EXECUTIVE SUMMARY
2011 ANNUAL REPORT
NATIONAL INSTITUTE OF HUMAN RIGHTS

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This year will go down in the Chilean people's memory as the year in which human rights claims and demands arose from different fields and various political and social actors. All of them had the special feature of contributing to a greater awareness of what living in community and what discrimination means in the enjoyment and exercise of rights.

The year began with the unfortunate consequences of the fire that broke out in San Miguel prison causing the death of 81 persons, and once more evidencing the scandalous living conditions of the inmates. Other events that marked the year were the hunger strike of the Mapuche communal landowners, who were demanding a fair trial as opposed to the antiterrorist law under which the investigation that had led to their conviction had been conducted; the final dismissal of 12 mostly young people in the "bombs case" after they had spent 6 months in preventive detention in maximum security prisons charged with terrorist conspiracy and the placement of explosive devices; the qualification of 9,795 new victims of political imprisonment and torture and 30 victims of enforced disappearance and political execution by the Presidential Advisory Committee (Comisión Asesora Presidencial) for the qualification of disappeared detainees, victims of political executions, political imprisonment and torture and a revival of claims in the field of education which managed to impose on society and on political institutions a renewed debate on inequalities in this area.

These facts, like those that occurred in other areas analyzed by the INDH in its 2011 Annual Report on the Situation of Human Rights in Chile, reflect substantial debts of democracy in the country and indicate the need to move towards a new stage. Disputes in the processes of democratic strengthening are directly related to the struggles for the recognition of equal rights, the redistribution of resources and power. In this sense, human rights provide an unavoidable foundation to prevent policies, plans or programs affecting groups and persons at levels that would be considered unacceptable from the point of view of safeguarding their dignity. Human rights impose clear limits on the tolerable degree of inequality according to the democratic political ethical imperatives in which these rights are embedded.

Although the State's role has been – and still is – subject of important debates in the light of historical experiences, the truth is that a strong and efficient State, with an active role in public affairs, is an essential condition for democracy to work in an acceptable manner. From a human rights perspective, this is a requirement whose relevance we need to stress, given that the weak role of the State in ensuring basic services of quality, as also in the regulation and control of some sectors of the

economy, have led to situations of profound social injustice and violations of rights which are claimed today by citizens.

Strengthening democracy is a challenge which is closely linked to the State's obligations of respecting, protecting and guaranteeing human rights. The ways in which these obligations are met are varied. Generally, both the guarantee of civil rights, as that of political and economic, social and cultural rights require a combination of administrative, legal and financial measures for which the international system has set specific deadlines and requirements. The judicial system has an essential role in matters of justitiability of the rights, and other institutions gain special strength by designing and implementing policies which contribute both to prevent violations of rights and to guarantee them by providing specific services.

It is necessary to refer to the key role played by civil society organizations in the process of strengthening democracy in the country, through the wide diversity of ideological subjects and positions which enrich the public debate. These organizations are crucial to ensure that the policies integrate different perspectives on policy needs, help with specific expertise and knowledge in matters that affect them and contribute to the control of public governance by improving transparency standards. The INDH seeks to build, as an essential part of its work, partnerships with civil society organizations which, in different parts of the country, play a central role in the advancement of democratic strengthening.

The 2011 Annual Report is organized into five thematic sections: i) circumstances of special public connotation throughout 2011, ii) access to justice, iii) economic, social and cultural rights, iv) equality and nondiscrimination, and v) massive, systematic and institutionalized human rights violations during the 1973-1990 period. On the basis of this review, the INDH makes general and specific recommendations to the State designed to advance in the promotion, respect and guarantee of human rights in Chile.

CIRCUMSTANCES OF SPECIAL PUBLIC CONNOTATION THROUGHOUT THE YEAR

Rights of detainees

The San Miguel Remand Centre had, at the time of the fire, an overpopulation of 197%. The event constituted a challenge to government and Congress authorities, the courts of justice and Gendarmerie, the media and society in general, by evidencing the consequences of concentrating in the prison the main response to every crime.

By October 2011, the rate of prison overcrowding was 62.5%; the levels of overpopulation in some prisons violate the human rights of detainees, besides being an obstacle for the peaceful coexistence of the inmates and a hindrance for possibilities of rehabilitation and resocialization. It was also found that very few requests for parole had been granted. According to data provided by the Chamber of Deputies, during the last process of evaluation, only 133 out of 2,578 requests had been granted. Of 53,383 detainees in the closed system, 18.6% are in remand.

From a policy perspective, one of the areas of concern that remains is the punishment in solitary confinement, which constitutes 90.7% of the total penalties for violation of internal rules. This shows the excessive use of an exceptional measure which affects both the individual freedom of the inmate, as his physical and mental integrity.

Some positive measures have been implemented to reduce the risk of accidents and improve prison conditions such as, for instance, the removal of stoves from some prisons and increased meal times. As regards the possibility of participating in the Centers for Education and Employment, the coverage is low, a fact which is worrying if one takes into account that one of the ways in which the State may fulfill its duty of ensuring that detainees may develop themselves inside prisons is through a policy of providing training courses for inmates. The low percentage of participation in these Education and Work Centers (CET in its Spanish acronym) shows that in this respect the State is also at fault.

The INDH highlights the short and long term measures announced by the government to address prison problems in the country. However, these initiatives should be complemented with others geared to rationalize the lack of freedom, the reform of the Chilean Gendarmerie and the creation of Trial Courts, changes which have not been fully expressed by the authorities in public debate.

Rights of Indigenous Peoples

Although the State has made efforts in order to design and implement policies to reduce the inequality gaps and discrimination affecting indigenous peoples, it has not acted in an unambiguous manner to have an effective impact in overcoming such gaps. The institutional unawareness of the multicultural nature of the State is one of the factors that hinders the full exercise and enjoyment of the individual and collective rights of indigenous peoples, which contributes to perpetuate their invisibility and the maintenance of relationships with the State characterized by conflict.

The hunger strike held during 87 days by Mapuche communal landowners to protest against the trial proceedings against them was a fact that called into question the

discretionary application of more stringent legal statutes for this sector of the population. Although the convictions were not for terrorist offenses, they were based on the procedural advantages granted by said statute. The event took place within the broader context of social mobilization, in which there have been serious cases of violation of the rights of young indigenous boys and girls that have been awarded protection by the Courts.

