400) for the relatives of each victim, to be divided between spouses, mothers and children. Each child may receive 15 per cent of this total. Children's benefits cease at the age of 25, but handicapped children receive the pension for life. In addition, a one-off *ex-gratia* payment of the equivalent of one year's pension is made to each beneficiary.

Fathers and siblings of victims, as well as the beneficiaries of the pensions, receive free medical attention in state clinics and hospitals, and children in middle and higher education get their fees paid in full, as well as a maintenance grant. All children have the right of exemption from military service if they request it. A total of approximately 2,300 families are current beneficiaries of the Reparation Law, but the number may increase to over 3,000 when the Corporation has decided all the pending cases.

Although relatives of the "disappeared" were angered and disillusioned with earlier drafts of the Reparation Law, the text finally passed seems to enjoy a wide measure of support. About 80 percent of eligible relatives have taken up their benefits, and

none have refused out of principle to do so.²²¹ However, they (and the principal human rights organizations) view the benefits as reparation, not as compensation. They do not accept them as a substitute for clarification of the fate of their loved ones, and for judicial investigation of the crimes committed. Although this is a far-off objective, the law shows that the Chilean government has not treated the Rettig Commission as a one-off "solution" to the human rights legacy. It is to be commended for making a serious effort to meet its responsibility to continue the investigations begun by the Commission, and for avoiding imposing a unilateral "full stop".

Judicial investigations into amnestied cases

The 1978 Amnesty Law continues to present a fundamental legal the iudicial investigation into deaths obstacle "disappearance" during the first five years of the military regime. Ten further cases of "disappearances" have been closed by courts applying the law during the first two years of the Aylwin government, according to Vicaría de la Solidaridad figures. In three cases higher courts have reversed the application of the law and in ten cases decisions are still pending following appeals. On 30 January the Corte Marcial amnestied Manuel Contreras, who had been accused of the disappearance of 70 people in 1975-1976. confirming the decision of the military judge in 1989. The Corte Marcial verdict was appealed to the Supreme Court. As noted in Chapter 9 in August 1990 the Supreme Court had declared the application of the Amnesty Law in this case constitutional. The "case of the 70" has been submitted by the Committee of Relatives of Detained and Disappeared to the Inter-American Commission of Human Rights.

²²¹ Interview with an official of the Vicaría de la Solidaridad, June 1992.

Vicaría de la Solidaridad lawyers also commended the work of first instance judges and Investigaciones in the investigation of the 211 pre-1978 cases submitted by the Rettig Commission to the courts. At least four provincial judges have issued charges for these crimes, and some have been upheld by appeals courts. For example, judge Rolando Ríos of Castro, in southern Chile. charged a major of Carabineros, Raúl Eduardo Gajardo with the murder in September 1973 of agricultural engineer Héctor Santana Gómez. The indictment was upheld on appeal by the Puerto Montt appeals court and is now pending a new appeal to the Supreme Court. In recent published interviews Investigaciones chiefs have reported having to start afresh on many of these old cases, since the original testimony and evidence gathered by the police and the army was unreliable. The army has continued to show no sympathy for the investigations or inclination to cooperate with them.

On 26 December 1991 the judge of Quillota, a provincial town not far from Valparaiso was barred entry to a military barracks, the Armoured Cavalry School (*Escuela de Caballería Blindada*) where he was trying to investigate the alleged secret burial in 1974 of victims of extrajudicial executions. Judge Beltrami subsequently lodged charges against the commanding officer, Colonel Francisco Pérez Egert, of refusing to assist the course of justice. The charges did not prosper. In April the Quillota case was transferred to a military court, and Judge Beltrami received a formal reprimand from the Supreme Court for exceeding his functions. ²²²

²²² Under Chilean law, civilian courts are not allowed to carry out investigations on military or police premises, such investigations must be carried out by military prosecutors. However, it is a widely held view that civilian judges remain legally responsible for the preliminary stage of investigations in all circumstances, and are not required to declare themselves incompetent until the existence of a crime, and the evidence of involvement of military personnel has been established.

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