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EXECUTIVE SUMMARY

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NATIONAL HUMAN RIGHTS INSTITUTE

CHALLENGES TO DEMOCRATIC CONSOLIDATION

The Constitution and Human Rights

The political Constitution of a country should reflect the minimum agreements binding a democratic society, providing it with a political blueprint from which the common existence of that society can be founded. There is currently an ongoing debate in Chile regarding the need for, and possibility of, reforming the Constitution. This Chapter examines, from a human rights perspective, which aspects should be considered in a process of constitutional reform, how deep such reform should be, and the reasons behind the decisions taken.

The Chapter addresses several different issues. Regarding economic, social and cultural rights, the INDH emphasizes the weakness of the current design of the constitution. On one hand, it fails to recognize the entirety of existing rights (for example, to housing and water), and on the other hand, legal protection of these rights is limited (social security, education, health and employment). Regarding indigenous peoples, constitutional recognition of different groups and the multicultural nature of the State is pending. Among additional reforms proposed, the INDH reiterates that the constitutional regulation of the right to protest – as a participatory mechanism – fails to respect the principle of legal reserve. Furthermore, calls are made for the amendment of article 16 of the Constitution to allow persons deprived of their liberty the right to vote.

The Chapter concludes by reviewing the advantages and disadvantages, from a human rights perspective, of the proposed mechanisms by which the constitution might be reformed, or how a new constitution may be drawn up (reform in line with Chapter XV of the Constitution, a bicameral commission, citizens' councils and a Constitutional Assembly). The INDH believes that whichever mechanism is used must comply with certain prerequisites, including: i) *Public trust*. If the process of constitutional reform involves constituted bodies, such as parliamentary assemblies or others, public trust in these bodies must be ensured. ii) *Participation*. The process must ensure the participation of organized civil society, without political parties assuming control of procedures. It must also ensure the active participation of the general public, in an effort to avoid the levels of political abstention that characterize Chilean elections. iii) *Vulnerable groups*. The process must guarantee the participation of indigenous peoples, disabled persons and persons with diverse sexual orientations; i.e., people from vulnerable groups or groups traditionally subject to discrimination. iv) *Equality between men and women*. Participation must be equal between men and women throughout the constitutional debate. v) *Territorial representation.* The process must guarantee that the territorial interests of inhabitants across the country are duly represented. vi) *Transparency and access to information*. The way in which procedures are conducted, including the compiling of documents and advance drafts, how decisions are reached and adopted and, in general, the entire constitutional reform process must be transparent and guarantee the principle of maximum disclosure of information. vii) *Equal votes.* The vote of each participant must

carry the same weight, reflecting the principle of “one person one vote”.

Democratic institutions and human rights

While the INDH has noted the trend in Chile towards strengthening democratic institutions, this Chapter examines certain areas in which the INDH has repeatedly expressed its concern. These areas include: the creation of an Undersecretary of Human Rights and a National Preventative Mechanism against Torture; ongoing commitments on the part of the Chilean State regarding the reform of military justice, as well as relevant judgements emanating from the higher courts on this matter. The Chapter also addresses the possible amendment of Law 18.314, which determines terrorist acts and the punishment thereof (the Counter-terrorism Act). This is particularly relevant given the events of September 8th, when an explosive artefact was detonated inside a garbage can in a shopping arcade in the “Escuela Militar” metro station in Santiago, resulting in injuries of varying degrees of severity to fourteen people. Similarly, there is the case of Sergio Landskron, who was killed by a bomb blast on September 25th in Barrio Yungay, Santiago. Finally, the Chapter examines the publication and contents of the Carabineros (the Chilean police force) Protocols on maintaining public order during 2014.

The INDH believes in the importance of the State being equipped with the sufficient procedures, powers and resources necessary to allow it to pursue the investigation and punishment of serious criminality, especially those which might be linked to acts of terrorism. Nevertheless, it is as equally important that these procedures and powers respect the rights and guarantees of a State governed by the rule of law. Regarding the right to protest, the Chapter examines the advantages and disadvantages, from a human rights perspective, of the Carabineros Protocols for maintaining public order. Accordingly, the INDH welcomes the concern shown by the General Management of the Carabineros in incorporating respect for the right to protest as part of the measures used for controlling public order.

