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Совет по правам человека

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**Поощрение и защита всех прав человека,
гражданских, политических, экономических,
социальных и культурных прав,
включая право на развитие**

Доклад Рабочей группы по насильственным или недобровольным исчезновениям

Дополнение

Миссия в Чили*

Резюме

По приглашению правительства Чили Рабочая группа по насильственным или недобровольным исчезновениям (РГННИ) совершила поездку в страну с 13 по 21 августа 2012 года.

РГННИ признает, что после возвращения страны к демократии были приняты очень важные шаги по установлению истины, обеспечению правосудия, возмещению ущерба и увековечению памяти жертв в связи с крайне серьезными нарушениями прав человека со стороны военной диктатуры. Эти успехи были достигнуты благодаря действиям, инициируемым, поощряемым или осуществляемым в первую очередь семьями погибших или представителями гражданского общества и некоторых государственных структур. РГННИ отмечает, что государство должно повысить свою ответственность и укрепить свою ведущую роль, с тем чтобы сделать эти инициативы частью комплексной, последовательной и постоянной государственной политики.

В Чили сохраняется ряд других серьезных проблем, касающихся, в частности, действия Декрета-закона об амнистии, применения слишком мягких санкций к правонарушителям, медленного хода судебного разбирательства, сохранения системы военной юрисдикции даже применительно к случаям нарушения прав человека и отсутствия национального плана по розыску пропавших без вести лиц.

* Резюме настоящего доклада распространяется на всех официальных языках. Сам доклад, содержащийся в приложении к настоящему резюме, распространяется только на языке представления и на английском языке.

Приложение

[English and Spanish only]

Report of the Working Group on Enforced or Involuntary Disappearances on the mission to Chile (13 to 21 August 2012)

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I. Introduction

1. The United Nations Working Group on Enforced or Involuntary Disappearances visited Chile from 13 to 21 August 2012. The Working Group wishes to thank the Government of Chile for extending an invitation to visit the country, for its positive cooperation before, during and after the mission, and for its openness to dialogue with the members of the Working Group. In addition, the Working Group wishes to thank civil society organizations, in particular associations of relatives of disappeared persons, and all the sectors of society with which it met.

2. The mission was conducted by two members of the Working Group: Ms. Jasminka Dzumhur and Mr. Ariel Dulitzky. The purpose of the visit was to examine the main initiatives and policies of the Chilean State in relation to enforced or involuntary disappearances in the context of past human rights violations, to assess the progress made in investigations and judicial proceedings involving cases of enforced disappearance, and to address issues related to truth, reparation for victims and prevention of enforced disappearance, *inter alia*.

3. The experts met with various authorities, including the Minister of Justice, the Deputy Director General for Multilateral and Global Affairs, and the Director of Human Rights at the Ministry of Foreign Affairs; the Undersecretary of the Interior and the Executive Secretary of the Human Rights Programme of the Ministry of the Interior and Public Security; the National Director of the Civil Registry and Identity Service; the National Director of the Forensic Medical Service; the Undersecretary for Justice; the Undersecretary for Defence; the Legal Aid Agency, Metropolitana Region; the Head of the Human Rights Department of Carabineros (Police); the National Head of the Human Rights Offences Unit of the Investigative Police; the Attorney-General (Public Prosecution Service), and the National Director of the Prison Service. The Working Group also met with the President of the Senate and the Presidents of the Senate's Committee on Human Rights, Nationality and Citizenship, and Committee on the Constitution, Legislation, Justice and Regulations; the President of the State Defence Council; the President of the Supreme Court of Justice, and the coordinating judge on human rights cases.

4. The Working Group also met with the National Human Rights Institute, with associations of relatives of disappeared detainees executed persons and political exiles, and with other civil society organizations and academics. Furthermore, the experts met with the Archbishop of Santiago. The Working Group visited the Memory and Human Rights Museum, Londres 38, Villa Grimaldi, and the Paine memorial.

5. Since its establishment, the Working Group has transmitted 908 cases to the Government of Chile, of which 806 remain outstanding.

II. Right to the truth

6. The military dictatorship committed grave and systematic human rights violations between 1973 and 1990, including enforced disappearances. Since the return to democracy, important institutional processes have been initiated to secure the truth in relation to disappearance, with the establishment, for instance, of truth commissions and other bodies tasked with determining the fate of victims.

7. In 1990, the National Commission on Truth and Reconciliation (known as the "Rettig Commission") was created with the mandate of investigating the situation of persons who had disappeared or had been executed during the military dictatorship. The Commission concluded its work in February 1991. The Working Group acknowledges the

seriousness and professionalism of the Rettig Commission. According to its report, the Commission received 3,550 complaints, of which 2,296 were considered justified; 979 of these were cases of enforced disappearance. During the presentation of the report, the President made an official apology and individual letters were sent to the families.

