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**Human Rights Committee**

**Consideration of reports submitted by States  
parties under article 40 of the Covenant**

**Chile\*, \*\***

**Addendum**

**Additional explanation submitted to the Human Rights  
Committee on paragraphs 9 and 19 of the concluding  
observations on the fifth periodic report of Chile**

[28 May 2010]

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\* 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.

\*\* Annexes can be consulted in the files of the secretariat.

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## **I. Low number of prison sentences handed down for grave human rights violations**

1. The pertinent information was sent in Note No. 343 dated 31 October 2008 by the Mission of Chile to Special Rapporteur Sir Nigel Rodley through the Office of the United Nations High Commissioner for Human Rights. Attached to the note was an alphabetical list of the victims whose cases had yet to be processed as at 30 September 2008. The list was compiled by the Human Rights Programme of the Ministry of the Interior and gives details of the 342 cases of human rights violations still before the courts on that date.
2. Supplementary information on the matter is presented below.
3. As at December 2009, only 59 State officials convicted in Chile for human rights violations were actually serving time in prison, despite the considerable number of sentences handed down by the Supreme Court for such violations. This is because, when deciding the severity of sentences for crimes against humanity and having declared that such crimes were partially prescriptible, the courts have opted to reduce the penalties for such crimes considerably and, in view of the resulting lightness of the sentences handed down, to grant benefits such as probation or suspended sentences. The Supreme Court has stated in most of its rulings that such crimes, to the extent that they fall into the category of crimes against humanity, are imprescriptible. However, in the past three years, it has ruled that, owing to the time lapsed since the crimes in question were committed, partial limitation applies in accordance with article 103 of the Criminal Code. This article allows crimes for which half or more of the statute of limitations has lapsed to be considered as attended by two or more extenuating circumstances, and by no aggravating ones, which enables the prison sentences imposed by the lower courts to be reduced to 5 years or less. This in turn paves the way for the sentence to be suspended or commuted to alternatives, such as probation or remission of sentence. In practice, between June 2007, when it applied the principle of prescription to crimes against humanity for the first time, and December 2009, the Supreme Court issued rulings of partial limitation in 42 out of 63 of its judgements, reducing penalties and granting benefits to 90 convicted persons, who today are serving their sentences outside prison.
4. It should be borne in mind that some of these sentences were imposed on members of the upper echelons of the military regime's security apparatus, including General Manuel Contreras Valdebenito (sentenced to a total of over 300 years' imprisonment) and Brigadier Pedro Espinoza Bravo, respectively the former Director and former Deputy Director of the National Intelligence Directorate (DINA), to name but two of the most emblematic figures. Both of these are currently serving prison sentences.
5. The following documents containing data updated to June 2009 are attached hereto:
  - (a) Table A:
    - (i) Presents the cases currently before the courts, the number of victims whose cases are under investigation and the stage in the proceedings that the cases have reached;
    - (ii) Indicates the number of victims whose cases have been closed and which of these resulted in the conviction of one or more officials; and
    - (iii) Shows the number of victims whose cases are not currently under investigation by the courts.

(b) Table B shows the number of victims whose cases have been closed (either because the proceedings were stayed or because they ended with a final conviction) and the cases that have been reopened during the period;

(c) Tables C, D and E detail the contents of table B in the month;

(d) Table F lists the State officials who were prosecuted and/or charged and/or convicted by the end of the period, together with an indication of the number who were convicted and are actually serving a prison sentence. The number of victims associated with these cases is also provided;

(e) The list of pending cases presents all the proceedings under way, with information on the courts and the victims whose cases are under investigation. The column headed "officials involved" shows whether (and how) any State officials have been affected by a judicial decision.

6. The alphabetical list of victims presents the same information as the list of pending cases, but in alphabetical order by victim.

7. The list of accused presents the cases which resulted in judgements that affected the State officials prosecuted in each case. The names of the officials are given, the extent of their involvement, the date of the judgement and the related victim or victims, together with details of the court and the proceedings. The list is ordered by pretrial and trial proceedings, definitive judgements, sentences passed by the court of second instance, sentences passed by the court of first instance and acquittals.

8. The summary of the list of accused persons presents the information by alphabetical order of the victims whose cases concluded with judgements that affected State officials, together with the names of those officials.

9. The alphabetical list of State officials names the officials who have been affected by one or more court decisions in alphabetical order, together with the corresponding case number and the offence and degree of involvement with which they were charged.

10. The list of convicted persons contains the names of those on the list of State officials who have been convicted since 2000 disaggregated either by a definitive judgement or by one passed by the courts of first or second instance.

11. The prison list gives the names of persons convicted by a final judgement who are currently serving prison sentences. Their names also figure on the State officials and convicted persons lists, except for the officials convicted for the aggravated homicides of José Manuel Parada, Manuel Guerrero and Santiago Nattino, who completed their sentences prior to 2000 (unless they are currently charged under a different judicial decision).

12. The ranks document classifies those included in the State officials list by the branch of the armed, public-order or civilian forces to which they belong or belonged.

13. Lastly, a comparative table shows the status of the proceedings at the end of each period (in this case, on 31 December 2004 and on 30 June 2009).

## **II. Capacity of those who have been convicted of human rights violations to hold public office**

14. According to general criminal law, persons are convicted of human rights violations if found responsible for perpetrating particular crimes (such as homicide, kidnapping, genocide or crimes against humanity). Under Chilean law, those crimes are subject to a specific penalty, which is accompanied by the additional penalty of being absolutely or

specially, perpetually or temporarily banned from holding public office or exercising public functions.