Regarding the Undersecretary of Human Rights, there is still the need to grant this position a mandate to design, implement and coordinate public policy relating to the promotion and protection of human rights. In October 2014, the Executive branch presented a series of suggestions in relation to the Bill (Bulletin 8207-07) and the INDH welcomes the Executive having accepted a number of its observations. Regarding military justice, the Chilean State still maintains as pending the adoption of the legislative measures required to ensure compliance with the Inter American Court of Human Rights ruling in the Palamara Iribarne vs. Chile case. Such measures would guarantee the right to a due process and treatment in line with the principle of equality. The Chapter welcomes the progress in terms of jurisprudence shown by the Constitutional Court and the Supreme Court, since both courts have rejected the application of military justice for gauging the causes of common crimes, in which victims have been civilians and the offenses committed by uniformed personnel.

Natural disasters, emergencies and human rights

This year, the earthquake which affected the far north of the country and the fire that devastated Valparaíso have demonstrated once again the link between natural disasters, emergencies and the violation of human rights.

On April 1st and 2nd 2014, the Arica and Parinacota Region and the Tarapacá Region were affected by two earthquakes, the first measuring 8.2 magnitude and the second 7.6 magnitude. The earthquakes caused the death of six people, as well as serious structural damage to houses, buildings, boats and roads, plus widespread fear among the population. This state of fear only increased following tsunami alerts being issued across the coastal areas of both regions. The coasts of Arica and Iquique were evacuated and tens of thousands of people climbed the surrounding hills to shelter in tents. Likewise, measures had to be taken to ensure that persons deprived of their liberty or disabled persons were able to protect themselves against the earthquake and tsunami alerts. Further south, between the 12th and 16th of April 2014, the city of Valparaíso was rocked by a fire which affected the hills of El Litre, La Cruz, Las Cañanas, Mariposas, Merced, Ramaditas and Rocuant. It left 12,500 people affected, 2,900 homes destroyed and 1,200 people sleeping in shelters. The disaster highlighted the fragility of the city, which is distinguished by the following factors: the environmental deterioration of its ravines and gullies; the historic problem of accessibility associated with its topographical difficulties; the deficient infrastructure connecting different parts of the city; the insufficient infrastructure and breach of planning regulations in the development of settlements; and the absence of urban mitigation works and/or risk prevention relating to the topography of the hills. In this Chapter, the INDH draws attention to the fact that the urban area affected by the Valparaíso fire failed to meet the standards of the right to adequate housing, specifically relating to the availability of services, materials, facilities and infrastructure.

Current institutions, particularly ONEMI, are insufficiently prepared to confront major catastrophes. Among the major weaknesses identified are: inadequate institutional design; a lack of a risk management policy; centralism and low participation; inadequate information systems and logistical problems affecting communications.

ACCESS TO JUSTICE

Persons deprived of their liberty and held in preventive detention

The respect for persons deprived of their liberty has remained in the public eye in 2014. Part of this debate relates to the concern for the abuse of preventive detention during criminal investigations. Preventive detention is an exception to the presumption of innocence and, therefore, its regulation and application must be exceptional. In this

Chapter, the INDH examines the situation of preventive detention in Chile, for both adults and young persons, between the years 2009 and 2013.

At the regulatory level, preventive detention raises issues in contravention to international human rights standards. For example, justifications for ordering preventive detention exceed the international legal framework, in which the practice is only permitted in terms of individuals appearing before courts. However, constitutional and legislative rules add to this framework preventive detention on the grounds of "danger posed to society", and it is further regulated with unspecific terminology. In addition, established criteria for ordering preventive detention is troublesome if the accused has been previously convicted of a crime for which they have been handed a sentence equal to or greater than the crime for which they are currently being charged. This is because such a procedure assigns a new punishment (preventive detention) to the accused, based on facts which have already been subject to investigation and punishment.

Regarding adults, the average time in preventive detention custody, between 2009 and 2013, was 121.1 days. In terms of the associated prison population, 88.5% of persons in preventive detention are men. Likewise, 28.7% of persons in preventive detention are aged between 18 and 23 years, with 23.8% aged between 24 and 29 years. The most common offenses resulting in preventive detention are burglary and non-violent theft, as well as crimes established under Law 20.000 relating to the illegal trafficking of drugs.