The year was also marked by difficulties in implementing the compulsory consultation on indigenous institutions, promoted by the Corporation for Indigenous Development (Corporación de Desarrollo Indígena), which was harshly criticized both by representatives of the indigenous peoples as by the National Congress for failing to comply with the principles of international law governing this matter. Related with this normative standard and analyzing certain enforceable judgments, for instance, in the environmental field, there is a repeated disregard of environmental and judicial authorities on the prior consultation in case of investment projects to be developed in indigenous lands and territories. In this way, the special nature of the duty of prior consultation is enfeebled and disregarded and the subsistence of said peoples is undermined by affecting lands, territories and natural resources that sustain their culture and worldview.

The year under review was also marked by demonstrations of the Rapa Nui people, who claimed restitution of their territories and recognition of political rights.

Right to education

The right to education has been recognized widely and for a long time by the international and domestic community, both for its value as a right in itself and because its enjoyment is a necessary condition for the exercise of other fundamental rights. Chile has a long history of public policies that have expanded the exercise of this right, in the expectation that it may help overcome poverty and create greater social equality.

The educational coverage achieved in the country is remarkable, with rates close to 95% in primary and secondary education, and significant increases at preschool level and higher education. However, there are still certain discriminatory regulations, mechanisms and practices in the educational system that create inequalities in the access and quality of the teaching/learning processes, due to which the expected social transformation to be achieved by education is far from being fulfilled.

The demands of the students' movement have placed in the public debate the idea of education as a right and not as a commodity. The profit present at all levels of the educational system, the debts with banks of families to fund their children's

universities, the self-financing of public universities and shared funding at school level, along with limitations on student participation, are issues of concern, many of which have enjoyed widespread public support.

The Constitution acknowledges the right to education in the dimensions stated by international standards of human rights: access to the process of education and learning, freedom of choice and freedom of education. The rules state that primary and secondary education are compulsory and that the State must finance a gratuitous system designed to ensure access for all the population. With this system, the country grants protection levels that are more stringent than the ones proposed by the universal system of protection of rights, at least as regards its declaration, extending free preschool and secondary education. The rule, however, does not state any specific obligation regarding higher education, due to which the role of the State limits itself to gradually fostering its development. Notwithstanding the previously described constitutional acknowledgement, the right to education is not incorporated to the catalog of rights sheltered by the remedy of protection, thus undermining the access to judicial protection in cases of violation.

In matters of public policy, although the joint provision of education is not a breach of the duties of the State, the fact that it operates under the mechanisms of selection and charge of fees produces and reproduces social inequality and creates a situation of structural discrimination. Since the reform of 1981, the public offer of free education has diminished and charging a fee has been allowed at all education levels. Consequently, the population has access to educational processes of different quality, depending on their ability to pay, and only some people may exercise the right to choose the kind of education they wish. This is the main problem of the right to education and other rights derive from it, such as the quality of the education, the disparity of resources available for learning and the sociocultural homogenization of the classroom.

One must add to the limitations of access and permanence due to the socioeconomic status of the individuals, the gap in the exercise of the right to education produced by belonging to traditionally discriminated groups. Although the State has made efforts to mitigate the effects of discrimination created by the system, these are not sufficient. Evidence shows the difficulties of conducting a sustained and successful learning process faced by people with special educational needs, adults with incomplete schooling, detainees, indigenous populations, pregnant teenagers, people with a different sexual orientation or gender identity and migrants. Another not very visible reality of educational offer is the one faced by rural areas. For these groups, access to higher education is even more limited than that exhibited by school education.

From the perspective of human rights, quality education includes the acquisition of skills for social participation, the achievement of a decent livelihood and the formation of citizens that respect human rights. The INDH has found, first of all, that the reformulation of the curricular bases currently under discussion is regressive and, in the second place, that little emphasis is placed on the training of professionals in the educational field for the recognition, appreciation and respect of these rights. There remains also a deficit in sexual education as a right of the students and a duty of the State.

Finally, in terms of school life and promotion of a culture that respects human rights, the emergence of bullying as a technical concept and channel of social concern has led Parliament to review several regulation initiatives, where unfortunately the prevailing viewpoints are the ones that place on a same level school coexistence and violence with criminal matters.

Right to demonstrate

Social demonstration is the collective exercise of essential human rights in a democracy, such as freedom of speech and assembly guaranteed by the Constitution and international treaties of human rights ratified by Chile.

This year there have been many social demonstrations in major cities of the country. In these contexts there have been acts of violence caused by minority groups, who have caused damage to shops, buses and cars and other damages to public property. As a consequence, many were injured, both civilians who were demonstrating as police officers, facts which the INDH regrets.

In this context, the repression by police officers affected the human rights of the people. The identification, prosecution and punishment of the perpetrators of criminal acts in such contexts should not obscure the fact that Chile faces a new stage in its democracy which requires from the authorities decisions and institutional practices in line with a broader view of the exercise of rights.

The regulation on the right of assembly is contained in Supreme Decree 1086 of 1983 on Public Assemblies, a rule criticized by the INDH and various associations of human rights for infringing the principle of legal reservation guaranteed by international treaties and for preventing the democratic exercise of social demonstration. This regulation is built on a concept of public order which excessively restricts fundamental rights, beyond what could be considered as proportionate and reasonable.

In criminal matters, one of the legal precepts most frequently used by the authorities for the prosecution of demonstrators is that of public disorder. The characterization

of this behavior does not imply an encumbrance *per se* to the right to demonstrate. However, the vague definition of the crime and its repeated use by the authorities to break up public demonstrations, generate an inhibiting effect on freedom of expression. The proposal in this sense of the Executive Branch contained in the project "strengthening the safeguarding of public order" is a cause for concern.

As regards the police control of demonstrations, the INDH is concerned about the numerous arrests and abuses during said arrests reported by women and girls, the excessive use of tear gas and acts of violence such as the homicide of the teenager Manuel Gutiérrez by a police officer.

The study of the arrests made within the context of street demonstrations indicates that the majority of cases do not reach trial, either because there is not sufficient evidence, there is no crime or the facts do not constitute a serious impairment to the public interest. Therefore, this procedure would indicate that arrests are being used to deter marches and not to arrest people who are committing a crime. Indeed, the criminal prosecution system operates by arresting preventively, randomly and arbitrarily, as a way of – illegitimately – controlling demonstrations.