8. In February 1992, Act No. 19.123 established the National Reparation and Reconciliation Board with a view to coordinating and implementing the reparation measures proposed by the Rettig Commission, and recognizing the status of victims of human rights violations whose cases the Rettig Commission was unable to consider due to lack of evidence or because background information was not submitted. The Board published the Report on the Classification of Victims of Human Rights and Political Violence, in which the status of an additional 899 victims was recognized, and of those, 123 were cases of enforced disappearance.

9. In 1999, the Forum for Dialogue (Mesa de Diálogo) was established with a view to involving the Armed Forces in the national dialogue on human rights violations under the military dictatorship, and to compile information on the fate of disappeared persons. Representatives of military and religious institutions, as well as lawyers and human rights defenders attending in their personal capacity, participated in the Forum for Dialogue. The main associations of relatives of victims did not participate in this Forum, as it operated under Act No. 19.687 of June 2000 whereby its work was deemed confidential in order to protect “those who present information that could help locate disappeared detainees”. Some sources reported that one of the most important achievements of the Forum was the first unequivocal institutional recognition by the Armed Forces of their responsibility for human rights violations, including enforced disappearances. Another notable achievement was that the subsequent transmission of its findings to the courts prompted the Supreme Court to appoint judges to exclusively investigate cases of human rights violations. A serious setback was the fact that the information provided by the Armed Forces as a result of the agreements reached in the Forum for Dialogue was often incomplete or erroneous, which generated mistrust among associations of relatives of victims.

10. In August 2003, the National Commission on Political Prisoners and Torture (the “Valech Commission”) was established. The Valech Commission took testimonies, compiled information and drew up a list of surviving victims who had been deprived of their liberty and tortured for political reasons – situations that were not covered individually by the Rettig Commission. The Valech Commission received testimonies from more than 35,000 people and established the status of 28,459 individuals as victims of political imprisonment and torture in an official report and another additional report published in 2004 and 2005, respectively.

11. Finally, Act No. 20.405 of 10 December 2009 created the National Human Rights Institute and, under a transitional article, the Advisory Commission on the Classification of Disappeared Detainees, Victims of Political Executions and Victims of Political Imprisonment and Torture, known as “Valech II”. This institution had the task of receiving new testimonies and/or new information about possible cases of enforced disappearance, political execution, political imprisonment or torture that had not been recognized by the previous commissions. In its report of August 2011, the Commission recognized 9,795 new cases of survivors of political prison and torture and 8 new cases of enforced disappearance. Sources reported that the Commission had not been consistent in its application of the classification criteria and recognized significantly fewer cases than the Valech I Commission. Questions were also raised regarding the failure to notify new victims or relatives personally and the lack of channels to challenge the classification.

12. In all, the Rettig, Valech I and Valech II Commissions recognized approximately 1,110 people as victims of enforced disappearance. It was suggested, depending on the source, that 7, 9 or 12 incorrectly classified cases should be withdrawn. These important

Commissions represent a major step forward in the search for the truth. The discrepancies in the number of possible incorrect classifications, as well as progress in judicial investigations of cases of enforced disappearance, highlight the need for a centralized database on the subject and an ongoing classification and review process. The legal provisions stipulating the confidentiality of the documents, witness statements, and records of the Valech I and II Commissions represent a step backwards with respect to the Rettig Commission, whose records and statements were available to the judiciary.

A. Human Rights Programme of the Ministry of the Interior

13. The Human Rights Programme (the Programme), created in July 1997 in the Ministry of the Interior, is an important institutional forum that demonstrated a high degree of openness during the visit of the Working Group. The Programme promotes the adoption of measures and contributes to establishing the truth about the fate or whereabouts of the victims of enforced disappearance, as “an inalienable right of the relatives of the victims and of Chilean society” (Act No. 19.123 of 1996). The initial mandate of the Programme was to provide assistance, mainly social, to the relatives of disappeared detainees and victims of political execution whose remains had not been returned to their relatives. This mandate was strengthened following the Forum for Dialogue and, in 2009, the Programme was granted the authority to take legal action in all known cases of disappearance or execution. At the end of 2009, it filed the first complaints, which were declared admissible in 2010, and was a party to the proceedings. This represents the first full and systematic exercise by the State in its duty to prosecute crimes against humanity, because previously the State had limited itself to participating, either through the State Defence Council — in a small number of cases of public importance submitted by relatives — or through the Programme, acting only as an “intervener”. According to the information received since then, the Programme has been a party to 592 cases of human rights violations, of which 219 concerned victims of enforced disappearance, involving a total of 568 victims.