Regarding adolescents (the Adolescents Criminal Responsibility Act), between 2009 and 2013 a total of 10,169 adolescents were admitted to Sename centres on a temporary basis, 93.8% of whom were young men. In terms of age, this measure is applied primarily to young persons aged 16 years (29.4%) and 17 years (38.6%). In relation to the reason for temporary internment, the largest proportion corresponds to property crimes, particularly those classified as burglary and non-violent theft. As for duration of temporary internment, figures show that, on average, each young person spent 81.5 days interned between 2009 and 2013.

Finally, the Chapter addresses legal actions for providing compensation to persons who have served their preventive detention, have been acquitted, or sentenced to a punishment other than the prevention of liberty. Regarding compensation for miscarriages of justice (article 19, paragraph 7, point i) of the Constitution), of the cases analyzed, none upheld the constitutional proceedings brought before the courts. The second possible legal proceeding (established in article 5 of the Organic Constitutional Act of the Public Prosecutor's Office) showed similar results. Of the legal cases examined, none were upheld by the courts.

EXERCISING RIGHTS WITHOUT DISCRIMINATION

Unpaid work in the domestic sphere

This Chapter addresses the effects of unpaid domestic labour on the rights of women. It notes that the increasing integration of women into remunerated work has neither reduced their domestic or family care chores in the home, nor has it resulted in the

redistribution of responsibilities to other actors belonging to the family group, the State and the market. In this sense, an INDH study on how time is used confirmed that in 2008, women in the labour market averaged 10.4 hours of total work per day, consisting of 2.9 hours of unpaid work and 7.5 hours of paid work in the home. The same research found that men averaged 8.8 hours of total work per day (8 hours paid and 0.8 unpaid).

Domestic labour in the production of goods and services for the family group and the delivery of care to dependent persons is traditionally taken on naturally and free of charge as part of the social role of women. This is done without considering its value for the economy and the workings of society, as well as being unrecognized as an additional job. As such, it remains a source of inequality and discrimination. Among the effects on the human rights of women are the obstacles they face in finding or maintaining a job and participating in community life, the excessive length of the working day and the lack of rights to breaks and vacations, among others. All this is compounded by a lack of policies and services directed at dependent persons.

Among the most vulnerable groups are: the poorest women; those providing care for dependent persons; young mothers and adolescents who cannot secure paid work or engage in education due to heavy workloads; and female older persons who have not managed to accumulate a pension fund. Recent studies report that 33.2% of girls aged between 15 and 17 dedicate more than three hours a day to domestic chores or care giving. This, according to the ILO, resembles dangerous (because of its duration) child labour. The situation also occurs, to a lesser degree, to boys from the same age group and to children aged between 9 and 14 years.

The Chapter also addresses the lack of current information on unpaid domestic labour in Chile. In addition, it looks into certain legislative and political advances in recent years, aimed at recognizing and valuing this work and incentivizing the shared responsibilities in this area. For example, the solidarity pension for those who never pay contributions (as is the case for many housewives) and the child bonus scheme, which recognizes the work of raising a child. It also addresses a series of labour regulations granting leave to working fathers, as is the case with Law 20.761, enacted in July 2014, which broadens leave to fathers of up to one hour a day to feed their child up to the age of 2 years.

Autonomy for persons with mental disabilities

According to the most recent figures from Senadis, there are 2,068,072 persons with some kind of disability in Chile, of which 16.83% possess some sort of mental disability. Regarding international standards, the Convention on the Rights of Persons with Disabilities recognizes their inherent dignity, individual autonomy, independence and freedom to make their own decisions. Accordingly, persons with mental disabilities (PWMD) are holders of rights and responsibilities for the full exercise of their legal capacity in all aspects of their lives. All this forms part of a paradigm seeking a shift away from a model of decisions that is based on substitute will, and towards a model of supporting decision-making, via backing and safeguards, which might be necessary against

potential violations.

At the national regulatory level, while Law 20.422 seeks to ensure the right to equal opportunities and eradicate all forms of discrimination against disabled persons, there are additional norms and practices that contradict this intention. For example, those generalizing and not recognizing differences as to degrees of mental disability, or those recognizing the right of disabled persons to choose treatment and receive information on this matter, or access to their own medical records, among others.