With respect to the arrests, reports have been made by young female university students and minors accusing police officers of having forced them to undress themselves while in custody. Product of all these and other acts of violence, the INDH has implemented in collaboration with a network of volunteer lawyers a pilot program of visits to police stations during demonstrations in order to observe the conditions of detention. This plan has been developed so far in the cities of Concepción, Antofagasta, Valparaíso and Santiago. As regards arrests in the streets, the INDH has noticed that once deterrent measures have been applied and arrests have been made by Special Police Forces, said measures and arrests have fallen equally on all persons, regardless of the attitude exhibited during the demonstrations.

Furthermore, observation has verified that in most cases, arrested people are not informed about the reasons for their arrest, their rights are not read out to them nor are they informed about the procedure. Similarly, statements have been made regarding an excessive use of force during the arrest and physical and psychological assaults in police buses en route to the police stations. The INDH is particularly concerned with the acts occurring inside police buses, as they are difficult to investigate and there is no record of the arrested persons, an identification which only takes place in the police station. The police authorities have not allowed INDH staff to go on board the institutional buses to determine the treatment of the arrested persons, thus preventing them the exercise of powers expressly conferred by Law 20.405 (art. 4) which authorize them to receive testimony and to obtain all the necessary information to act in the field of their competence.

The arrest of Recaredo Gálvez, general secretary of the Student Federation of the University of Concepción, is an example of such complaints. The young man was arrested by the police and accused of throwing a petrol bomb at police officers. After being detained for six days in the prison of El Manzano, the Court of Appeals of Concepción set him free because the facts presented were not creditable. Gálvez reported having been subjected to torture during his detention. The INDH filed in August 2011 a lawsuit against those responsible for the crime of torture before the Second Military Prosecution Office of Concepción.

Another critical issue concerns the findings of injuries; according to the testimony of detainees in police stations that were visited, these are not performed or else are performed in a very perfunctory way, quickly and without thoroughness, due to the lack of sufficient staff dedicated to comply with this guarantee.

A final obstacle detected is related to the lack of communication between the police force and the Public Prosecutor, which affects the hours of confinement of the detainees, as it is the Prosecutor who issues the order to release the detainees and on many occasions, he is not to be found or the police do not have the information of who the Prosecutor on duty is.

In connection with the use of tear gas, although the Protocol of the Police Force states that it has to be handled by skilled personnel (which implies that whoever handles it knows how to use it), certain facts have shown its problematic use. In May of this year, the female student of the University of Concepción, Paulina Rubilar Méndez, was hit by a tear gas grenade thrown by the police at a distance of 20 meters, causing her serious eye damage. Likewise, in August, a police officer threw inside the Union of Postal Workers a tear gas grenade when there were inside the room about 60 people, including children and elderly people. This officer was discharged from the institution as it is forbidden by the police protocol to throw tear gas grenades in closed or residential places.

ACCESS TO JUSTICE

The access to justice, to be understood as the right of every individual to have effective remedies under the guarantees of due process, in conditions of equality and non-discrimination, is one of the fundamental rights on which a democratic society is built. This right seeks to assure people whose rights have been threatened or violated an expedited way of legal protection. This chapter discusses the constitutional actions of protection and appeals; the military criminal jurisdiction; the application of the anti-terrorism law (Law 18.314); and obstacles in the access to justice for women.

Remedy of protection and appeals (habeas corpus): mechanisms for protection of fundamental rights

The main mechanisms for the protection of fundamental rights in the legal system are the actions and appeal for the protection (habeas corpus and the protection remedies) of constitutional guarantees. The exercise of these remedies is hindered both by procedural and by substantive aspects.

The remedy of protection is regulated, in its procedural aspects, by a Judicial Decree of the Supreme Court and not by a law, which affects the legal reservation as guarantee for the exercise of rights. This criticism becomes more important as the provision provides for a period of 30 days for the exercise of the action, causing a tension between the need to have a reasonable time which does not pose a limitation for the exercise of the action and the legal certainty as guarantee of any legal process. The Judicial Decree also restricts the bilaterality of the hearing by establishing an expedited hearing officer system, that is, without listening to the arguments of the parties, which reduces the transparency and publicity of the legal action and prevents the direct contact of the court with the alleged victims.

From a substantive point of view, it has been disputed that the remedy of protection has been mostly used for protecting property, which has spread not only to this right itself but to dominion over other rights, a phenomenon called "proprietarization of rights". It has also been criticized that the remedy excludes from its protection economic, social and cultural rights (ESCR).

With respect to the remedy of protection aimed at protecting individual freedom and safety, from the regulatory point of view it has received similar criticisms on account of its being regulated by Judicial Decree.

Between January and August 2011, the INDH conducted a partial pilot study in the Courts of Appeals of Santiago and San Miguel to analyze the use and effectiveness of the remedies of protection and appeals filed and concluded during this period. The investigation sought to answer: i) if there is a real access to the mechanisms of protection of rights in the cases studied, and ii) if the mechanisms of protection of fundamental rights have been effective in the defense of human rights in said situations. During the period under study, 14,591 applications for remedy of protection were filed and 2,466 appeals for legal protection. Out of this total number, the INDH analyzed 1,061 actions of protection and 1,266 habeas corpus; given the characteristics of the methods used, the study results should not be generalized.

The admissibility of the remedy is the process that verifies the compliance of formalities (for instance, that is has been filed in due time) before the Court hears the merits of the case. The review of the studied cases shows that legal representation helped to facilitate the admissibility of the remedies, both in appeals for legal protection as in remedy of protection.

Two other aspects observed in the study and related to the possibility of having access to justice and that have an influence in the quality of said access, are referred to the merits of the judgments in the cases of inadmissibility and the kind of service that is used for most of the resolutions in each process. As regards the merits, it was noted that on certain occasions the arguments to declare inadmissible an appeal were not very specific in stating the reasons for rejection. Knowing the specific grounds contributes to legal transparency and to the understanding by those involved of the reasons for the final decision of a court.