14. Many sources expressed their concern at the changes in the personnel of the Programme since 2010, with the departure of several lawyers with extensive experience. The Programme now has 20 lawyers and 7 legal representatives, which represents a commendable increase in the number of personnel in the Legal Unit. Younger lawyers who have recently joined the Programme have been trained mainly in the new criminal system rather than in the old system which applies to these cases, which makes it hard for them to adapt to the new role assigned to the Programme, but the Working Group recognizes the training of many of the Programme’s new lawyers in international human rights law as a valuable tool for their work. This Programme also faces many obstacles in the implementation of its mandate, including the long period of time that has elapsed since the violations were committed; the destruction of documents and material evidence; the death of witnesses and officials; the failure of the Armed Forces to provide documents; the delays in endorsing new complaints at the Ministry of the Interior; and the delaying tactics of the defence lawyers.

15. The Working Group is particularly concerned about the information provided by some relatives of disappeared individuals and associations of relatives of victims concerning their lack of trust in the Human Rights Programme, and the absence of interaction of this Programme with the main associations of relatives of victims.

B. Search and investigation

16. A very important step in the process of ascertaining the truth is the search for and identification of victims of disappearance, which cannot be the task of the relatives alone

but should be treated as a State obligation requiring serious commitment. The compilation of data in the field, the adoption of specific policies, promotion and awareness-raising activities, the monitoring of exhumation and identification processes, and commemorations and other public events, all help speed up the process of clarifying the fate of the disappeared.

17. The Forensic Medical Service, which operates under the Ministry of Justice, plays an essential role in establishing the identity of disappeared persons and the possible causes of death. The Service maintains excellent cooperation with accredited foreign institutions that provide it with support in the analysis of human remains. The Working Group was very impressed with the work and development of the Service despite difficulties related to, among others, cover-up actions undertaken during the dictatorship such as the “Television Removal Operation”, the poor condition of skeletal remains, fragmentation, problems in locating family donors, and the death of some of the most suitable family members. The Forensic Medical Service has identified 282 disappeared and executed persons through recovered remains. Of these cases, 142 are victims of enforced disappearance. Between July 2007 and July 2012 a total of 122 identifications were reported to the courts and the relatives. Errors in the original identification of some remains found in 1991 in Patio 29 of the General Cemetery, the discovery of which in 2006 led to extensive and constructive reorganization of the Service, illustrates the need for a highly qualified forensic medical service.

18. The Forensic Medical Service has developed a national database with DNA samples of relatives of victims recognized by the different Commissions to ensure that any newly discovered human remains can be correctly and rapidly identified. The Service has taken blood samples from 3,470 families representing 978 victims. Cooperation has been established with the relatives of victims of enforced disappearance. There are still dozens of victims of enforced disappearance for whom there are no matching blood samples from relatives to facilitate identification in the future.

19. The Working Group stresses the importance of continuing the exhumation and identification of victims of enforced disappearance. These activities require a comprehensive State policy, with full institutional, political and financial support from the legislative, executive and judicial branches. Full cooperation and coordination are also essential, both at the intersectoral level and between agencies, as well as between these agencies and the relatives and associations of relatives.

20. According to several sources, some judges lack a victim-based focus that takes into consideration the suffering caused by enforced disappearance, and its impact. The Working Group received information about the productive and positive efforts of the Forensic Medical Service, and the protocols it had developed, to interact with the families of disappeared persons and to ensure that they are firmly committed to the process of identifying remains. These practices must be fully supported and should serve as a model for other State institutions, including the judiciary and the Programme.

21. The Working Group also takes note of the role of the national Civil Registry and Identity Service in intervening when a body is identified and issuing decisions to transfer the property of the person absent due to enforced disappearance, in accordance with Act No. 20.377 of 2009.

C. Compilation and systematization of information

22. In Chile “absent” victims are generally classified into two categories: victims of enforced disappearance and victims of political execution. Within the latter category, a distinction is made between victims according to whether their remains have been returned

or not. This term is used to describe circumstances in which, notwithstanding evidence or general recognition that the person was executed, the body has not been returned to the relatives – a situation which in other countries is considered to constitute enforced disappearance.

23. The information regarding the number of cases registered, investigated and prosecuted, the number of exhumations and identifications, the requests for reparation submitted and granted or rejected, and the progress of judicial proceedings, *inter alia*, is not compiled by only one State institution. The information publicly available on the Programme's website is partial and is not updated. A regularly updated central database is crucial to promote transparency, accuracy and security in relation to enforced disappearances, as well as to understand and monitor State efforts in this area. The information available is not sufficiently disaggregated. For instance, the number of cases of enforced disappearance of women or Mapuche people under investigation may be requested periodically from the Programme but is not permanently monitored and updated. Furthermore, there appears to be no full list of recognized victims available for public access or in any State department.