### **III. Information on the publication of files compiled by the National Commission on Truth and Reconciliation and the National Commission on Political Prisoners and Torture**

#### **A. Information held by the National Commission on Truth and Reconciliation**

15. The classified information not included in the Report of the National Commission on Truth and Reconciliation is available to courts upon request. Every time a judge has asked for information on a classified case, the information has been provided.

#### **B. Information held by the National Commission on Political Prisoners and Torture**

16. 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, who had received no compensation. This in no way prejudices the victims' right to obtain justice through the appropriate courts.

17. The Commission deemed the information in victims' testimonies 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 policy was explained to those who provided statements.

18. 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 final report and to give the public the full picture of events. The report provides information on what actually took place and explains the effects on victims' lives, while protecting the confidentiality of individual accounts. It was not a question of protecting the perpetrators, accomplices or accessories after the facts. The Commission was not authorized to investigate the crimes, but only to hear the testimonies and to check whether the persons making them had really been political prisoners or victims of torture.

19. In order to protect the privacy and honour of the victims, 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 historical records in other countries. A law was passed providing for testimonies to be kept secret for a period of 50 years, although this does not prevent people from publishing their statements or taking action through the courts to establish the criminal responsibility of the perpetrators. Moreover, compensation for victims was not conditional on their waiving the right to seek compensation through civil action. They are free to go to court to establish the injury they have suffered and to seek appropriate compensation.

#### **IV. Information on land demarcation and compensation measures introduced to respect and recognize the rights of indigenous communities to their land**

20. Under the indigenous land policy, the following have been recognized as indigenous lands since 1993 (Act No. 19253):

- (a) Lands owned or held under specific titles;
- (b) Lands historically occupied by indigenous communities;
- (c) Lands recorded under this Act in the indigenous land register;
- (d) Lands transferred to indigenous communities by the State.

##### **A. Settlement of land claims**

21. Under the various laws currently in force, which allow the National Indigenous Development Corporation (CONADI) and the Ministry of National Assets to transfer and regularize the possession of land by indigenous persons and communities, the Government has pursued two courses of action: (a) the expedition of the transfer of land in accordance with the Government plan *Re-Conocer: Pacto Social por la Multiculturalidad* (Re-acknowledge: a social pact for multiculturalism) in order to satisfy historical claims; and (b) the review of land policy to update the criteria and procedures applied in order to guarantee efficiency and transparency.

22. The Government has recently updated its data on landholdings, and the new information is worthy of note:

##### **1. CONADI Indigenous Land and Water Fund**

23. In 2006, the budget allocated to the subsidies programme to implement article 20 (a) and (b) of Act No. 19253<sup>1</sup> was increased to 2,500 million Chilean pesos, a rise of 17 per

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<sup>1</sup> Article 20 of Act No. 19253 provides for the creation of an Indigenous Land and Water Fund under the management of CONADI. According to the article, CONADI may pursue the following objectives through the use of this Fund:

(a) Grant subsidies for the purchase of land by indigenous persons, communities or segments of communities, when the land area of the community in question is insufficient, subject to CONADI approval. The application process is to be different for individuals and communities. In the case of individual applicants, previous savings, socio-economic status and family situation are to be taken into account. In the case of community applications, in addition to the criteria established for individual applicants, the antiquity of the community and the number of members are to be considered;

Regulations are to establish the form, conditions and requirements of the subsidies and their administration;

(b) Finance land dispute settlement mechanisms, especially so as to implement judicial or extrajudicial decisions or transactions involving indigenous lands that constitute final decisions regarding indigenous lands or lands transferred to indigenous peoples under grants or other titles, concessions or allocations granted by the State in favour of indigenous peoples;

(c) Finance the establishment, regularization or purchase of water rights or finance the construction of waterworks.

The President of the Republic is to issue regulations on the mode of operation of the Fund.

cent compared with 2005. This benefited 1,475 families for a total investment of 13,239 million pesos.

24. The budget increase allowed the Indigenous Land and Water Fund to expand its activities across the country and to increase investment in land purchases in the Bío Bío, La Araucanía, Los Lagos, Los Ríos and Magallanes regions under article 20 (a) and (b) of Act No. 19253.

25. The amounts budgeted for 2008 and 2009 and the estimated budget for 2010 have been determined on the basis of the funds required to address the totality of the historical claims made to date (art. 20 (b)) by the indigenous communities of the Bío Bío, La Araucanía, Los Lagos and Los Ríos regions.

## 2. The Ministry of National Assets (1993–2008)

26. Since the entry into force of the Indigenous Peoples Act No. 19253 of 1993, the Ministry of National Assets has focused its activities on indigenous peoples with a view to contributing to the social development of indigenous communities and individuals through the acquisition and provision of the necessary fiscal assets and the regularization of private ownership of land and property, all in accordance with the Government's indigenous land policy. The goal is to establish a legal basis for ancestral occupation, to increase indigenous landholdings and to enable indigenous communities and families to benefit from State social programmes, which operate on the basis that land is owned by those who live or work on it.

27. The Ministry has processed individual land titles, as well as transfers of lands to communities, free of charge and has leased Government lands to individuals, communities and CONADI, also free of charge, under Decree-Law No. 1939 of 1977 (on the acquisition, administration and disposal of State assets). The Ministry has carried out these activities in the commune and province of Isla de Pascua (Easter Island), specifically under Decree-Law No. 2885 of 1979 (on the granting of deeds of title and leases for Government plots on the island). The Ministry has also regularized individual and community titles to private lands under Decree-Law No. 2695 of 1979 (on the regularization of small real-estate holdings).