With respect to the services for remedies and appeals for protection, the system used in most of the resolutions is the system of the Daily Gazette which does not allow access to information to people who file appeals without legal representation because of its impersonal nature. In fact, a minimum of procedural and legal knowledge is needed to know where and when it is published and how to interpret it. For the same reason, these procedures must adopt methods of service in an easy and timely format providing real guarantees of information.

The main reasons for which people have filed remedies and appeals for protection tend to focus on the following: unilateral increase of health plan fees (only protection), sex discrimination in social security issues (only protection) and prison conditions of detainees (remedy and appeal for protection). Regarding the effectiveness of these mechanisms of protection of fundamental rights, except in the case of Health Plan Providers where there exist strong arguments and case law, in the other matters, the observed results were not very conclusive as to the protection of rights.

In connection with the appeals for protection, 731 of the 1,266 appeals studied were filed against Gendarmerie, which represents 57.7% from the total number. Of these, 7 were accepted which is 0.9% of the remedies analyzed that were filed against this institution. In the procedure that is initiated once the appeal has been filed, Gendarmerie is judge and party in the process. The INDH considers that the Court of Appeals should be the one to check on the real conditions of the inmate.

The study shows the need for legislatures to regulate by law the procedures of these constitutional actions and to provide free legal assistance to persons exercising these actions in order to ensure access to justice.

Military Justice

The murders of Manuel Gutiérrez Reinoso (16 years old), occurred in the commune of Macul in August of this year during the National Strike summoned by the United Federation of Workers (Central Unitaria de Trabajadores), and of Daniel David Riquelme Ruiz, found dead on March 2010 in the commune of Hualpén, when there was a curfew imposed by the special circumstances following the earthquake, are human rights violations involving Army and police personnel. The enquiry and determination of criminal liability is subject to the jurisdiction of the Military Justice which offers no guarantees of independence and impartiality, injuring the rights of the victims and their families to have access to justice respecting the rules of due process. The same is true with respect of investigations in which civilians claim police abuse and brutality and even common criminal acts which, due to their involving army or police officers, are investigated by Military Courts.

Law 20,477 (December 2010) is a step to exclude from the jurisdiction of military courts trials of civilians and minors when they are accused of crimes. However, the regulation still allows civilians that are victims to be subject to the procedures of military justice. It is essential to strengthen the effort of introducing reforms in tune with the ruling of the Inter-American Court of Human Rights (2005) in the case of Palamara Iribarne vs. Chile, which established the obligation to adjust within a reasonable time domestic legislation in this area. Military justice, if it is deemed necessary, should in all circumstances limit itself exclusively to the knowledge of crimes of a military function that excludes any possibility to investigate and eventually punish common crimes, ensuring that it is only applied to military personnel.

Law which identifies and punishes terrorist acts

Despite the reforms introduced to Law 18,314 (October 2010) which identifies and punishes terrorist acts, there are still regulatory gaps – inadequate definition of the offense and alteration to the rules of due process – which have allowed a wide degree of discretion in its application, particularly against members of the Mapuche people.

This year the debate centered around the trial conducted in Cañete which was finally ruled by the Supreme Court in June 2011; the hunger strike initiated in March of this year and held during 87 days by four Mapuche communal landowners who were convicted in said trial and which ended with the creation of a Committee for the Rights of the Mapuche People (Comisión por los Derechos del Pueblo Mapuche), as well as on the so-called "bombs case" which was taken to court in 2010 with a great deployment of the police and the media and which in October 2011 took a turn when a dismissal was issued in relation to crimes of conspiracy of a terrorist nature. All

these facts evidenced a legislation which is at odds with international standards of human rights.

What the INDH has sustained is consistent with the causes for concern and recommendations of the organizations of universal and Inter-American human rights system – UN Human Rights Council, UN Special Rapporteur on the Rights of Indigenous Peoples and Inter-American Human Rights Commission, among others – which have invariably expressed to the Chilean State the incompatibility of domestic laws in this area with international laws on human rights.

Access to justice for women

Access to justice is nowadays one of the main problems for the protection of the human rights of women. Access to justice must be addressed within the framework of a comprehensive public policy on the prevention of violence, and the training of judges from a gender viewpoint in which justice must be the last link in a chain that must work in coordination. In this report, the INDH reviews three situations in which there exists violation or breach of human rights standards relating to access to justice for women: violence in the area of emotional relationships which disproportionately affects women; sexual violence within the context of massive and systematic violations of human rights during the dictatorship period and the case of the Aymara shepherdess, Gabriela B., an example of the complexity of balancing cultural, social and economic aspects with the gender issue in the legal processes involving indigenous women.

In the area of violence against women within the scope of their affective relationships, the number of complaints of acts of violence and of cases that are prosecuted have risen steadily during the last years. However, treatment in the criminal justice shows that the proportion of non-judicial outputs has not changed significantly, nor has the relationship between convictions and conditional suspended sentences changed, thus showing a sustained pattern of a kind of legal process which is a cause for concern.

The efforts by the judiciary and prosecutors have focused on granting interim measures to protect the lives and safety of women. However, the findings in several femicides that occurred this year that the victims had protective measures, shows an inadequate response to the magnitude and complexity of the phenomenon. Changing the cultural pattern which sustains violence against women requires a comprehensive policy that addresses both prevention and care in public facilities and punishment for the perpetrators. The State's response has focused itself on the legal and criminal dimension and is therefore insufficient to provide the comprehensive protection it must give its female citizens.

Sexual violence against women victims of political imprisonment and torture in the context of massive and systematic violations of human rights was one of the most despicable attacks against the dignity of people, and there have been very few legal initiatives seeking to clarify the facts and ensuring access to justice of the survivors. The National Commission on Political Imprisonment and Torture (Comisión Nacional sobre Prisión Política y Tortura) devoted a section of its report to inform about this aberrant practice committed by State agents that affected thousands of captive women and girls. However, it is only recently that complaints have been filed for the use of tortures of a sexual nature, contributing to the effort of making visible this scourge and urging the Courts of Justice to investigate this form of torture.