III. Right to justice

24. During the military dictatorship and in the first years after the return to democracy, there was total impunity in cases of enforced disappearance, even when judicial investigations were conducted. It is only from 1998, when lawsuits against Augusto Pinochet were admitted, that very important developments emerged in the area of justice. Cases were reopened through the application of the Amnesty Decree-Law and trials previously held in military courts were referred to the ordinary courts. Developments in the field of justice were largely due to the fact that Chilean judges began to consistently implement the human rights treaties ratified by the State, which included the main human rights treaties such as the International Convention for the Protection of All Persons from Enforced Disappearance, the Inter-American Convention on Forced Disappearance of Persons, and the Rome Statute of the International Criminal Court.

25. Significant momentum was gained in 2001 when the Supreme Court decided to allocate cases to a group of Court of Appeal judges and specialized judges throughout the country. In 2006, these specialized judges were abolished and the cases were handed over to special inspecting judges, coordinated by a Supreme Court judge. The overall purpose was to expedite and ensure the proper investigation of cases involving serious human rights violations with due regard for their seriousness and complexity. Thirty-two independent judges from the different Courts of Appeal are now assigned to the various human rights cases. However, the Working Group is concerned by the overwhelming caseload borne by the inspecting judges. There is clearly a shortage of judges, which adversely affects the chances of prompt and effective proceedings. Furthermore, some of these judges continue their regular activities in Courts of Appeal and are unable to devote themselves exclusively to these cases.

26. Chile is perhaps the country with the most comprehensive judicial response to serious human rights violations, including enforced disappearances, as proceedings on behalf of at least three quarters of the total number of victims of enforced disappearance have been concluded or are under way: 771 individuals have been tried and convicted for human rights violations since 2000. Since 2002, the Supreme Court has handed down 150 sentences in cases of human rights violations, of which 133 were convictions. Ninety of the sentences involved cases of enforced disappearance affecting 178 victims (78 sentences, in respect of 163 victims, were convictions). According to the Supreme Court, 132 cases of enforced disappearance are currently the subject of judicial proceedings, comprising 93 at

the pretrial stage, 22 at the trial stage, 10 that have been tried, and 7 at other stages of the proceedings. These cases affect 556 victims who are still awaiting a final judgement. The Working Group congratulates the State and Chilean society on the impressive progress made in the field of justice.

27. Nevertheless, it is of concern that only 64 individuals convicted of serious human rights violations are currently serving prison sentences, while 173 officials convicted for serious human rights violations have never been imprisoned, having received light, non-custodial sentences in accordance with Acts Nos. 18.216¹ and 20.603.² Under article 4 of the Declaration on the Protection of All Persons against Enforced Disappearance (the Declaration), the punishment of enforced disappearance shall take into account the seriousness of the offence. This requires that enforced disappearance should be classified as a separate offence with commensurate punishment, and that individuals found guilty of committing enforced disappearances should effectively serve such punishment.

28. In Chile there seems to have been a pattern, since 2007, of imposing non-effective sentences (non-custodial sentences) on the perpetrators of these offences, or custodial sentences mainly on persons already in prison. It appears that this is essentially a result of the application of two principles that are contrary to those underpinning the Declaration. On the one hand, there is the application of the partial lapse of the statute of limitations, a potential mitigating factor provided for in article 103 of the Criminal Code. However, since May this year, the Criminal Chamber of the Supreme Court has not applied the partial lapse of the statute of limitations, which is a very important development. This recent case law, in contrast with that which had prevailed since mid-2007, implicitly or explicitly recognizes that the statute of limitations and the partial lapse of the statute of limitations have the same legal basis and that therefore neither of the two procedures should be applied, a view the Working Group fully supports. The Working Group hopes that these decisions become standard jurisprudence of the Chilean judiciary. The partial lapse of the statute of limitations should not be applied because, it takes into account the passage of time and thus it essentially has the same legal basis as the statute of limitations. If the effect of the partial lapse of statute of limitations is to preclude effective punishment, as required under the Declaration, it should not be applied.

29. The Working Group was also informed of 119 cases in which “irreproachable conduct prior to the commission of the offence” was applied as a mitigating factor, even in cases in which persons have been repeatedly convicted for executions and enforced disappearances. The courts only consider whether, at the time of the commission of each offence, the persons in question had not been convicted of other offences. This is absolutely impossible to verify given the systematic pattern of impunity during the military dictatorship. Considering this as a mitigating circumstance encourages non-custodial sentences. In addition, the application of the partial lapse of the statute of limitations makes it impossible to apply particularly aggravating circumstances such as premeditation.

30. Under article 4.2 of the Declaration, special attention must be paid when considering mitigating circumstances if “persons who, having participated in enforced disappearances, are instrumental in bringing the victims forward alive or in volunteering information which would contribute to clarifying cases of enforced disappearance”. This is enshrined in article 11, paragraph 9 of the Criminal Code which provides for effective cooperation.