In the case of interdictions, the legal capacity of PWMD is supressed definitively, "due to dementia", and individuals are placed under the charge of a carer or tutor, despite having the mental lucidity to make decisions themselves. This measure impedes PWMD from administering their own estates. Regarding involuntary commitment, this constitutes a limitation on personal freedom, which is a constitutionally guaranteed right. As such, necessary safeguards should be considered to ensure practices like this do not constitute arbitrary or discretionary measures. Law 20.584 includes certain safeguards, but other legislation permits the commitment of persons with mental disabilities without their prior consent. In this regard, it is worrisome that Chilean prisons currently house people who entered the facilities with some form of mental disability, thereby constituting a violation of their rights. Lastly, this same legislation allows for treating PWMD against their will, including in irreversible medical procedures, such as psychosurgery. Regarding sterilizations, these can only be performed on adults and in no way can they be considered a solution to the danger of sexual abuse faced by PWMD. The troublesome aspect in regard to this latter point is that such irreversible procedures are being conducted without the authorization of Conapprem (the National Commission for the Protection of the Rights of Persons with Mental Disabilities), the only body authorized to grant such permission.

Rights of Afro-Chilean persons

In the case of Chile, the multicultural nature of society and the State is not only reflected by the presence of nine indigenous peoples throughout the country. It is also reflected by the existence of other human groups, which, by sharing common features, identify themselves through their ancestry of the African diaspora born in Chile. Due to the collective identity assumed by this group, in contrast to much of the rest of the population inhabiting the national territory, today they demand recognition of this status. This group is particularly vulnerable, given the general lack of awareness to which it has historically been subject.

In the 2014 Annual Report, the INDH helps to visualize the situation of Chilean Afrodescendants. It does so in the conviction that this is the first step towards the development of policies aimed at protecting and guaranteeing the human rights of the relevant holders. In order to do so, the Chapter examines the history of African presence in Chile. Secondly, it reviews the international standards relevant to the Afrodescendant population. Lastly, it examines the situation regarding the exercise and enjoyment of these rights under domestic and international law.

The Chapter welcomes recent progress (for example, the Anti-discrimination Act and the Afrodescendant Population Survey of Arica/Parinacota). However, it warns that challenges remain for the State, including guaranteeing the right to identity through constitutional recognition of the multicultural nature of the country; recognition of Chilean Afrodescendants that meet the requisites of tribal peoples, as well the rights associated to this condition; and incorporating Afrodescendant as a variable within the next census. The aim of such measures is to help in the design of pertinent public policies. This should be accompanied by efforts spanning all areas of education – formal and informal – which, on one hand recognize the African presence in Chile and its legacy in building the country, and on the other hand, help to strengthen a culture which respects the dignity of the human being.

Rights of children and young person victims and witnesses in legal proceedings

A judicial actor frequently forgotten in legal proceedings, whether family or criminal hearings, are children and adolescents (CA) victims and witnesses. This Chapter addresses the invisibility of CA in these legal proceedings and how this contributes to the violation of human rights.

All CA who participate as victims or witnesses in any legal proceeding have the right to be heard and to express their opinion, regardless of their age, as well as to be informed of the legal process. It is recommended that safeguards are applied for protecting the interests of the child. This implies adapting the way in which they are passed information, and that cross-examinations – carried out by specialized professionals – are more conversational rather than a one-sided interrogation. Changes such as these would also help to ensure the following: the protection of the child against discrimination; that interference in the private life of the CA is limited to the bare minimum; that the child is heard under conditions of confidentiality; that the disclosure of information from the legal proceedings is restricted; and that the appearance of the child to the public is limited so as not to be excessive, especially in terms of exposure to the media, in order to protect their privacy. This, in turn, implies a duty on the part of the State towards CA, to protect against possible intimidation and/or reprisals.

At the legislative level, the Chapter addresses the lack of one single law to comprehensively ensure the participation and protection of child victims and witnesses during legal proceedings. Regarding criminal proceedings for sexual crimes, the Chapter outlines how CA have to endure at least eight cross-examinations or interviews with different institutional actors. Likewise, as not all cases are heard before the courts, not all CA are entitled to access therapy. In addition, in the cases in which children are able to access therapy, the waiting times to begin treatment constitute a point of weakness: 28.8% of referred cases had to wait between one and four weeks following the complaint being filed, while 47.2% waited between one and six months. The Chapter also examines the problem of coordination regarding the Family Courts, whereby a lack of joint work between these courts and the criminal courts opens the possibility of the CA experiencing a secondary victimization.