The challenge of an approach to indigenous women's right to access to justice consists in integrating at least two dimensions: to consider that, as women who furthermore belong to an ethnic group, they are exposed to special discriminatory situations and that the exercise of the right must fall within the context of the fulfillment of the obligations undertaken by the State regarding the collective rights of indigenous peoples, particularly Convention 169 of the ILO. The case of Gabriela Blas is paradigmatic in this approach. She was accused of neglect resulting in the death of her 3 year old son and sentenced to 12 years of long-term imprisonment to the medium duration, which she is currently serving in the high security prison of Acha in Arica. The case review shows possible violations of due process, discriminatory considerations based on gender and violation of the applicable principles of Convention 169 on indigenous peoples of the ILO. Furthermore, since she was charged, she spent 3 years in custody on remand.

ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ESCR)

The field of economic, social and cultural rights is broad and covers at least individual and collective labor rights, right to social security, right to family protection, right to health, right to education, right to housing, right to food, right to a pollution-free environment, right to water and cultural rights. The State's obligation to respect, protect and warrant the ESCR requires the development of

different kinds of measures, including the adoption of standards, the creation of control institutions, the definition of specific social plans and policies and the allocation of sufficient resources for their implementation. This is related to the escalation in the fulfillment of the ESCR, which requires States, regardless of their level of economic development, to progress as quickly as possible in materializing these rights. The progression is accompanied by the principle of non regressivity, i.e. the prohibition on the States to take measures that imply a regression in the exercise of such rights. Finally, the ESCR are justiciable – the same as civil and political rights – which implies the right of every individual to file complaints in the Courts of Justice in cases of non-compliance of the State.

In Chile, the Constitution is weak in the acknowledgement of these rights. First of all, only some of them are part of the catalog of constitutional rights and others, such as the right to housing, to food, to water or to culture, are omitted. In the second place, those that are acknowledged lack legal protection because they are excluded from the remedy of protection (Art. 20), which is the action to be invoked to restore the rule of law when it has been violated.

Only recently have people in Chile begun to consider these rights as human rights. As part of the effort to make known their existence and measure their due respect, protection and guarantee by the State, the INDH analyzes in this report the right to work and labor rights, health and pollution-free environment rights.

Right to work and labor rights

The respect and protection of the right to work have consequences for the individual, his environment and society because it creates the conditions of independence, autonomy and development which are the basis for the full exercise of human rights. The right to work is the right that each individual has to earn a living by working; labor rights are the set of guarantees a job must meet: fair wages, proper health and safety conditions and the possibility of participating in trade union organizations, among others.

The Constitution acknowledges the freedom of choosing a job, freedom of contract, right to collective bargaining and to create unions, but they are not named as right to work and labor rights. This undermines a robust reading of the right, to which we may add the fact that the constitutional action of protection may not be invoked regarding collective bargaining and other labor guarantees. Within this context, the creation of labor justice (Law 20,087 of 2006) and, specifically, of the mechanism of protection of fundamental rights in the labor relationship is a step forward in the protection of the right to work and labor rights.

In the period reviewed by this Report, the country signed Convention 189 of the ILO which provides for equal treatment in relation to working hours for domestic workers and in June a bill essentially designed to match the working hours of domestic workers with ordinary regulations entered Parliamentary debate. Another significant aspect is the reform of the postnatal regime (Law 20,545) which extends the period of leave to 12 additional weeks – parental postnatal leave – and the possibility that the father may make use of said leave, if the mother agrees to it.

There are, however, shortfalls in labor practices and policies. In matters of safety and health in the workplace, figures show a rising trend of labor accidents and the average number of days lost. The number of accidents is higher in companies of no more than 10 workers. The Presidential Advisory Committee for Safety at Work (Comisión Asesora Presidencial para la Seguridad en el Trabajo) (November 2010) noted the need for a policy of health and safety in the workplace to guide efforts aimed at preventing accidents and occupational diseases, and to set the framework for the measures taken in this field by the government, administrators of insurance companies and the workers.

Moreover, the defense of labor rights and greater guarantees for the workers is based primarily on freedom of association, collective bargaining and strikes. In Chile, 94.9% of companies have no union and the problem is exacerbated by the occurrence of anti-union practices seeking to inhibit the creation of unions or hinder their development; in fact, the complaints received by the Department of Labor on these practices are generally from productive areas with lower unionization, such as construction and trade.

On the other hand, the Labor Code places obstacles for collective bargaining by establishing a minimum number of beneficiaries, permitting not only unions to negotiate but also workers organizations specially associated for that purpose and excluding from the right people working in project-based contracts or transitory jobs. In the event of a strike, the law imposes a period of three days to make it effective and authorizes the employer to replace those who are exercising this right (Art. 381 of the Labor Code), which allows the company to continue operating. The situation described requires an adaptation of the laws to guarantee the exercise of collective rights in the workplace.

As regards equality and non-discrimination in the right to work and labor rights, a critical aspect that remains to be settled is the wage gap between men and women, despite the rule that protects equality in earnings (Law 20,348). Given its feeble results, it has to be admitted that this kind of discrimination requires additional tools to create a culture of equal treatment for women and men. Another matter of concern is the maintenance of the rule requiring that at least 85% of the workers of a

company must be Chilean, which constitutes a barrier for the entrance of migrants to the labor market.

Right to health

The right to health is contained in various human rights documents and is defined by the World Health Organization as a state of complete physical, mental and social wellbeing, and not merely absence of disease or infirmity. It is a broad and inclusive right as it combines, on one hand, timely and appropriate health care, access to essential services and medicines and to culturally acceptable and quality health care systems, with full respect for fundamental liberties and without discrimination. On the other hand, it includes the consideration of the main determinants of health, such as drinking water, sanitation, a healthy environment, education, employment and gender equity, among others.

The Constitution enshrines the right to health protection but does not define its scope, which makes difficult both its interpretation as filing claims in cases of infringement. A significant step in strengthening this right was achieved by the rulings of the Constitutional Court in the last three years which specify the condition of law – and not mere expectation – of social rights and in particular, of the right to health.

The Chilean health system is composed of two subsystems, one which is public (FONASA- National Health Fund) and a private one (ISAPRES – Preventive Health Institutions). The financing of the health care of people is done through a compulsory 7% contribution which enables the contributor to choose one or the other system. The right to health protection is not part of the rights subject to the protection of the law through protection remedies, which only applies to the rights acquired in the health plan. The reform to the law on ISAPRES (Law 20,015) allowed these institutions to unilaterally change the prices of health plans based primarily on age and gender criteria. This has greatly increased the number of protection remedies filed on this account. The Constitutional Court declared in August 2010 unconstitutional the rules of ISAPRES permitting discrimination in insurance premiums on account of age or sex. With this, the Court reaffirms the obligation of State protection in cases of actions of private entities that could affect the exercise of this right.