31. The Working Group also received worrying information regarding conditions of detention for persons convicted of enforced disappearance. These persons are reportedly not detained in ordinary prisons, or in maximum security prisons by virtue of the

¹ Act No. 18.216, establishing alternatives to the deprivation or restriction of liberty.

² Act No. 20.603, amending Act No. 18.216.

seriousness of the offence committed, but in purpose-built premises in Punta Peuco and Cordillera, both governed by the Prison Regulations.

32. Several of the persons convicted of enforced disappearance have received privileges such as prison benefits apparently allowing them to obtain permission to go out on Sundays or weekends, to be released on parole and/or to receive a reduced sentence before the full completion of the original conviction. Although the Working Group considers that all persons convicted of enforced disappearance have the same rights as the prison population in general, there are three essential elements to bear in mind. Firstly, the granting of any type of benefit must be subject to effective judicial oversight. Secondly, the particular seriousness of the offence must be considered when deciding to grant benefits. Thirdly, there must be a transparent process which provides appropriate public information on the criteria used for the granting of these benefits and the reasons for their award in each specific case. Act No. 20.587, which rules out the involvement of the executive in the granting and/or denial of the benefit of conditional release, is one step in the right direction, albeit insufficient.

33. Progress has been made in delivering justice in spite of the absence of a separate offence of enforced disappearance. This means that in the case of enforced disappearances committed in the context of the military dictatorship, individuals are tried and punished for aggravated kidnapping (article 141 of the Criminal Code), which fails to encompass the totality, complexity and seriousness of the enforced disappearance. Article 6 of Act No. 20.357 on crimes against humanity and genocide and war crimes classifies and punishes the offence of enforced disappearance of persons as part of a widespread or systematic attack against any civilian population. But even today, enforced disappearance is not a criminal offence in Chile outside the context of crimes against humanity.

34. Countless human rights lawyers and civil society organizations, through their tireless efforts, have been the main promoters of court action for enforced disappearance and other serious human rights violations that occurred during the military dictatorship. This work has been significantly strengthened by the appointment of the inspecting judges, many of whom, since 2000, have carried out and continue to carry out an exemplary role in effectively promoting the prosecution of cases of enforced disappearance and other related offences. However, even today, the idea prevails in many sectors of society and the State that the investigation of enforced disappearances is a matter for the individual initiative of relatives and their lawyers rather than being a duty of the State. The Programme's mandate was extended only in 2009 to enable it to take action *proprio motu* on behalf of any victim of disappearance or execution. The Human Rights Office of the Legal Aid Agency in the Metropolitan Region also efficiently represents victims acting as plaintiffs in several cases of enforced disappearance.

35. The Human Rights Brigade of the Investigative Police — as an auxiliary judiciary body — investigates cases of human rights violations, thus playing an exemplary and essential role in the proceedings. The Brigade has accumulated extensive experience in the investigation of these events, by developing practices that take due account of the specificity of the offence of enforced disappearance and the particular sensitivity required in dealing with victims and relatives of disappeared persons. As with the Programme, since 2010, concern has been expressed regarding the transfer of experienced personnel of the Brigade, with the resulting erosion of human capital, specialized knowledge and relationships of trust with relatives, witnesses and informers.

36. According to the information available, judicial proceedings take a long time. Most cases initiated or reopened in 1998 remain unresolved almost 15 years later. Despite the obvious complexity of some of these investigations, in view of the fact that most disappearances occurred more than three decades ago, the State, particularly the judiciary, the Investigative Police and the Programme, need to take urgent action. To be effective, the

investigation of serious and systematic human rights violations must be carried out within a reasonable time frame. The passage of time increases the risk of destruction or loss of evidence as well as the possibility that witnesses, perpetrators and relatives will die. Judges, as leaders and guarantors of the process, must avoid any delaying tactics without impairing the rights of the accused to due process, in accordance with the requirements of article 16.4 of the Declaration. The Working Group received reports that the submission of complaints by the Programme was delayed for failure to receive prompt approval by the Undersecretary of the Interior.

37. The Working Group emphasizes that military courts lack the necessary independence and impartiality to deal with human rights violations, as recognized by the Supreme Court itself. Act No. 20.477 of 2010 amended the jurisdiction of military courts, restricting it to prevent any civilians being subject to military jurisdiction. However, military courts still have jurisdiction over human rights violations against civilians by military officials or Carabineros today. The Working Group was informed that the Ministry of Defence was considering a comprehensive reform of the military justice system.