Right to religious freedom

The right of all people to join a particular faith, or none, as their right to express their belief, publicly or privately, is a human right that must be respected, guaranteed and protected by the State. Likewise, a non-denominational State should not intervene in matters of creed, and the law, legislation and public policies should not be passed or adopted based on criteria or principles solely religious in nature.

As well as reviewing international and domestic regulations regarding this right, the 2014 Annual Report analyzes five legal cases in which the practical application of this guarantee comes into conflict with other rights. This includes respecting the holy days of Adventist students, the refusal of a school pupil to receive religious classes, respect of holy sites and places of worship, and the duty of the State to respect worship practised by indigenous peoples.

The INDH reiterates that the right to religious freedom constitutes several challenges to a non-denominational and democratic State. Likewise, as shown by the case studies, notable aspects exist, including the non-application of the criteria of legality, proportionality and necessity. These criteria, established under international human rights law, can help determine the legitimacy of restrictions on the freedom of religion.

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Right to education and freedom to learn in the educational reform

The INDH considers the reform of the educational system a necessity. The focus of this Chapter, from a human rights perspective, is on the different problems existing at present. Among others, these include: the need to strengthen public education, through adequate financing; improving educational institutions; reforming and boosting teacher training, ensuring its quality, as well as training head teachers of public schools; eliminating the discriminatory mechanisms in the system, as well as the geographical or ethnic obstacles in accessing education which affect groups whose rights are violated; strengthening the investigatory powers of the State; and integrating education with human rights, especially within teacher training, as a necessary condition for their effective implementation across schools, among other issues. It should be noted that, regarding higher education, its regulatory framework, financing, admissions system, supply of technical education, and the system of higher public education itself, will all be subject to the process of reform.

Nevertheless, this Chapter focuses on reviewing, specifically, one of the proposals presented by the current Government and only addresses one particular aspect of the educational reform. The aim of this approach is to review whether the proposed measures comply with international human rights standards. In May 2014, the Executive branch presented a Bill to Congress which would regulate the student admission process, eliminate the shared financing component, and prohibit profit in educational institutions

which receive State funding (Message 131-362).

Regarding the issues addressed by the Bill, the Chapter suggests that shared financing, or co-payment, in the way in which it currently operates, violates the right to equality and non-discrimination. Furthermore, it argues that the practice constitutes a barrier to accessing education and the freedom of choice of education, restricting choice to the ability to pay for admission or the duration of the course. The Bill has also questioned the process of selection, understood to be the acceptance of students according to criteria set by the educational institutions. This practice could undermine the ability of students to choose their own education, thereby generating barriers stemming from social, economic and cultural factors.

In this sense, in line with international human rights standards, the Chapter raises the need to strengthen State powers in eliminating discriminatory practices or outcomes, including in non-State financed institutions, in accordance with the principle of equality and non-discrimination. This should be done in such a way whereby the freedom to open and administer educational institutions is respected, as long as it always ensures the following: that the education provided, regardless of the teaching establishment, is geared towards the full development of the human personality and strengthening respect for human rights and fundamental freedoms, as enshrined by the relevant international treaties.

Similarly, the Chapter raises several concerns regarding the Bill. Firstly, the prohibition of the process of selection should be extended to institutions offering artistic education, as well as those deemed “emblematic establishments”. Secondly, measures for regulating the internal rules of institutions should refer back to the Subsidies Act, rather than the General Education Act. This is because, despite the fact that legislation must respect the development of different educational projects, the principle of non-discrimination is applicable across all types of institutions. On the other hand, there is concern regarding the impact of the availability of education in rural areas, if criteria for granting new subsidies fail to take the adaptability of educational projects covering the particular area into account.

Right to health and motherhood

In general, it is problematic when any woman experiences motherhood or the inability to bear children, when this is not in line their overall desires or possibilities in life. Difficulties arising out of an unwanted pregnancy, for example, can become complicated for different reasons, sometimes conflicting.

The right to sexual and reproductive health of women is violated when the means for an informed and safe exercise of sexual orientation is denied, when the exercise of motherhood without discrimination is rejected, and when a woman experiences mistreatment, abuse or a lack of information from those who are obliged to protect and treat the health of women and that of their pregnancy.