There is broad consensus that the Chilean health model has created segmentation and discrimination because there exist significant differences of health care between different sectors of the population. To overcome these problems, in 2004 a Regime of Health Guarantees was adopted (Régimen de Garantías en Salud - GES, commonly called AUGE), mandatory for all preventive health institutions of the country which ensures access for everyone to a prioritized set of health care

services, including those diseases which cause more deaths and disability (cardiovascular diseases, cancer, high blood pressure, diabetes); the costliest diseases (HIV/AIDS and schizophrenia) and those health problems which, if discovered and treated early, have a high rate of improvement.

Despite these advances and the improvement in the health indicators of the population in recent years, inequality in the full exercise of the right to health is one of the principal problems in Chile. This is reflected in the epidemiological profile (what diseases people suffer) and in the access to health care services. There is not, for instance, the same coverage and opportunity for the different social groups – among them, children and teenagers, indigenous people and women – a situation which has been pointed out by organs of human rights treaties in their recommendations to the country.

Right to a pollution-free environment

The Declaration of Principles of the United Nations Conference on Environment and Development (Río Summit, 1992) states that the best way to address environmental issues is through the participation of all concerned citizens and this requires adequate access to information about the environment that is held by the public authorities, the opportunity to participate in decision-making processes and efficient judicial and administrative procedures in situations where the rights of people are violated or for purposes of recovering damages.

In terms of environmental standards and regulations, the country has progressed, although not in a harmonious and symmetrical way. Chile is better able to guarantee the right of any person or citizen group interested in environmental matters having access to information. However, this right is closely related to that of participating and having access to environmental justice and the two latter ones are in a more deficient state

The right to public information is regulated in the Law on Transparency and Access to Public Information (Law 20,285) and specifically in the Law on General Bases of the Environment which states that everyone has the right to access information of an environmental nature that is in the hands of the public administration. The rule is particularly relevant in the context of the System of Evaluation of Environmental Impact (SEIA): it allows to know the effects that a specific project may cause on the environment, people's health and the livelihoods of communities, among other things, and to establish mitigation, restoration and compensation measures in the event of negative impacts. One of the fundamental requirements is that the information that is generated and delivered to the public is easily understood; otherwise, access to public information can be of little use if the documentation has technical or scientific levels of sophistication that only an expert can understand.

Regarding public participation, the environmental law has expanded its spaces in several areas, among them, in the processes of environmental assessment of investment projects and in the strategic environmental assessment of policies, plans and programs, the latter to be still implemented. Citizen organizations and individuals (without restriction to direct involvement) may submit observations on projects analyzed by the Environmental Assessment Service (Servicio de Evaluación Ambiental -SEA), and these must be considered in the bases of the Environmental Qualification Resolution (Resolución de Calificación Ambiental - RCA). The law provides a remedy of lawsuit if it is felt that the observations were not taken into account.

Notwithstanding the above, citizen participation is facing serious difficulties in the Environmental Assessment Service (SEIA) on account of the limited time to make observations and its restriction to certain times of the processing procedures of the environmental studies or assessments and the exceedingly technical language of the materials to be analyzed. To this we may add that the proceedings of the lawsuits that are filed take a long time and their filing does not suspend the effects of the RCA and, consequently, there is a risk that the decision of the competent body may not be a timely decision or allow to take adequate measures to solve the case.

As regards the law, judicial actions on environmental issues are the remedy of protection and the lawsuit for environmental damage. The first one has become a well-known procedure, given the need for specialized legal and scientific reports and very rarely are the courts willing to take measures involving the suspension of a polluting activity or the suspension of the effects of an administrative act before ruling on the matter at issue. The decision eventually taken by the court will most likely not be made in a timely manner. Regarding environmental damage, the law only allows natural or legal persons who have suffered the damage to file a lawsuit: municipalities for the events that have occurred in their respective communes and the State, through the State Defense Council (Art. 54).

Both as regards the remedy of protection and the lawsuit for environmental damage, the competent courts are ordinary courts of justice lacking in experience, knowledge and time to deal with the legal, scientific and social complexity of environmental conflicts. The creation of environmental courts in the country, currently before Parliament, would strengthen the enforcement of this standard.

There are previous records of environmental violation in all the regions of the country. The INDH exposes some cases which allow appreciating the practical difficulties of exercising the rights to information, participation and access to a legal remedy in cases of violation. The cases are those of Plomo de Arica, Ventana, the Barrancones Project and the Hidroaysén Project.

EQUALITY AND NON-DISCRIMINATION

The promotion of equality and non-discrimination from a perspective that recognizes and values differences between people is one of the greatest challenges for the Chilean State and conditions the possibility of the country to develop in a harmonious manner. During this year we have witnessed a public emergency of problems and claims from groups who demand to overcome the situations of discrimination that affect them.

This chapter discusses the main features of the human rights situation of the groups that are most exposed to discrimination, in particular people with special needs, the elderly people, the migrant population of the country, the crime of trafficking people, sexual diversities and the situation of children and adolescents. The diversity of areas under analysis crystallizes the variety of forms of discrimination which affect the conditions of equality between different groups and individuals.

Rights of people with special needs

People with special needs are a vulnerable group of the population exposed to exceptional difficulties in the enjoyment of their fundamental rights. According to the available evidence, this is expressed by their poor participation in the labor market and the difficulties of access in terms of equality and non-discrimination to, among other things, education, health, information, culture and public spaces.

The guarantee of rights for this segment of the population requires conceiving and understanding both special needs and abilities as the consequences of the difficulties imposed by the sociocultural environment on this group. This perspective is contained in the United Nations Convention on Persons with Disabilities and its Optional Protocol, international instruments ratified and in force in Chile and the new law (2010) on equal opportunities and social inclusion whose guiding principles are those of independent living, universal access, universal design, cross-sectoral approach, social participation and dialogue. It is through this law that the term "positive action" to achieve effectively equal opportunities for all is expressly acknowledged by the Chilean legal system. The 2011 Annual Report provides an account of the delays in the effective implementation of the law and associated regulations, and the low coverage of programs aimed at the social inclusion of people with special needs.