28. The Ministry's land activities have mainly been pursued in regions where the density of the indigenous population is high and where that population has a history of occupying or using the land, namely: Arica and Parinacota, Tarapacá, Antofagasta, Atacama, Bío Bío, La Araucanía, Los Lagos, Los Ríos and Magallanes and the commune and province of Easter Island.

### Information on the regularization and transfer of land titles

*Land acquired by the Indigenous Land and Water Fund, 1994–2009*

	<i>Article 20 (b)</i>	<i>Article 20 (a)</i>	<i>Transfers of Government lands</i>	<i>Regularization of indigenous property</i>	<i>Total</i>
<b>Total 1994–2009 (hectares)</b>	<b>97 811</b>	<b>28 491</b>	<b>245 134</b>	<b>286 084</b>	<b>669 482</b>
Families	8 294	3 476	8 015	49 091	<b>68 876</b>
Communities	251	165	189	8	<b>613</b>
Individual subsidies	-	1 465	-	-	<b>1 465</b>

29. The Government's *Re-Conocer* plan provides for the handover of lands to 115 communities in the period 2008–2010.

30. In fulfilment of this plan, land was acquired in 2009 for 43 communities in the regions of La Araucanía, Bío Bío, Los Ríos and Los Lagos. This expanded indigenous landholdings by 18,416 hectares.

31. Purchases to meet the requirements of the remaining communities covered by the plan are scheduled to start in 2010, with the incorporation of other communities that are socially highly vulnerable.

32. In order to optimize its current land policy and land purchasing procedures, the Government has asked the University of Concepción, through its EULA environmental sciences centre, to update the register of indigenous land, water and irrigation systems. This will make it possible to measure the progress made as well as the work that still remains to be done to satisfy the demand for land among the indigenous communities of the country's main provinces.

33. Finally, it should be noted that a friendly agreement was reached with the Mapuche communities of Temulemu, Didaico and Pantano of Traiguén. These communities are claiming the restitution of a plot known as Santa Rosa de Colpi, which is registered as belonging to the company Forestal Mininco. The land is currently being valued for the purpose of establishing a price for its purchase from Mininco, which has agreed to sell it. Talks held between community authorities and forestry companies (including Mininco), with the support of the Inter-American Development Bank (IDB) and public promotion institutions, led to the establishment of a mixed working group comprising representatives of the communities, companies, the public sector and IDB. This group is currently drafting a joint proposal for financing investments within the framework of community development plans. These will be carried out through commercial partnerships with forestry and other types of companies around the respective value chain. Once approved, the project will be piloted with the aforementioned communities and the companies that agree to assume specific commitments towards them.

## **B. Recognition of the rights of indigenous peoples over lands and natural resources**

### **1. Ancestral lands traditionally occupied or used by indigenous peoples**

34. Pursuant to Act No. 19253, State policy has aimed to protect and recover indigenous lands held under various types of title, including community ownership titles granted by the Colonial authorities (*títulos de realengo*) in the case of land on the island of Chiloé. In this way ancestral lands have been recovered and returned.

35. While the *títulos de realengo* granted during the Colonial period could be considered to mark the first acknowledgement of the existence of indigenous property on Chiloé, and after many changes occurring in subsequent periods, it was the Indigenous Peoples Act No. 19253 that established once and for all the mechanisms whereby the State would proceed to protect and recover ancestral lands.

36. State-owned lands have thus been transferred under the corresponding programme to indigenous communities on Chiloé as follows:

#### **State-owned land transfer programme (Chiloé)**

<i>Indigenous community</i>	<i>Date of transfer</i>	<i>Hectares transferred</i>
Coihuin de Compu	4 November 2005	1 132.40
Coihuin de Compu	27 October 2005	1 390.90

<i>Indigenous community</i>	<i>Date of transfer</i>	<i>Hectares transferred</i>
Coihuin de Compu	27 October 2005	703.00
1. Chanquen	18 January 2005	4 727.24
2. Huentemó		
Coihuin de Compu	24 January 2008	2 404.23

37. A transfer of land to the Weketrumao community is also pending but has been held up by disputes among the communities living in the area. A reconciliation process has now been launched.

38. The cases of indigenous lands covered by *titulos de realengo* that cannot be resolved via the aforementioned transfer of State-owned property because the lands are currently under private ownership may be settled under article 20 (b) of Act No. 19253 pursuant to the provisions of subparagraph (d) of the current CONADI land policy. This refers to lands, which, despite having been occupied for many years by indigenous communities, are owned by other persons under titles issued in earlier periods when the courts had ruled against the indigenous communities. In such cases, article 20 (b) of Act No. 19253 is fully applicable.

39. According to information obtained from the CONADI Indigenous Land and Water Fund, the following communities have filed claims under the aforementioned article 20 (b):

**Register of land claims filed under article 20 (b). Communities of the commune of Chiloé province, Los Lagos region, having filed claims**

<i>Commune</i>	<i>Community</i>	<i>Status</i>
Quellón	Wequetrumao	In process
	Tugueo	
	Guaipulli	
	Coihuin De Comp	

40. In addition, the Buta Huapi Chilhue community of the Compu sector, Quellón commune, Chiloé, has been declared eligible to file a claim under article 20 (b) since 2005.

41. Meanwhile, in a clear statement of the recognition of ancestral lands by Chilean law, article 12, paragraph 2, of Act No. 19253 recognizes as indigenous all lands that indigenous persons or communities have historically occupied and owned, provided that the corresponding rights have been recorded in the public register of indigenous lands upon the request of the respective community or owner of the property. In this way ancestral land occupation is recognized and protected.

