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HUMAN RIGHTS COMMITTEE

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

CHILE*

Addendum

**Information provided by the Government of Chile on the implementation
of the concluding observations of the Human Rights Committee
(CCPR/C/CHL/CO/5)**

[21 October 2008]

* In accordance with the information transmitted to States parties regarding the processing of their reports, the present document was not formally edited before being sent to the United Nations translation services.

Paragraph 9: The State party should see to it that serious human rights violations committed during the dictatorship do not go unpunished. Specifically, it should ensure that those suspected of being responsible for such acts are in fact prosecuted. Additional steps should be taken to establish individual responsibility. The suitability to hold public office of persons who have served sentences for such acts should be scrutinized. The State party should make public all the documentation collected by CNPPT that may help identify those responsible for extrajudicial executions, forced disappearances and torture.

The State party should see to it that serious human rights violations committed during the dictatorship do not go unpunished. Specifically, it should ensure that those suspected of being responsible for such acts are in fact prosecuted.

1. In 1990, in order to ascertain the true fate of disappeared detainees and persons executed for political reasons, Chile established the National Commission on Truth and Reconciliation, which issued a report on the non-surviving victims of the military dictatorship.
2. With regard to these victims, the State has at its disposal the Human Rights Programme¹ of the Ministry of the Interior. Its purpose is to continue promoting and contributing to efforts to determine the whereabouts and the circumstances of the disappearance or death of the detainees who disappeared and of those whose remains have not been located even though their deaths have been officially recognized. This task was begun by the Programme's predecessor, the National Compensation and Reconciliation Board, which ceased to legally exist on 31 December 1996.
3. The Programme makes an active contribution to the judicial investigations into cases of enforced disappearance by supplying the courts with all the records and documentation gathered by the National Commission on Truth and Reconciliation. It also supplies the records of subsequent investigations conducted by the National Compensation and Reconciliation Board and by the Programme itself. The Human Rights Programme is an intervener in 258 cases of human rights violations.
4. At the request of the Executive, a bill establishing the National Institute of Human Rights is currently being considered by the National Congress. In one of its transitional provisions, the bill provides that "the Human Rights Programme, established by Supreme Decree No. 1005 of 1997 of the Ministry of the Interior, will continue to provide legal and judicial assistance as required by relatives of the victims referred to in article 18 of Act No. 19123, in order to give effect to the right accorded to them in article 6 of that Act". It follows that it will have the power to take all the necessary legal action, including to bring actions for the crimes of kidnapping or enforced disappearance, and for homicide or summary execution where appropriate.

¹ Programme of Follow-up to Act No. 19123, established by Supreme Decree No. 1005 of April 1997.

5. With regard to developments in the area of judicial proceedings, while the pursuit of truth and justice has proved difficult, there has been no let-up, and in recent years this work has been boosted by improvements in the courts' processing of cases of human rights violations. This is a result of, among other things, the new membership of the courts since 1997, the appointment of special judges to deal with such cases, and the persistence of victims' relatives and their lawyers.

6. The democratic governments have opposed the implementation of the amnesty decree-law, which unfortunately could not be repealed for lack of the necessary parliamentary majority, holding that it is for the courts to interpret the decree-law.

7. For years, the military courts responsible for trying cases of human rights violations applied the amnesty decree-law without investigating or determining responsibility; when such cases were reviewed on appeal, the Supreme Court confirmed that interpretation of the law. However, the practice of the Supreme Court began to change in 1998, and some of its rulings have set aside the application of the amnesty in cases of detainees who disappeared. Despite the fact that, in Chile, analogy is not used as a method of interpreting the law in criminal cases, since 1998 the Supreme Court has ruled the amnesty inapplicable based on the main instruments of international humanitarian law and human rights that Chile has ratified and that are in force, which provide that crimes against humanity are not subject to a statute of limitations or amnesty.

8. Another change in Supreme Court practice that has made it possible to continue pursuing judicial investigations into human rights violations committed during military rule concerns the jurisprudence that holds that detainees who disappeared are not considered victims of homicide but rather of kidnapping. As kidnapping is, according to legal scholars, a continuing offence until such time as the victim is found, dead or alive, any application for amnesty or prescription of the offence while this is not the case is considered premature.