Rights of elderly people

National statistics show that since the 90's, the country is inserted in a stage of demographic transition, characterized by an aging population, associated with low

levels of fertility and mortality: 13% of the population is 60 or older, a proportion which will rise to 28, 2% by 2050.

Chilean society as a whole has nowadays greater sensitivity to the situation of older persons. However, there are recurring press reports of situations of violence and abuse, neglect and helplessness especially of low income elderly people. Inequalities in society as a whole are reproduced in this population and it is not unusual that they are even more accentuated in this stage of life.

Although the rights and guarantees acknowledged by the Constitution are applicable to the elderly - in particular, non-discrimination, right to work, social security, health and education -, the text does not explicitly establish a special protection of the freedom and human rights of older people. There are special laws applicable to their situation, mainly in the areas of health, work, welfare, social security and protection against violence. A progress made during this period is the elimination of the 7% discount from the contributions to the public and private health system for older people in a vulnerable situation, as is the reform of the law on domestic violence which includes the legal concept of abuse against a person over 60 years.

There are other rules affecting the exercise of the rights and legal capacity of the elderly, such as exposing them to be declared incapacitated without the procedures complying with the minimum requirements of international standards, or the inability to make decisions about their stay in homes for the elderly and being subjected to certain medical treatments. Similarly, institutional abuses do not yet have legal safeguards for their prevention and punishment, as together with the existence of homes for the elderly which operate in an irregular manner, specialized agencies have almost no power of supervision.

Rights of the migrant population

Although in net terms, Chile is still a country with a mainly migrant population, in recent decades foreign population has been steadily increasing. Migration in the country is nowadays characterized by a population of working age, educated and which migrates looking for a job, largely female and of Latin American origin. For 2009 the migrant population was estimated at 352,000 people, mainly from Peru, Argentina and Bolivia.

Despite the efforts made by the State, those who migrate to Chile face an institutional framework that is not prepared for their arrival. In September of this year, the country produced its first report to the Committee of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, allowing to make a thorough analysis of the situation of this population, and the INDH submitted to it its additional comments and concerns. The

2011 Report reviews the regulatory and public policy difficulties - in the areas of health, work and education – affecting the full exercise of rights by migrants in the country.

Immigration laws are outdated, scattered in different bodies of legislation that do not take into account the new migration trends and have significant shortages in human rights standards. The State informed the Committee of its intention to submit to Parliament a bill on migration which would allow the country to have a legal body consistent with the current migration situation in Chile. The INDH will monitor that the project is in accordance with international standards of human rights and that its drafting takes into account the concerns of civil society and, particularly, those of migrant workers and their families.

In the field of immigration policy, the State has responded in recent years to the most urgent problems that have affected risk populations such as pregnant women, children and teenagers in irregular status. This will of the State is reflected mainly in provisions for health and education. However, these benefits are poorly understood by people in an irregular immigration status, and/or do not respond adequately to the special features of these people. Similarly, an area which requires further action by the State is the workplace, where there have been repeated cases of abuse and breach of the regulations in force, thereby affecting the fundamental rights of migrants.

Human Trafficking

Human trafficking is the trade in human beings for sexual exploitation, labor, slavery or servitude, or trafficking in organs. According to information from various agencies like the International Organization for Migration, Chile has gradually become a country of origin, transit and destination for the traffic of men, women and children for specific purposes of sexual exploitation and forced labor. The INDH highlights as a step forward the new classification of the crime of human trafficking adopted by the country in April of this year that expands the classification to forced labor, servitude or slavery or similar practices, or the removal of organs.

There remains, however, a problem of production and systematization of the information on human trafficking in the country. There is no registration system which permits knowing the number of cases detected, the persons affected per sex, nationality and age and other relevant information for preventing and dealing with the problem, and protecting the victims. The information that the INDH was able to obtain shows isolated events distributed among various government offices, hardly related between themselves.

In May of this year a report was made known of the labor exploitation of Paraguayan citizens, a case in which the INDH filed a criminal complaint against

those found responsible. According to the data obtained, this could be considered as a crime of human trafficking as, through deceit, a group of people were captured, transported and received in Chile in order to perform work that can be classified as forced labor, or at least a similar kind of labor, in poor human and working conditions.

Rights of children and adolescents

This year the Law on School Violence was passed (September 2011), which amended several aspects of the General Law on Education (Ley General de Educación - LGE), evidencing a step forward in protecting the rights of children and youth. The new regulation includes the phenomenon of school violence and contains elements which provide ample protection to every student.

Child abuse and child labor are also cause for concern for the INDH. There has been a steady increase in complaints of violence against persons under 14 years; the data show that girls are mainly affected and the same trend is observed in reports of sexual offenses against persons under 14. In relation to child labor, one of the main concerns is the lack of information available to assess the magnitude and prevalence of the phenomenon. Eliminating child labor remains a challenge for the State.

Another aspect analyzed in the 2011 Report is the one referred to juvenile criminal responsibility, reiterating the recommendation to the government to limit the use of imprisonment as an immediate measure for young offenders, reserving it for exceptional cases. The trend has been to immediately adopt the strongest punitive measures: 34.8% of the convicted teenagers received an imprisonment sentence.

Regarding the SENAME (National Department of Children's Affairs) centers, reports from visitors of Inter-Institutional Committees for the Monitoring of Centers found infrastructure deficiencies, particularly with regard to the maintenance of the wet and dry pipe systems. Similar concern must be stated with respect to access to the right to education, which is precarious and limited: 4 of the 17 closed centers and of temporary detention do not have schools or regular education programs and only count with educational rehabilitation programs.

Sexual Diversities

The support given by Chile to the Human Rights resolution on sexual orientation and gender identity adopted by the Human Rights Council in June 2011 which requested the High Commissioner for Human Rights to perform a global survey documenting discriminatory laws and practices and acts of violence against persons based on their sexual orientation and gender identity, constituted a progress. The support of the resolution is an excellent opportunity for the Chilean State to generate

information and review public affairs from the perspective of the respect, guarantee and protection of their rights.