## V. Application of counter-terrorism laws

42. Act No. 18314, which criminalizes and establishes penalties for acts of terrorism, has only been applied on a limited number of occasions in response to acts of violence that, owing to their nature and/or the seriousness of the means used, made it necessary from the standpoint of criminal law to apply legislation carrying heavier penalties.

43. Since 2006, the Government of Chile, through the Ministry of the Interior and its land distribution programmes, has initiated three proceedings (one in 2008 and two in 2009) alleging acts of terrorism.

44. In each case in which the Ministry of the Interior has applied special criminal statutes, it has done so in consideration only of the seriousness of the acts involved and the means used for their commission and regardless of the cause that might be cited to justify them. These were the legal grounds for the proceedings initiated under the aforementioned provisions of Act No. 18314. The fact that the accused were members of indigenous communities or peoples was never a consideration. On no occasion has the criminal law been used to discriminate on political, social, ethnic or religious grounds.

45. Legitimate demands regarding the land rights or ancestral rights of the country's indigenous communities, which many such communities claim as a cause worthy of State protection, must not be confused with isolated acts of violence committed by small minority groups of individuals who, operating outside the law, seek only to spread fear among the population with their attacks, while attempting to justify their criminal conduct by invoking the legitimate struggle of indigenous communities.

## **VI. Information on the practical implementation of consultation and participation procedures for indigenous communities**

### **A. Early implementation of the right to be consulted**

46. On 25 June 2008, a few months after the new indigenous policy was introduced under the *Re-Conocer* plan and almost 18 months after the entry into force of International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, President Michelle Bachelet issued presidential instruction No. 5, which, among other measures, established the obligation to hold consultations on legislative and administrative initiatives that could affect indigenous peoples. The new instruction was based on: the need immediately in the activities of public agencies to mainstream consideration of suggestions put forward by indigenous peoples, through a procedure aimed at channelling relevant information to indigenous communities, collecting their observations and opinions on the initiatives that target or affect them, and establishing the duty of public agencies to provide reasoned responses. This, together with other activities set out in the plan, will gradually pave the way for the implementation of the specific measures on participation that will ensure full compliance with Convention No. 169.

47. The right to consultation was thus beginning to be implemented even before ILO Convention No. 169 entered into force, and the lessons learned (together with the results of the consultation process described in section 1.3 below) were subsequently taken into account in the drafting of the regulations on consultation procedures set out in Decree No. 124.

### **B. Entry into force of ILO Convention No. 169 and the passing of Decree No. 124**

48. In order to comply with the obligations set forth in article 6 and article 7, paragraph 1, of ILO Convention No. 169, as soon as it came into force on 15 September 2009, the Government issued Decree No. 124, which establishes regulations for the implementation of article 34 of Act No. 19253 on the consultation and participation of indigenous peoples.

The Decree was published in the Official Gazette of 25 September 2009 after being subjected to constitutional review by the Office of the Controller-General.<sup>2</sup>

49. The regulations were drafted taking into account paragraph 38 of the report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people on the international principles applicable to consultations on constitutional reforms regarding the rights of indigenous peoples in Chile, which states in the final section that when such mechanisms do not exist formally, transitory or ad hoc mechanisms must be adopted provisionally to ensure the effective consultation of indigenous peoples.

50. The corresponding transitory article of Decree No. 124 states that once these regulations enter into force, indigenous peoples will be consulted regarding the procedures to be used for consultation and participation processes in accordance with the provisions of article 34 of Act No. 19253 and article 6, paragraphs 1 (a) and 2, and the second sentence of article 7, paragraph 1, of ILO Convention No. 169.

### C. Consultation process

51. In accordance with the provisions of the transitory article of Decree No. 124 and the recommendations that the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. James Anaya, set out in paragraph 50 of his report on Chile, the Government is currently consulting indigenous peoples on their views and ideas regarding the consultation and participation process provisionally set up under the Decree. The aim is to optimize the process, taking into account their suggestions and proposals, and thus establish a definitive consultation and participation procedure in keeping with the provisions of ILO Convention No. 169.

52. In order to ensure that that consultation procedure includes suitable modalities and activities that respond to the particular characteristics of each region and indigenous people, the Government, through the Indigenous Policy Coordination Unit of the Office of the Minister and Secretary-General of Government and in conjunction with the regional governor's offices of regions that are home to mainly indigenous populations, has held an initial round of meetings with representatives of indigenous peoples through the regional indigenous councils.

53. The goal of these meetings has been to hear the opinions and proposals of representatives of indigenous peoples regarding the characteristics, activities and calendar of the consultation process, with a view to incorporating them into the plan under which the consultation procedure will be implemented in the corresponding region. The meetings held to date are listed in the table below.

<i>Region</i>	<i>Town</i>	<i>Date</i>	<i>Attendance</i>
Arica	Arica	16 November 2009	14
Tarapacá	Iquique	16 November 2009	18
	Iquique	23 November 2009	
	Iquique	2 December 2009	5
Antofagasta	San Pedro de Atacama	27 November 2009	19

<sup>2</sup> See annex 1.