The development of international human rights law has become more specific in certain areas of the right to sexual and reproductive health, including that of autonomy. This area covers two aspects relating to State obligations: on one hand, the protection of pregnant women throughout the entire pregnancy and after the birth; and on the other hand, respect for the autonomy of women's decisions regarding whether to have children or not, in the sense of access to adequate information and resources for exercising their right to sexual and reproductive health. Regarding abortion, international law has not explicitly recognised the practice as a right, but it has developed guidelines for States, as discussed in this Chapter.

Regarding the situation in Chile, the live birth rate of women under the age of 19 has fallen since 2009, and the Ministry of Health predicts its continued reduction. Current figures are not uniform across the country or socio-economic groups. The most prominent factor is socio-economic inequality, which translates into a higher rate of adolescent mothers in lower income regions and districts. According to specialists[1], the favourable evolution of this indicator is most probably a combination of factors, including greater public understanding of the contraceptive pill, increased public debate, and public health campaign strategies targeting adolescent boys and girls, in effect since 2007. Despite State efforts, deficiencies remain in terms of meeting the needs of young mothers.

Among the new initiatives aimed at supporting options of motherhood and fatherhood is greater access to non-complex infertility treatments. Despite its limited coverage compared to the possible wider demand, these measures are successfully providing treatment to sections of society to which, due to the high costs involved, they were previously inaccessible.

In terms of guaranteeing respectful treatment of women in their exercise of the right to sexual and reproductive health, there are increasing numbers of cases registered by the press relating to the mistreatment of women in labour, forced abortions and sterilizations, unnecessary caesarean sections, and non-consensual procedures, among others. These types of mistreatment have been called "obstetric violence", a term that has still not acquired a specific legal category in Chile. Of particular concern to the INDH on this matter has been the access to healthcare of migrant women and their children, especially those who find themselves in irregular situations.

Regarding abortion and maternal mortality, although the number of deaths per abortion is low, this does not exonerate the State from safeguarding the health of women undergoing unsafe abortions. Women and adolescents practicing clandestine abortions without adequate medical assistance face significant risks, not just death. The prosecution of women having abortions continues to be a practice in the public health system, highlighting the tension between punitive regulations and the law on rights and responsibilities of patients and the specific 2009 ruling on humanized and confidential

[1] http://diario.latercera.com/2014/05/25/01/contenido/tenden cias/16-16531 5-9-embarazo -adolescente-llega-a-su-nivel-mas- bajo-en-15-an os.shtml

treatment of women hospitalized for abortion. In summary, induced abortions carried out under clandestine and unsafe conditions remain a problem, impacting on the integrity and health of women who turn to this measure as a last resort before pregnancy.

Right to work and employment tribunals

In a State governed by the rule of law, such as Chile, not only is recognizing human rights essential, but so too is the establishment of legal and administrative mechanisms which allow for such rights to be effectively protected. Regarding the issue of employment, Law 20.087 – published on March 3rd 2006 – which created the procedure for protecting fundamental rights, represents progress in the field of access to justice for workers. Several years after its enactment, the INDH proposed an analysis of this employment procedure, from a human rights perspective.

The Chapter addresses the main problems and challenges of this legal procedure, which during 2012 accounted for 7.1% of all labour cases filed before the courts. Among the obstacles detected is the use of conciliation as an act of bringing to an end a large number of these legal proceedings. In 2012, 49.3% of these lawsuits filed before the courts were closed by means of conciliation, whereas 26.2% concluded in sentences being passed. In this sense, it is concerning to the INDH that conciliatory means might be being used as a tool to avoid responsibilities regarding the fundamental rights of workers. By means of this approach, in the cases analyzed, the responsibility of the respective employers towards the fundamental rights of their workers was not established.

The INDH considers that the procedure for safeguarding fundamental rights is, generally, a step forward in terms of workers' access to justice regarding the violation of their fundamental employment rights. Nevertheless, challenges remain in this field, linked primarily to changes in public policy and administrative and legal practices, rather than regulatory modifications. In particular, it is worrisome that conciliation, as a means of bringing to an end those procedures concerning the violation of fundamental rights, can be used by employers to avoid their legal employment responsibilities.