During this year several relevant events have taken place in the country, such as the adoption of a policy of care for transgender people by the Ministry of Health and the inclusion of a question on cohabitation of people of the same sex in the next Population Census (2012). In August of this year, the Government sent to Parliament a bill of Life Partnership Agreement. The initiative regulates domestic partnerships of persons of the same or different sex, and it was added to the other two being debated in Congress. Subsequently, in November, the Senate approved with amendments the bill on discrimination and submitted it to the Chamber of Deputies, a significant step in the parliamentary process. These matters are reviewed in depth in this Report.

The fact that all three branches of government are addressing matters relating to the recognition of the rights of people with different sexual orientation or gender identity is an indicator of the public visibility that the claims of sexual diversity and the debate of the public have had, a healthy development for democracy and for overcoming discrimination.

However, the acts of violence against people of sexual diversity, particularly against transgender people, are disturbing. This year, the murder of Cinthia Gonzalez Rodriguez, a transsexual woman, which occurred in the city of Calama in July, the brutal assault to Sandi Iturra in Valparaíso in June and the arson of four shacks in which lived transsexual members of the group "Transgéneras por el Cambio" in Talca in September, set the tone.

MASSIVE, SYSTEMATIC AND INSTITUTIONALIZED VIOLATIONS OF HUMAN RIGHTS DURING THE 1973-1990 PERIOD

The democratic State demands that the dignity of the human being should never more be exposed to arbitrariness, abuse and crimes. In order to overcome silence, denial and oblivion, in other words impunity, efforts should be strengthened to have access to the truth, court action and the establishment of policies of reparation in a comprehensive sense.

Right to truth

In Chile the official acknowledgement of the acts and crimes committed during the dictatorship period has been gradual and constant over time. The process has been complemented by the work done by the Presidential Advisory Committee for the qualification of the disappeared victims of political executions and political imprisonment and torture which received 622 reports of acts constituting forced

disappearance, extrajudicial execution and cases of political violence, and 31,831 requests for qualification of people who reported having been victims of political imprisonment and torture. The Committee which worked during a period of 18 months established 9,795 new cases of political imprisonment and torture and 30 new cases of political prisoners who had disappeared or had been executed, the official figure of acknowledged victims of political imprisonment ultimately rising to 38,254 people. The Executive and Legislative branches of the government must ensure the right to truth, justice and reparation and, within this perspective, strengthen the framework of government institutions to ensure the coordinated and permanent management of these policies.

Access to justice

Between January and September of this year, the Criminal Chamber of the Supreme Court issued decisions in 12 cases involving systematic violations of human rights. These were criminal investigations whose proceedings lasted on average a decade. The sentences consolidate the jurisprudence which consists in considering the acts as constituting war crimes and/or crimes against humanity.

In the rulings under study, the Supreme Court insisted in pointing out that the legal consequences of these kinds of crimes arise from the absolute prohibition, at any time or place, of violating the dignity of the human being, a mandatory standard which is part of public international law. It emphasized that the injury to these rights imposes on the State the unavoidable duty of investigating and punishing. It stated furthermore that the international instruments of human rights have priority and the State is forbidden to invoke its domestic law to avoid complying with the obligations of respect, promotion and guarantee demanded by international laws of human rights and universal legal conscience. All the decisions analyzed were divided decisions with a small majority, as two of the five ministers of the Criminal Chamber were in favor of exempting from criminal responsibility and from the course of justice the perpetrators of these crimes.

During 2011, the Second Chamber of the Court, despite noting that there is no period of limitation for these crimes, applied what is called the average prescription, which together with considering the mitigating circumstances of previous irreproachable conduct and the granting of probation or the conditional remission of sentence, made the final rulings lack sanctioning effectiveness.

With respect to the State's liability, it has been noted that family members ignore their right to be compensated for the perpetration of these crimes. It is necessary to make progress in a change that allows unifying jurisprudence and ensuring the effectiveness and priority of the right to reparation. In the opinion of the INDH, the

protection of the national wealth should never be an obstacle for comprehensive reparation of the damage caused by the State and its agents.

Providing an appropriate assistance to the victims so that they may have access to justice is a duty which the State fulfills through the Human Rights Program of the Ministry of the Interior and Public Security. The number of open cases in which past violations are being investigated require a strengthening of the institutions, resources and Program staff in order to fully comply with its mandate and provide a proper legal and social support to the members of the families of the victims.

Although during the period under study the Courts of Justice did not apply the Amnesty Decree, compliance with the ruling issued by the Inter-American Court of Human Rights in 2006 in the Almonacid case which ordered the State to deprive said decree from legal effect, is still pending. No progress has been noticed in this matter as the rule remains in force and there are no guarantees that it will not be applied on other occasions. On the other hand, real progress was observed in the case of the reopening, investigation and punishment of the perpetrators of the murder of Luis Almonacid Arellano. On August 18 of this year, the Court of First Instance sentenced Raúl Hernán Neveu Cortesi to a term of imprisonment of five years for the crime of manslaughter.

Some measures of individual reparation

To repair damage which is in itself immeasurable is an issue which poses a challenge for the States in war crimes and crimes against humanity. Some consensus has been reached in this matter over the minimum requirements that should guide their work. The elements that constitute the right to full and effective reparation involve the dimensions of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Since the beginning of the transition to democracy, the State has made efforts in ensuring the right to reparation of the victims of crimes of the State through public policies with various dimensions and scopes: individual and collective; symbolic and economic. In an increasingly inclusive process, these policies have responded to the various forms of human rights violations, such as the violation of the right to life (forced disappearance and extrajudicial execution); to freedom of movement (exile); to physical and mental integrity (tortures) and to loss of pension opportunities (exoneration).

Some of these measures of reparation are reviewed in the Annual Report, including those of a patrimonial and moral content which consist in establishing a monthly reparation pension, access to health care in the form of institutional care and access to education benefits. There have been reports of an eventual misuse in the

management and granting of some of these benefits which have led to investigations of the Justice, the Comptroller's Office and Parliament. At the time of preparing this report the determination of eventual responsibilities is pending.

Symbolic reparation through education is an aspect that is analyzed in the 2011 Annual Report, concluding that the Executive must move decisively to include explicitly human rights education in school programs and classroom practices and at all levels and areas of education, including the Armed Forces and law enforcement forces and agencies.