9. This change in practice represents significant progress in dealing with such cases, making it possible to ascertain the nature and extent of involvement of the officials responsible. By the same token, progress has been made in the procedural steps of court cases, in many of which guilty verdicts have been passed in the trial court and upheld on appeal.

10. As at September 2008, according to records submitted by the Ministry of the Interior's Human Rights Programme, 342 cases of human rights violations, concerning 1,125 victims, had come before the courts. These judicial investigations had resulted in 505 State officials being tried and charged, with 2,150 indictments against them. Some 408 sentences had been handed down to 245 individual officials; 39 officials were serving prison sentences, while the remainder had been granted remission or parole.

The State party should make public all the documentation collected by the National Commission on Political Prisoners and Torture that may help identify those responsible for extrajudicial executions, forced disappearances and torture.

11. With regard to survivors, the mandate of the National Commission on Political Prisoners and Torture states that its sole objective is to "ascertain, from information submitted, which

individuals suffered deprivation of liberty and torture for political reasons at the hands of State officials or persons in the service of the State, during the period from 11 September 1973 to 10 March 1990".²

12. The Supreme Decree establishing the Commission limits its functions by stipulating that it cannot pass judgement, and therefore cannot "rule on individuals' possible responsibility under the law for acts that come to its attention".³

13. The Commission was established in response to the appeals of human rights organizations and victims' associations seeking the truth in cases of political prisoners and victims of torture and seeking reparation on their behalf. From the outset, the process aimed to provide a factual basis for recognition of these grave human rights violations, with a view to establishing a historical memory of events and recognizing and compensating the victims, for whom no compensation was available at the time. This in no way prejudices the victims' right to obtain justice through the courts.

14. For its part, the Commission deemed the information in victims' testimony to be confidential, given the intimate nature of many of the statements, which contained accounts and described the consequences of torture that many of those interviewed did not wish to make public. This was explained to those who provided statements.

15. The Commission, and subsequently the legislative authorities, had to weigh the public's need to know against the need to maintain confidentiality. Hence the decision to publicize the Commission's report and give the public the overall picture in all its magnitude and horror. The report provides information on what took place and explains the effect on people's lives, while protecting the confidentiality of the individual accounts. This was not done to protect the perpetrators, since the Commission did not have the authority to investigate those responsible, but only to hear the victims' version of events and to determine whether they were in fact victims.

16. In order to protect the privacy and honour of the individuals concerned, it was proposed that the information left out of the published report should be kept confidential for a certain period of time, as is the practice with other archives around the world in situations of this type. After the report had been published, a law was passed providing compensatory benefits for people recognized as victims.⁴ The law also provided for their testimony to be kept secret for a period of 50 years, although this does not prevent people from publishing their stories or taking action through the courts to establish the criminal responsibility of the perpetrators of these crimes. Since the compensation for victims was not conditional on their foregoing civil action, they are free to go to court to establish the injury suffered and seek appropriate compensation.

² Supreme Decree No. 1040 of 2003, art. 1 (1), and chap. II of the Commission's report.

³ Supreme Decree No. 1040, art. 3.

⁴ Act No. 19992 of 2004, art. 15.

Paragraph 19. While it notes the intention expressed by the State party to give constitutional recognition to indigenous peoples, the Committee is concerned about the variety of reports consistently indicating that some claims by indigenous peoples, the Mapuche in particular, have not been met, and about the slow progress made in demarcating indigenous lands, which has caused social tensions. It is dismayed to learn that “ancestral lands” are still threatened by forestry expansion and megaprojects in infrastructure and energy.

The State party should:

(a) Make every possible effort to ensure that its negotiations with indigenous communities lead to a solution that respects the land rights of these communities in accordance with article 1, paragraph 2, and article 27, of the Covenant. The State party should expedite procedures to recognize such ancestral lands;

(b) Amend Act No. 18314 to bring it into line with article 27 of the Covenant, and revise any sectoral legislation that may contravene the rights spelled out in the Covenant;

(c) Consult indigenous communities before granting licences for the economic exploitation of disputed lands, and guarantee that in no case will exploitation violate the rights recognized in the Covenant.