TERRITORY AND HUMAN RIGHTS

Rights of indigenous peoples: territory and prior consultation

During 2014, there have once again been acts of violence in southern Chile, including damage to public and private property[2], in the context of the intercultural conflict between the State and members of the Mapuche community. Such acts also include the

[2] For example, the burning of six trucks and a front end loader during the early morning of January 11th 2014, in the Los Notros area, located at kilometre 7 of Highway S40, on the stretch of road linking Carahue and Imperial, in the coastal zone of Araucanía (Radio Bio Bio, 2014). Another act was the fire that took place on the early morning of August 12th 2014 that affected agricultural land belonging to the Institute for Agricultural Research (INIA) in Carillanca, in the rural area located between Cajón and Vilcún, in the Araucanía region (La Segunda, 2014).

violent deaths of José Qintriqueo Huaiquimil[3] and Víctor Manuel Mendoza Collío[4], both members of the Mapuche community, as well as serious injuries caused to uniformed members of police, one of whom faces the possibility of losing the vision in one of his eyes after being hit with buckshot[5]. Events such as these renew the urgency for seeking answers to a conflict that continues to deteriorate and for which no resolution has yet been found.

The State response to these issues has been unsatisfactory, not only for members of the Mapuche community, but also for business people, farmers (small and medium-sized) and other non-indigenous actors, who live with a daily sense of impotence and anxiety regarding a deteriorating inter-ethnic coexistence. As such, it is necessary to begin dialogue with a view to building a new type of relationship with indigenous communities, particularly the Mapuche community. This dialogue will be complicated. Nevertheless, it must not only address the gaps of social inequality, poverty and marginalization experienced by large sections of the indigenous communities, but it must also answer their call for constitutional recognition. International human rights law offers a support framework which might help this initiative.

In this Chapter, the INDH examines one aspect of the relationship of indigenous peoples and the State in relation to territorial rights. Access and guaranteeing the right to the ownership of land and territory, including ancestral areas, as well as guaranteeing the rights to the natural resources found on this land, represent an obligation for the State. This is an underlying issue in the conflict that the State maintains with indigenous peoples. While there is a consensus in terms of the response to the indigenous demand for the restitution of stolen land, no such level of agreement exists concerning the scope of this policy, or of what model to follow. To date, this process has followed a logic that has been guilty of ignoring the special relationship between indigenous peoples and the land, relating to their survival and foundation, for exercising and enjoying other fundamental rights – religious, cultural, those concerning identity, development and self-determination, etc. Current legislative frameworks and institutions responsible for addressing this land policy have shown signs of inefficiency and exhaustion, as well as accusations of corruption. Such aspects highlight the obsolescence of the bodies and the policy pursued thus far.

[3] His death occurred on the Nilpe farm, where a group of approximately 20 members of the Mapuche community, upon claiming ownership of the estate, began to occupy the land. One of the farm workers subsequently ran over one of the protesters, identified as José Mauricio Quintriqeo Huaiquimil (32 years old) with a tractor, causing his death (La Tercera, 2014).

[4] Víctor Mendoza Collío, Lonko (Head) of the Manuel Pillan de Ercilla community, died on October 29th 2014 as a result of a shot fired at his home by an unknown person(s). The victim was the cousin of Jaime Mendoza Collío, who was killed by shots fired from Carabineros five years ago (Radio Universidad de Chile, 2014).

[5] This event took place following events of October 4th 2014 at kilometer 30 of Highway P-70 linking Cañete with Tirúa. The Regional Authority (Intendencia) of Bio Bio filed a complaint to the Cañete Criminal Court regarding offenses of: public disorder; abuse of police personnel carrying out their functions; illegal possession of fire arms; damage and attacks against Law 12.927 on internal State security, dated October 7th 2014. This complaint addresses several injuries received by seven police officers, the most severe of which, initialed LJL, related to buckshot to the face, neck, chest, upper limbs and left eye socket. Cañete Criminal Court. RUC No. 1410032373-8 RIT No. 1269-2014.

Secondly, the Chapter examines the right to prior consultation, with attention paid to how this obligation represents a fundamental tool in guaranteeing the exercise and enjoyment of the rights of indigenous peoples. Accordingly, the State has adopted two instruments for institutionalizing the duty of prior consultation (the Environmental Impact Assessment System Regulation, outlined in Supreme Decree No. 40, of the Ministry of the Environment, and Supreme Decree No. 66, of the Ministry of Social Development, which rules on the Indigenous Consultation Procedure, as set out by ILO Convention No. 169). The INDH, while welcoming State efforts in this field, believes additional work must still be done on reviewing the aforementioned instruments. Such work should also be conducted with the participation and consultation of indigenous peoples.