<i>Region</i>	<i>Town</i>	<i>Date</i>	<i>Attendance</i>
	Calama	9 December 2009	14
Coquimbo	La Serena	18 November 2009	21
Valparaíso	Rapa Nui	21 December 2009	14
Metropolitana	Santiago	24 November 2009	
	Santiago	1 December 2009	29
	Santiago	15 December 2009	24
Los Lagos	Osorno	26 November 2009	28
	Osorno	17 December 2009	30
Aysén	Coyhaique	27 November 2009	10

54. To keep participants informed on the progress of the talks and discussions held, the Government has presented a number of documents to the representatives of the indigenous communities on the regional indigenous councils. These include the aforementioned Special Rapporteur's report on the international principles applicable to consultations regarding constitutional reform in the area of the rights of indigenous peoples in Chile and the pertinent parts of the ILO manuals on the implementation of Convention No. 169. ILO representatives have also participated in several of the meetings to explain the content and scope of the Convention.

55. This initial stage of the consultation process is currently under way and once it has been concluded, the actual consultations process will commence.

#### **D. Consultations held to date**

56. Since the issue of the presidential instruction on 25 June 2008, two national consultations and two consultations on issues affecting specific indigenous communities have been held. These are:

- (a) At the national level:
  - (i) Consultation on initiatives to promote the political participation of indigenous persons;
  - (ii) Consultation on the constitutional reform to recognize indigenous peoples currently under consideration by parliament.
- (b) At the local level:
  - (i) Consultation on the repatriation from Switzerland of skeletal remains of members of the Kawésqar and Yaganes indigenous communities;
  - (ii) Consultation on the constitutional reform to permit the suspension or restriction of rights to stay or reside on Easter Island.

##### **1. Consultation on political participation**

57. This consultation aimed to determine the position of indigenous peoples regarding:

- (a) The election of representatives of indigenous peoples to Congress and regional government councils;

## (b) The creation of an indigenous peoples council.

58. The demand for political participation by indigenous peoples is set out in a series of documents: the Nueva Imperial Agreement (December 1989); the Report of the Historical Truth and New Deal Commission (October 2003); and the National Debate of Chilean Indigenous Peoples, which concluded with the National Indigenous Congress (October 2006) and the National Mapuche de Quepe Congress (November 2006).

59. The first stage of the consultation on political participation commenced on 5 January 2009 with the dispatch of written proposals to 4,500 indigenous organizations, whether they had legal personality or not. These proposals were accompanied by an explanation of how to participate. The consultation was publicized on national, regional and local media so that all interested communities would be informed and receive the background information necessary for preparing and submitting observations.

60. This first stage of the consultation was originally due to end on 16 February 2009, but given the high level of interest shown by indigenous organizations, the deadline was extended, initially to 2 March (as announced through a new nationwide publicity campaign), and it was subsequently decided that after that date stakeholders could continue to submit proposals in writing.

61. During the period set aside for written submissions, 522 responses, representing various indigenous peoples and their organizations and reflecting their territorial identity, had been received by 9 March 2010. These are currently under analysis and are listed in annex 2.

62. On 11 March 2009, a series of workshops and round tables were launched in all the parts of the country with an indigenous presence.

63. During this second stage, visits were made to indigenous organizations to explain the contents of the two proposals and to hear their views and suggestions for optimizing the projects. Annex 3 lists the workshops and round tables held and the number of indigenous community members who attended and contributed to the consultation on political participation.

64. The process ended with the systematic review and compilation of the conclusions of the workshops and round tables held across the country, which were published on the website [www.conadi.cl](http://www.conadi.cl). These are also presented in annex 4 together with information on the weight they were given in the Government's formulation of the proposals.

## 2. Consultation on the constitutional reform to recognize indigenous peoples

### (a) *Historical context of the constitutional recognition of indigenous peoples*

65. The demand for constitutional recognition has a long history in the relations between the indigenous peoples and the State of Chile and was in fact referred to in the Nueva Imperial Agreement of 1 December 1989,<sup>3</sup> which states:

“Patricio Aylwin Azocar hereby undertakes to further the claim of the indigenous peoples of Chile set out in the manifesto of the Concertación party, specifically in section a:1 on the constitutional recognition of indigenous peoples and their fundamental economic, social and cultural rights.”

<sup>3</sup> Meeting of the indigenous peoples of Chile with the then presidential candidate, Patricio Aylwin, at which the agenda was set for talks between the State and the indigenous peoples within a democratic framework.

66. In a similar vein, the Report of the Historical Truth and New Deal Commission<sup>4</sup> presented on 28 October 2003 to then President Ricardo Lagos states the following:

“In keeping with the principles outlined above, the Commission recommends the constitutional recognition of indigenous peoples: that is, the amendment of the Constitution of the State of Chile through a clause inserted into the institutional framework that declares that the indigenous peoples exist and form part of the Chilean nation and recognizes that they have their own cultures and identities ...”.

67. The National Debate of Chilean Indigenous Peoples was held between June 2006 and January 2007. This debate took the form of 200 local and regional meetings and 1 national event and involved over 120 organizations representing indigenous peoples. Direct talks were also held with at least 5,000 leaders of grass-roots organizations and indigenous communities. The Debate concluded with two national meetings: the National Indigenous Congress, which ran from 3 to 5 October 2006, and the National Mapuche de Quepe Congress, held on 11 November 2006.

68. On 30 April 2007, the President of the Republic, Michelle Bachelet, endorsed the proposals made and put forward the case for constitutional recognition within the Government’s new guidelines on indigenous affairs. Finally, on 1 April 2008, in the new policy on indigenous affairs as set out in the *Re-Conocer* plan, which is in force today, the President approved a chapter on the political system, rights and institutions, that details the measures to be implemented to promote the participation of indigenous peoples in the political system, including the constitutional recognition of their existence as part of the Chilean State.