17. According to the National Indigenous Development Corporation (CONADI), there are no cases pending involving the demarcation of indigenous lands, as these had already been duly delimited and demarcated in the various nineteenth-century laws granting land titles. Likewise, the boundaries were duly determined in the land titles granted, which were divided up. The lands that have been acquired recently for indigenous communities and persons are all delimited.

18. Chile has made every effort to resolve the land claims made by indigenous people and communities, investing a significant proportion of its budget for that purpose over many years. This is in addition to the lands that the State transfers to them through the Ministry of National Assets and other services. The delay in the acquisition procedures is due to strong demand and the lack of resources to meet it immediately. The relevant data are given in paragraph 20 below.

Land rights of indigenous communities and legal avenues for the recognition of indigenous lands.

19. The return of indigenous communities' land, the very source of their culture and development, constitutes recognition of the land rights of which they were deprived, often in painful and abusive circumstances. The focus on an institutional approach to achieve this has facilitated progress in meeting this historical claim. The following are the main mechanisms for reclaiming indigenous heritage:

(a) Land subsidies (Act No. 19253, art. 20 (a)): used to expand land boundaries when the land area is too small for families and communities to develop. This mechanism gives access to a non-refundable contribution that is personal and non-transferable, and payable to anyone who sells property to the beneficiary;

(b) Purchase of disputed land (Act No. 19253, art. 20 (b)): this mechanism provides financing for efforts to solve land-related problems arising as a result of legal disputes over some historical act that led to the illegal loss of land by indigenous people (squatting, erection of fences, fraudulent sales, expropriation during agrarian counter-reform, etc.);

(c) Transfer of State property to indigenous communities (Act No. 19253, art. 21): this mechanism gives CONADI the power to take possession of State lands, holdings, properties and water rights, for transfer to indigenous communities or individuals. This concerns State land that has historically been occupied or claimed by indigenous families and communities;

(d) Subsidy for upgrading and regularization of indigenous land: this subsidy aims to provide legal certainty regarding indigenous property that lacks such certainty for various reasons, and thus to consolidate the indigenous heritage.

20. Between 1994 and 2005, some 493,000 hectares of land were returned to indigenous communities, benefiting over 18,800 families, using the whole range of mechanisms at the State's disposal, as described above. Using only the mechanisms for land subsidy and purchase of disputed land, some 85,000 hectares were returned in that same period, benefiting 374 communities.

21. Between 2006 and 2007, these two mechanisms alone accounted for the return of some 23,000 hectares of land, benefiting a total of 2,200 indigenous families from 110 indigenous communities. In 2008, the total budget for the Indigenous Land and Water Fund was 23,314 million pesos (US\$ 44,622,657), of which 19,555 million pesos (US\$ 37,427,986) was for land purchase only.

Amendment to Act No. 18314 to bring it into line with article 27 of the Covenant.

22. While the content of this Act is exceptional, it is a regular law in that it applies to all citizens without distinction, and no discrimination was exercised against the Mapuche individuals prosecuted under it. Quite apart from the specific case of these individuals, it is necessary to understand the context of this situation, which in no way constitutes political persecution of the indigenous or Mapuche movements. The following background information must be taken into consideration:

(a) Minority groups linked to the claims over indigenous land rights began an offensive in 1999 against forestry and agricultural companies in some provinces of regions VIII and IX (Biobío and Araucanía). They carried out illegal occupations and committed robbery and theft; set fire to forests, crops, employer's buildings and houses, agricultural and forestry machinery and vehicles; attacked workers, forestry police, *carabineros* and property owners and their

families; and even assaulted and threatened members of Mapuche communities who would not accept their methods. Their action bore no resemblance to that of the vast majority of indigenous organizations, which did not resort to violence to assert their legitimate aspirations;

(b) The Act has been applied in situations of the utmost seriousness in nine prosecutions since 2001. The last occasion was in July 2003, in the case of the attack on the witness Luis Federico Licán Montoya, which left him disabled for life. Nine individuals of indigenous origin were convicted under the Act;⁵