38. The Working Group received information on the case of a young Mapuche aged 16 years, José Huenante, who disappeared in 2005, investigation of which was assigned to the military justice system because those responsible were reportedly Carabineros. This contravenes article 16.2 of the Declaration and constitutes a major obstacle to efforts to end impunity in this case of enforced disappearance. Cases such as that of José Huenante should be investigated promptly and effectively by the ordinary justice system. Still today, the Chilean Carabineros are subject to military jurisdiction for any unlawful act committed by their members. The Working Group has been informed of a new bill to reform military jurisdiction and hopes that it will ultimately curtail its scope, in accordance with international standards.

39. The cases of 34 victims of enforced disappearance were finally dismissed in their entirety through the application of the Amnesty Decree-Law (DL 2.191, 1978). Although in recent years the courts have not applied the Amnesty Decree-Law to crimes against humanity or war crimes, including enforced disappearance, there is no guarantee that that practice will not be resumed. Article 18.1 of the Declaration states that persons responsible for enforced disappearances shall not benefit from any amnesty. This is consistent with the principle upheld by the Inter-American Court of Human Rights in the case *Almonacid Arellano v. Chile*. The fact that the Amnesty Decree-Law remains in force poses a latent risk that, should there be a shift in the make-up or the opinion of the Supreme Court, it could be applied to its application in the future. Furthermore, it can be interpreted to mean that the executive and the legislature do not have the political support to categorically state that offences of enforced disappearance shall not be eligible for amnesty. A bill to “reinterpret”, not the Amnesty Decree-Law but the articles of the Criminal Code relating to its application (93 and 103), which would have prohibited the application of amnesty in these cases was unfortunately not approved by Congress.

40. The entire national legal framework on enforced disappearance dates back to the military dictatorship or was in force at that time. Modernization of the law and its adjustment in line with the international treaties ratified by Chile have not had any impact on the administration of justice. For example, the provisions of the old Code of Criminal Procedure apply in this context, involving an inquisitorial procedure in which the judge initiates criminal proceedings and carries out the investigation. This procedure also authorizes other persons and bodies to initiate criminal proceedings as private litigants (*querellante particular*).

41. The Working Group welcomed the Government’s assurance that the Armed Forces are fully committed to cooperating with judicial investigations and providing any information it has. However, different sources reported that judicial requests for records

addressed to the various branches of the armed and security forces were answered only partially, with information crucial to the progress of the investigations omitted or denied.

42. According to information received, many of the judges in charge of these cases focus their attention on the most emblematic cases, for various reasons, or on some specifically chosen cases, thereby neglecting a large number of cases. In addition, apart from receiving reports prepared by each judge, the coordinating judge has little to do, providing mainly logistical support. Yet, various sources indicated — and the Supreme Court confirmed — that there was no substantive coordination between all inspecting judges that would allow them to exchange information, or conduct joint or complementary investigations combining different lines of investigation, which would address the systematic nature of serious human rights violations. As a result, many trials have to reproduce exactly the same documentary evidence, testimonies, and expert reports already produced in other trials, or else each investigation has to start from the beginning irrespective of developments in related cases. The Human Rights Brigade of the Investigative Police have developed a practice of investigating violations from a systemic perspective, taking into consideration the *modus operandi* developed during the dictatorship. This practice has been strengthened by the recent creation within the Brigade of an analysis unit and a database which compiles the results of its investigations. The judiciary should do likewise.

43. During the dictatorships in the Southern Cone, the armed and security forces acted in a coordinated and cooperative way, particularly through Operación Condor. Yet there seems to be no close cooperation between the Chilean judiciary and identification institutions and those of other countries in the region either in terms of judicial investigations or in the search for disappeared persons.

IV. Right to reparation

44. Chile is perhaps the country that has granted the highest level of financial reparations to victims of enforced disappearance. The total amount of reparations is reportedly over US\$ 1,500 million. Act No. 19.123 established benefits for relatives of victims recognized by the Rettig Commission and the National Reparation and Reconciliation Board. The relatives of the victims recognized by the Valech II Commission have the same rights. The law establishes a reparations pension for the immediate family; a reparations voucher for victims' children aged over 25; a compensation payment for the immediate family; study grants for victims' children aged up to 35; access to the Compensation and Comprehensive Health-Care and Human Rights Programme, giving access to the public health system for free physical and mental health care; exemption from compulsory military service for victims' children, grandchildren, siblings, nephews and nieces; and counselling and support for relatives in relation to identification and return of the remains of victims. Furthermore, the Compensation and Comprehensive Health-Care and Human Rights Programme covers the costs of funeral ceremonies arranged by relatives of victims once remains are returned, as well as costs of investigations ordered by the judges concerned.