69. Constitutional recognition has been demanded for many years both by indigenous peoples themselves and by various Government agencies. The proposed constitutional reform aims to right a historical wrong identified many years ago. The political consensus needed to push through that reform has yet to be achieved, however. Even in the most recent constitutional reform of 2005, which wrought major changes in the institutional framework of the Chilean political system, and despite Government efforts, the long-awaited recognition of indigenous peoples was not incorporated into constitutional law.

70. Particularly noteworthy, then, are the Senate’s approval, on 7 April 2010, of an initiative to legally enshrine the recognition of indigenous peoples and the willingness shown by the Constitution, Legislation, Justice and Regulations Commission of the Senate to further this initiative. Both mark a substantive and significant shift in attitude compared with the various discussions held on the subject in previous years.

71. The Government views the initiative in question as a historic step forward in the relations between the State and the native peoples of Chile. Not only does the Senate’s approval of the proposal to recognize indigenous peoples in the Constitution mark the first vote in favour of the notion since it became the subject of parliamentary debate nearly 18 years ago, but the content of the proposal represents substantial progress in comparison with previous initiatives and with other countries’ legislation on this subject.

72. One of the most progressive aspects of the proposal is the recognition of indigenous peoples as collective holders of political, cultural, social and economic rights in the first chapter of the Constitution, which lays the foundations for the State’s institutional framework. This is fully in keeping with the norms and principles of ILO Convention No.

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<sup>4</sup> Commission comprising leading personalities from indigenous and non-indigenous society, which was set up to advise the President of the Republic on the history of the indigenous peoples of Chile and to make proposals for a “new deal” between the State and indigenous peoples.

169. Notwithstanding the above, the Government is still developing new ideas for improving the initiative.

(b) *Consultations held on the text of the constitutional reform to recognize indigenous peoples*

73. Consultations were held from 13 April to 15 July 2009 with indigenous communities across the country on the constitutional reform bill to recognize indigenous peoples, which had been approved in general by the Senate at its session of 7 April 2009.

74. The goal of the consultations was to hear the proposals of indigenous peoples' organizations on the text approved by the Senate as the first step in the constitutional review process and to channel these to the Constitution, Legislation, Justice and Regulations Commission as input for its discussions, particularly its consideration of the constitutional reform bill.

75. The precursors to the bill are the Message from the Executive Branch (Government of Chile) that entered the legislative process on 27 November 2007 and the Parliamentary Motion initiated by opposition senators on 6 September 2007. The current proposal for the constitutional recognition of indigenous peoples clearly builds on these two initiatives, the content of which was amalgamated into a single text by the Constitution, Legislation, Justice and Regulations Commission. The report of the Commission states that over 50 indigenous leaders and organizations were interviewed in the process.<sup>5</sup>

<sup>5</sup> The report states that representatives of the following associations and organizations were heard by the Senate Commission in fulfilment of the obligation to consult set forth in article 6 of ILO Convention No. 169: Mr. Adán Carimán and Mr. Juan Jara, respectively President and leader of the Mapuche-Moluche ethnic group; Ms. María Elena Curihuinca, Mr. Agustín Paillacán and Mr. Osvaldo Tripailaf, members of Parlamento Mapuche; Mr. Amado Painén, member of the Council of the Teodoro Schmidt commune; Ms. Amelia Mamani, member of the Quechua Sumaj-Llajta group; Mr. Andrés Millanao, Chair of Consejo de Pastores de la Araucanía; Mr. Angelino Huanca, Chair of Comisión de la Lengua Aymara; Mr. Aucán Huilcamán, member of Consejo de todas las Tierras; Ms. Blanca Camufi, teacher at school F-465 of Padre Las Casas; Ms. Cecilia Mendoza, Ms. Oriana Mora and Mr. Julio Ramos of the Atacameña Lickanantay community; Ms. María Eugenia Merino and Mr. Daniel Quilaqueo, of the Catholic University of Temuco; Mr. Dionisio Prado Huaiquil, Chair of Unión Comunal de Comunidades Mapuches de Collipulli; Mr. Domingo Marileo, *Unen Lonko* (President) of Asamblea Nacional Mapuche de Izquierda; Mr. Edmundo Antipan and Mr. Domingo Raín Anguita, leaders of Identidad Territorial Lafkenche; Mr. Francisco Vera Millaquén, member of the political committee of Identidad Territorial Lafkenche, and Mr. Myriam Yepi, member of the same organization; Mr. Edie Zegarra and Ms. Rosa Maita, representatives of the Putre and General Lagos communes, respectively, on the National Aymara Mallkus and T'allas Council; Mr. Emilio Cayuqueo, Principal of the Amul Kewün school of Nueva Imperial; Ms. Erika Cruz, intercultural adviser to the municipality of Padre Las Casas; Mr. Francisco Rivera, leader of the Poblado de Codpa indigenous community in Arica; Mr. Gustavo Quilaqueo, of the Wallmapuwen ethnic group; Ms. Nelly Hueichán and Ms. Isolde Reuque, respectively coordinator and leader of Asociación de Mujeres Mapuches Urbanas; Mr. Jaime Catriel, member of the Padre Las Casas Council; Mr. José Ignacio Llancapán, member of Consejo Indígena Urbano; Mr. José Lincoñir, Council member of Freire; Mr. Juan Carlos and Mr. José Tonko, respectively Chair and member of the Kawashkar de Puerto Edén community; Mr. Juan Carlos Guarachi, Chair of Corporación Cultural Aymara J'acha Marka Aru; Mr. Julián Mamani, Chair of Unión Comunal of the Putre commune; Mr. Luis Ojeda and Mr. Luis Jiménez, respectively Vice-Chair and member of Asociación Aymara Marka; Ms. Magdalena Choque, Chair of Comisión Aymara de Medio Ambiente (Aymara Environmental Commission) (CADMA) of the provinces of Arica and Parinacota and head of the Bureau of Indigenous Affairs of the Putre municipality; Ms. Marcela Gómez, President of the indigenous community of Umirpa, Arica; Ms. Margarita Cayupil, member of Asociación Indígena Nizol Mapu; Ms. María Carolina Arum, Director of Asociación Tripay Antü; Mr. Patricio Chiguay, member of the Yagán people; Mr. Rogelio Nahuel, member of the Liwen ñi Mapu coordination team; Ms. Rosa Morales, member of