(c) The legal action taken aimed to punish the perpetrators of the crimes, not the Mapuche people; punishing those who commit crimes does not constitute “criminalizing” a social demand, and much less an entire community;

(d) Chile has recognized the legitimacy of the indigenous peoples’ claims, particularly those of the Mapuche; these claims have always been taken up by the democratic governments and channelled through the institutional machinery. Accordingly, the protection of the right to land has been enshrined in the Indigenous Peoples Act since 1993, enabling the transfer of land as detailed in paragraph 20 above.

23. Nevertheless, the President of the Republic has taken the policy decision not to apply this legislation to cases in which indigenous individuals are involved on account of their ancient demands and grievances, if it is possible to try them under ordinary law in future. It should be noted that in the specific case of the crime of arson, the penalty provided for under the Criminal Code is as high as that under the Counter-Terrorism Act.

The State party should consult indigenous communities before granting licences for the economic exploitation of disputed lands, and guarantee that in no case will exploitation violate the rights recognized in the Covenant.

24. Chile has legislation establishing procedures for consulting and involving indigenous communities in projects that are carried out on their lands. These procedures depend on the type of licence or concession that is being sought. For example, indigenous lands are protected and can be transferred only under certain circumstances; they are imprescriptible, cannot be attached, and can be encumbered only in specific cases and with authorization from CONADI. Mining concessions have special legal status under the Constitution and the Mining Code, which regulates their ownership, use and enjoyment.

⁵ The nine people convicted for terrorist crimes are: Jaime Marileo Saravia; Juan Marileo Saravia; Patricia Troncoso Robles; Juan Huenulao Lienmil; José Nain Curamil; Rafael Pichun Collonao; Aniceto Norin Catriman; Pascual Pichub Paillalao and Víctor Ancalaf Llalupe. The only one who is not of Mapuche or indigenous origin is Patricia Troncoso Robles.

25. Moreover, the statute regulating indigenous lands is supplemented by other laws such as the Environment (Framework) Act, and establishes a consultation process for environmental impact studies. The 2006 ruling by the Temuco Court of Appeal provides an excellent example of this in its decision on the application for protection in case No. 1029-2005.⁶

26. The 1989 ratification of the International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), which was recently approved by Congress, will ensure that indigenous communities participate in projects involving their lands without prejudice to the protection afforded to them by the State under the Indigenous Peoples Act.

⁶ Eleuterio Antío Rivera, representing the Pedro Ancalef indigenous community, used this remedy to claim that the following constitutional guarantees had been violated: the right to life and physical and mental integrity of the person; freedom of conscience, expression of any belief and the free exercise of any form of worship not inconsistent with public morals or order; the right to live in an unpolluted environment and the right to own property. This was in response to the approval of a project for a sewage plant in the commune of Villarrica, in region IX, which had not taken into consideration the fact the sewage plant could affect the health, the productive and cultural activities, and the sacred sites located on lands bordering the plant, which are inhabited by indigenous peoples who are protected under the Indigenous Peoples Act. On these grounds, they requested that the project be halted and requested an environmental impact study.

The Court of Appeal's judgement upheld the application for protection, which was confirmed by the Supreme Court on 5 January 2006. The operative part of the judgement acknowledged that indigenous communities are regulated by the legal statute of the aforementioned Act, which recognizes their legal personality to act on behalf of the members of their indigenous community, through their legal representatives. The judgement makes reference to the opinion proffered by CONADI on the health risks to the Mapuche population as a result of the quantity and quality of the outflows, waste and emissions, and the adverse effect on natural resources such as water, soil and air which lead to changes in the way of life and customs of the population, and also affect places of cultural interest.

On these grounds, the contested decision was found to be arbitrary as it contravened the applicable laws and because the opinion of the indigenous communities had not been taken into account. Their members could be affected by the planned sewage plant owing to the proximity of their residences to the plant and to the changes to their cultural and religious rituals that take place in places that border the planned plant. The application for protection was upheld by the Supreme Court.