45. The Working Group recognizes the importance of the universal system of pensions for all relatives of disappeared persons, established by Act No. 19.123. The Act guarantees a minimum equal level for all victims. However, this universal system does not allow for the assessment of individual damages or of the suffering of the disappeared person or their relatives. The reparations required by the Declaration must remedy the direct consequences of the enforced disappearance, and that means the particular situation of each person and each case must be considered. From this point of view, the Compensation and Comprehensive Health-Care and Human Rights Programme is extremely important, being

the only component of the reparation mechanism that takes into consideration the individual needs of each beneficiary.

46. The importance of the Compensation and Comprehensive Health-Care and Human Rights Programme must be emphasized. Given that the passage of time affects individual situations and generates new and particular needs among relatives of disappeared persons, clear technical guidance is required for the Programme, as well as an evaluation process and periodic adjustment. Several relatives of disappeared persons reported that the beneficiaries of the Programme faced problems such as a scarcity of medical specialists, particularly in the regions.

47. Regarding claims for civil reparations in court, the State Defence Council and the third Constitutional Chamber of the Supreme Court consider that they should not be addressed since the victims would already have been granted reparations under Act No. 19.123, and in view of the four-year statute of limitations established by article 2332 of the Civil Code. Conversely, the Criminal Chamber of the Supreme Court considers financial reparation from the State to be applicable where it is ordered in conjunction with criminal convictions against military officials in cases of enforced disappearance. In view of the disagreement between the two Chambers, the plenary of the Supreme Court has been requested to resolve this matter. The Working Group considers that the Declaration distinguishes between the civil liability of the State for the enforced disappearance of a person (art. 5) and the compensation to which all victims of enforced disappearance have a right (art. 19). Accordingly, benefits under Act No. 19.123 and civil reparations through the courts must not be considered mutually exclusive. Where appropriate, an exception for partial payment could be established. Furthermore, since the civil liability of the State is incurred by the seriousness of the offence of enforced disappearance, the passage of time should not be made an impediment to civil claims by means of provisions such as the statute of limitations and, in particular, the short time limits provided for in the Civil Code.

48. The Valech II Commission has demonstrated that the number of victims of enforced disappearance can still rise. In the current context, with more than 1,000 ongoing cases, it is plausible that new evidence may attest to the existence of other victims of enforced disappearance. However, in Chile there are no mechanisms in place to confer the status of disappeared person on anyone other than those who have been recognized as victims by the Rettig or Valech II Commissions, which directly affects the right of the relatives to reparation.

V. Preservation of memory

49. In recent years there has been a steady increase in new memorial initiatives and other steps to restore and preserve the memory of serious human rights violations and their victims. The various memorials constitute a collective recognition by society of the violations that have occurred, and demonstrate society's rejection and condemnation of these violations. In this respect, the visit of the President of Chile to the Museum of Memory and Human Rights marked a major milestone for Chilean society.

50. The growing number of memorials being built and maintained for the preservation of historic memory has been the result of civil society initiatives, driven mainly by associations of relatives of victims rather than State policy. The Working Group has been informed, and has been able to confirm in some cases, that certain memorials are not being adequately maintained by the State. However, the State has supported the construction and maintenance of several memorials and the development of cultural works of various kinds. The Programme has had an instrumental role in this regard and has participated in the development and implementation of 72 projects to date. According to the information

provided, the Programme receives requests to support architectural and artistic projects presented by relatives' associations and civil society organizations, sometimes for new buildings, sometimes for restoration of existing memorials. The Working Group did not receive information on the evaluation criteria used by the Programme for construction or restoration projects; neither did it receive information on prioritization criteria or amounts allocated when the funds requested for different projects exceed the available budget.

VI. Coordination

51. Most State officials, NGOs and relatives of victims of enforced disappearance raised the problem of partial or complete lack of coordination between the different institutions. The Working Group heard different opinions on the desirability of creating an Undersecretary for Human Rights as proposed by the current Government. Although the Working Group does not take a position on this initiative, it emphasizes the importance of having an appropriate coordination mechanism with clearly defined responsibilities at every level of Government with a view to coordinating the activities of the different institutions involved in the prevention of disappearance and the search for disappeared persons, as well as in the investigation of cases of enforced disappearance.

VII. National Human Rights Plan of Action

52. The Working Group observed that there is still a lack of coordination and of a comprehensive approach to human rights, including in the area of enforced disappearance. The adoption of a National Human Rights Plan of Action, as recommended by the 1993 World Conference on Human Rights, can contribute to greater promotion and protection of human rights as a national priority.

VIII. Awareness-raising, human rights education and other preventive measures

53. The military dictatorship committed very serious human rights violations. In order to avoid the recurrence of such events in future, it is essential to effectively raise public awareness of what happened and to properly educate future generations about the past and about human rights. In this connection, the Working Group welcomed reports that the training courses for the Armed Forces and Carabineros include human rights and international humanitarian law. The Working Group stresses the importance of ensuring that training for military personnel and Carabineros, as well as medical personnel, State officials and other persons involved in the custody and treatment of persons deprived of liberty, includes the necessary instruction on relevant provisions of the Declaration with the specific purpose of preventing them becoming involved in enforced disappearances. Training should place emphasis on the importance of preventing and investigating enforced disappearance and recognizing the urgent need to resolve cases of enforced disappearance.