76. On this matter, the Special Rapporteur, in his report, states that the consultation should be open in principle to other issues, which, in the light of international standards, domestic legislation and the legitimate demands of indigenous peoples, could be included in the aforementioned text (the one approved by the Senate).

77. The consultation concerned the content of the text approved by the Senate, but since it serves as the basis for new legislation, that text can be modified in subsequent parliamentary proceedings. The answer guide prepared for the consultation process therefore not only enabled indigenous people to express their approval or disapproval of the measure, but also to make comments, observations or new proposals, which did not necessarily have to be limited to the proposed text of the constitutional reform approved by the Senate on 7 April 2009.

78. The same approach was applied in the information workshops held within the framework of the consultation process. The main issue under consultation was discussed, but the workshops were open, democratic forums in which stakeholders could voice their opinions on all matters of importance to them.

79. The same procedures were used in this consultation process as in the consultation on political participation: information and material were sent to the communities, including the answer guide (annex 5) and a question and answer manual (annex 6). In total, 121 workshops were held (detailed in annex 7), attended by 3,392 people, for whom a special induction video was prepared (available on <http://www.conadi.cl/videos.html>). Publicity and information activities were also organized through the media (see [www.conadi.cl](http://www.conadi.cl)).

80. All in all, 428 observations were submitted in various formats, either by e-mail, or by post or hand-delivered to the various operative units of CONADI across the country or the offices of the Presidential Commission for Indigenous Affairs. They were then forwarded to Congress for consideration in its discussions of the constitutional reform bill.<sup>6</sup>

81. In this respect, and with regard to the Special Rapporteur's point that the consultation on the proposed text should be held prior to the legislative process, it should be noted that the aforementioned legislative initiatives date back to 2007, at a time when ILO Convention No. 169 had not yet been approved by Congress.

82. Moreover, as is common practice in the congressional legislative review process in Chile, representatives of indigenous communities and organizations, as well as academics and other people who were in a position to contribute to the analysis, were invited to participate in congressional hearings on the topic. The Commission thus received input from representatives of several indigenous peoples, who presented their visions, observations and expectations regarding their proposed recognition in the Constitution.

83. The Commission's report refers to the duty to consult established in ILO Convention No. 169 and to the hearings that were held in fulfilment of the obligation to hear the opinions of people, organizations and communities. Two aspects of the context in which that reference was made need to be clarified, however:

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Asociación de Mujeres Indígenas Urbanas; Ms. Rosa Oyarzún, Mayor of Padre Las Casas; Mr. Sergio Liempi, Director of Pelom community radio, Padre Las Casas; Ms. Verónica Soto, of the ecological movement Ciclo Árbol Vida; Mr. Víctor Toledo Llancaqueo, academic from the Public Policy and Indigenous Affairs Centre of the University of Arcis; and Mr. Wilson Galleguillos, Chair of Consejo de Pueblos Atacameños. Invitations were extended on several occasions to representatives of Observatorio de Derechos de los Pueblos Indígenas, who declined to attend but submitted a document which was annexed to the report together with other documents received during the Senate Commission's examination of the matter.

<sup>6</sup> See the report on the consultation process presented in annex 8.

(a) The hearings were arranged prior to the entry into full force in Chile of ILO Convention No. 169;

(b) The Constitutional Court has declared that the consultation referred to in article 6 of the Convention is automatically enforceable and applicable by all State agencies, including the National Congress, from the moment the Convention enters into force, without complementary implementation measures being required.<sup>7</sup>

84. In the light of the Senate's approval of the initiative to enshrine the recognition of indigenous peoples in the Constitution, the Executive Branch decided to withdraw the "high urgency" status<sup>8</sup> attached to the bill in order to enable the Government to hold consultations on the matter.

85. The constitutional reform bill is currently in the text analysis stage, rendering it inappropriate to draw any definitive conclusions on the subject.

### **3. Consultation on the repatriation from Switzerland of skeletal remains of members of the Kawésqar and Yaganes indigenous communities**

86. In accordance with the wishes of the Indigenous Development Council of the Magallanes Region, CONADI, through its office of indigenous affairs in Punta Arenas and with the support of indigenous policy coordination unit of the Office of the Minister and Secretary-General of Government, held consultations with the Kawésqar and Yagan communities from the southernmost region of Chile on how to proceed with the repatriation of the remains of several members of the canoe people of Tierra del Fuego that were illegally removed from the country in 1881 and displayed at exhibitions and fairs in Europe before ending up in the University of Zurich in Switzerland.