Right to a pollution-free environment: Sacrifice zones and environmental institutions

The exercise of the right to a pollution-free environment is an ongoing concern for the INDH, particularly with regard to critical situations in certain areas of the country. Pollution is the product of multiple factors and sources: industrial emissions; the use of firewood; means of transportation; the use of agrochemicals (primarily nitrogen-based fertilizers and pesticides), among others. As the INDH has observed[6], the violation of the right to live in a healthy environment can impair other rights. Usually, this means that the right to health is the right most severely affected. This can lead to the individual in question having to miss work, pay for health treatment and even being forced to take early retirement. The same can happen to the right to health for children or young persons in terms of their access to education.

The Chapter, in addition to reviewing relevant international standards and domestic regulation at the constitutional and legislative levels, also conducts a diagnostic test of the situation relating to two "sacrifice zones". Firstly, the "Quintero Bay" sacrifice zone, in the Valparaíso Region, which was declared a pollution-saturated zone in 1992. Despite this declaration, it did not stop the continued installation of dangerous and polluting industries in the area, culminating in the disproportionately large "Ventanas Industrial Park". This activity has had a bearing on the chronic intoxication of children, adolescents and adults, with victims suffering from pollutants being deposited in different internal organs, impacting on their quality of life, and even cutting it short. Secondly, the "Huasco Valley" sacrifice zone, in the Atacama Region. This area should have been declared a pollution-saturated zone in 2005, but it was only declared a "latent" zone in 2012, meaning that increased pollution in the area was subsequently prohibited. However, in January 2014 a project to install a third thermo-electric power plant in the area was approved. As well as polluting the atmosphere, this plant will have a significant impact on marine ecosystems and biodiversity. Finally, the Chapter examines the implementation and operation of the Environmental Courts, as part of the new institutions linked to providing access to

[6] In addition to the chapters on the Right to a pollution-free environment in the 2011 and 2012 Annual Reports, the INDH has devised a Socio-environmental Conflict Map for Chile. The map registers 97 conflicts to have occurred between January 2010 and June 2012. Also available are the reports from the observer missions to Puchuncaví-Quintero-La Greda (September 14th 2011) and to Freirina, in the Atacama Region (May 31st and June 1st 2012).

environmental justice.

LARGE-SCALE, SYSTEMATIC AND INSTITUTIONALIZED HUMAN RIGHTS VIOLATIONS (1973-1990): ACCESS TO PUBLIC INFORMATION, ARCHIVES AND ACCESS TO JUSTICE

The investigations about human rights violations committed during the Chilean dictatorship constitute undeniable progress. However, this does not signify the end of State obligations to adopt the required measures, by any means necessary, for ensuring the clarification of the facts. One of the areas lacking in this field is access to information relating to the large-scale and systematic violations of human rights. Over the course of 2014, this issue remained in the public eye, as archives from Colonia Dignidad were seized under the legal framework of investigation led by the Minister of Jurisdiction at the Santiago Court of Appeals, Jorge Zepeda. They were subsequently submitted to the INDH and other human rights institutions and related organizations, having previously been held in secret for nine years.

The truth commissions have helped to officially document, albeit incompletely, the large-scale, systematic and institutionalized human rights violations committed between September 1973 and March 1990. The Chapter warns that the information collected by the distinct truth commissions is subject to different and contradictory systems of access to information. As such, there is no uniformity within domestic legislation covering this issue. Furthermore, the existence of different treatment before the law could eventually constitute a violation of the principle of equality and non-discrimination.

As well as the limited public access to information relating to the large-scale human rights violations, there is an absence of an archiving policy for preserving and safeguarding the document archive associated to this period, as well as for State-produced documentation in general. The current legal framework regarding general archives is well-founded (dating back to 1929). However, as well as being large in size, it is widely dispersed. This means it does not contribute to generating homogenous practices in the conservation and upkeep of items such as these, which constitute part of the national heritage. The need to develop an archive policy in this area is to ensure transparency and accountability with regard to State action. Furthermore, such a policy would provide fundamental support to the policies of truth that could eventually be useful in guaranteeing access to justice and to avoid impunity.