87. The consultation was held in two stages: first, from 19 to 23 October 2009, guidelines for the consultation were drafted and views were formally recorded in writing; second, participative workshops were held between 1 and 16 November 2009.<sup>9</sup>

88. The deadline for receiving input, comments and proposals was extended from 23 October to 23 November 2009, and in the end, 32 responses were received from organizations and 2 from family groups.

89. Additionally, between 1 and 16 November 2009, four seminars were held in Magallanes, which were attended by 44 members of indigenous organizations in the region.

90. These activities and the outcome of the consultation process made it possible to agree with the indigenous organizations on how the skeletal remains should be repatriated, which protocols needed to be followed and where the remains should be finally laid to rest.

91. Finally, on 12 January 2010, the remains were duly repatriated and buried according to indigenous rites and traditions.

<sup>7</sup> Rulings ledger No. 309 of 2000 and No. 1050 of 2008.

<sup>8</sup> The Executive Branch has a so-called "urgency" instrument that it can use to prioritize the discussion and voting on certain draft legislation. This instrument is quite flexible inasmuch as it can be applied and withdrawn without limitation and in any procedure. Its most notable effect is its ability to influence the Senate's agenda and to instigate discussion of the projects deemed most pressing.

The high urgency status attached by the President of Chile to the constitutional reform bill on the recognition of indigenous peoples aimed to take advantage of the willingness of the Senate to generally approve the initiative and thus, for the first time, to have the recognition of indigenous peoples discussed in parliament, which would pave the way for the next stage of the process.

<sup>9</sup> See the final report on the consultation process presented in annex 9.

**4. Consultation on the constitutional reform to permit the suspension or restriction of rights to stay or reside on the special administrative territory of Easter Island**

92. As part of the Ministry of the Interior's activities to establish mechanisms to regulate the migration and residence of individuals on Easter Island who are not members of the Rapa Nui people, consultations were held to reach an agreement with the Rapa Nui community on the proposed constitutional reform to regulate the transit, circulation and stays of outsiders coming to the Island, an issue which the Rapa Nui people have long wished to resolve.

93. Consultations were thus held on 24 October 2009 on Easter Island to hear the Rapa Nui people's views on the subject. On the basis of the opinions received, the Ministry of the Interior drew up a proposed plan and timetable for the process, which were endorsed by the Office of the Minister and Secretary-General of Government and CONADI, as set out in Supreme Decree No. 124.

94. As part of the consultation process, working meetings attended by leaders and representatives of the Rapa Nui community were held both on Easter Island and in Santiago. In order to keep people duly informed, several videoconferences were organized with members of the Executive Branch and Rapa Nui representatives; the process was broadly publicized via local media, including radio and television; and various workshops were held the week of 19–24 October 2009 in preparation for the referendum held on 24 October 2009.

95. Three voting stations remained open from 8 a.m. to 4 p.m. on Saturday, 24 October 2009, to allow all the Rapa Nui people recorded in the electoral register kept by CONADI's Office of Indigenous Affairs of Easter Island to participate in the "One Rapa Nui – one vote" referendum, in which voters had to express their agreement or disagreement (by voting "Yes" or "No") with the proposed constitutional reform, the content of which had been previously discussed with representatives of Rapa Nui organizations.

96. Of the almost 1,300 people eligible to vote, 706 chose to do so, exceeding expectations of the community itself and approximating the number who participated in the election of Rapa Nui representatives to the Easter Island Development Commission. Of those who cast their vote, 678 voted in favour of the proposal, 26 against, and 2 submitted blank votes. This meant that 96.3 per cent approved the Government's initiative to put forward a constitutional reform bill, the final text of which was presented to Congress on 5 November 2009.

**E. Participation of indigenous peoples**

97. The Government has been pursuing various initiatives to create opportunities for indigenous peoples to participate in State structures. These include:

**1. Creation of regional indigenous councils**

98. The indigenous councils were set up as meeting points and forums for permanent and systematic dialogue between regional or provincial authorities and indigenous organizations in the various regions. They provide an opportunity for public agencies and indigenous organizations to coordinate, discuss and participate in matters and, as such, they promote the participation and influence of indigenous people and organizations in public affairs.

99. The regional and provincial indigenous round tables are presided over by the regional or provincial governor, as applicable. Currently they are functioning in the regions of Arica and Parinacota, Tarapacá, Antofagasta, Metropolitana, Bío Bío, La Araucanía and

Magallanes and in the Province of Osorno. They have made it possible to analyse, coordinate and target regional governments' investments, plans and programmes in indigenous lands and territories and to coordinate action within the consultation process.

**2. Bill on the creation of an indigenous peoples council**

100. On 29 September 2009, a bill on the creation of an indigenous peoples council was submitted to Congress. The purpose of the council will be to represent the interests and needs of indigenous peoples before State agencies, Congress, the Judiciary and constitutionally autonomous agencies (see annex 10).

101. The council will participate in the design and monitoring of national indigenous affairs policy, publish annual reports on the status of indigenous peoples' rights, and approve translations of official State documents into indigenous languages, among other activities.

102. The council will have 43 members chosen by the different indigenous peoples in proportion to their size and from the special indigenous voter register which will serve as a basis for the indigenous electoral roster. The bill is awaiting discussion by parliament.

**3. Participation of indigenous peoples in the Chamber of Deputies and regional councils**

103. As noted earlier, between January and March 2009, the Government consulted indigenous communities on a proposal to allow indigenous peoples to participate, through their own representatives, in the Chamber of Deputies and regional councils.

104. The observations and suggestions arising from this consultation with indigenous communities led to improvements being made to the initial proposal, and a new bill will be drafted and submitted by the Government to Parliament.

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