54. The Working Group was also informed that courses in Chilean military history did not include references to the serious violations committed by members of the Armed Forces during the dictatorship. This is essential to ensure that future officers and non-commissioned officers in the security forces are aware of the reprehensible and unjustifiable nature of these acts.

55. Furthermore, the information received suggests that there are still sectors of Chilean society that are unaware of the seriousness of the violations committed during the dictatorship, or try to justify them. More than 20 years after the return to democracy there is

a new generation of Chileans who were born when the dictatorship was ending or under democracy. Therefore, State efforts must be strengthened to ensure that Chilean society always remembers, reflects upon and condemns the serious human rights violations committed by the dictatorship.

56. As an important preventive measure in relation to the custody and treatment of persons deprived of liberty, a national preventive mechanism must promptly be established in accordance with the obligations set forth in the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

57. Under articles 10, 11 and 12 of the Declaration, deprivation of liberty must be carried out in strict compliance with national and international human rights standards in order to prevent enforced disappearances. The Working Group welcomed the information provided by the Carabineros concerning the existence of procedural protocols for the detention of persons, particularly in the cases of mass demonstrations.

58. The existing cooperation between the Carabineros and the Human Rights Institute is also noteworthy, as is the memorandum of understanding between the Carabineros and the International Committee of the Red Cross (ICRC), signed on 18 January 2012 with a view to “updating, developing and promoting the integration of international human rights standards and applicable humanitarian principles in police work”. In the context of the recent mass movements of students and Mapuche indigenous people, the Working Group was informed that police procedures do not adequately distinguish between those who protest peacefully and those who engage in acts of violence. In fact, detention checks by Public Prosecution Service prosecutors are carried out on a very small proportion of individuals arrested at these demonstrations and very few of the detainees are effectively subjected to investigation and judicial proceedings. It was also noted that many police officers did not display their identification clearly and consistently, or refused to identify themselves during operations. The Working Group was informed that, in the event of collective detentions at public demonstrations, there were no standardized procedures and existing procedures were slow and disorganized. As a result, persons were kept in custody for many hours and were eventually released without charge and without having received any information on where or why they were being held. Information was also received that lawyers who did not belong to the Institute faced difficulties in attempting to interview persons arrested at public demonstrations and in exercising the right to a defence. There is reportedly no right to immediate defence or to information on the situation of detainees, and records are reportedly not presented to relatives with the necessary promptness.

IX. National Human Rights Institute

59. The National Human Rights Institute was established on 10 December 2009 and started work on 20 July 2010. The Institute plays an important and recognized role in the promotion and protection of human rights in relation to enforced disappearances. For example, the Working Group highlights the Institute’s recommendation to Congress regarding the ratification of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; its responsibility as custodian of the archives of the various truth commissions; and the inclusion of a chapter on serious human rights violations in its annual report. The Working Group also recognizes as a positive development the application for accreditation of the Institute under the Paris Principles. It also notes the initiatives to cooperate with and monitor the activities of the Carabineros.

X. Enforced disappearances and the ethnic and gender perspective

60. Women were victims of enforced disappearance in Chile and were and remain at the forefront of the fight against this horrific practice. The Working Group was informed that activities related to enforced disappearance did not give due consideration to the gender perspective and that no particular attention was paid to the needs of women victims of enforced disappearances.

61. The Rettig Report identified among the victims in the Araucanía region a group from the Mapuche community. It noted “the extreme harshness with which the Mapuche people and their families were treated and the difficulties arising, particularly in rural areas, from having to live — even to this day, in some cases — in the same locality as the officials who caused the deaths of their loved ones”. “As a result of fear, poverty or desperation, only a small percentage of these families brought cases, where appropriate, before the courts, or submitted complaints to human rights organizations.”³ Although the Report referred to individual cases of victims belonging to the Mapuche community, especially in the Lautaro area in 1974, it did not specifically focus on this subject.

62. State initiatives do not place emphasis on ethnic or gender issues. No specific method of gathering background information and gaining insight into the particular experiences of women or indigenous peoples has been identified. No efforts have been made to consider the implications of repression from that perspective either, nor have policies been designed for targeted reparations.

XI. Final comments

63. The Working Group appreciates the substantive information provided to it by the various authorities, civil society organizations, and associations of relatives and victims with a view to improving understanding of the issue of enforced disappearance in Chile.

64. Since the return to democracy very important steps have been taken to guarantee truth, justice, reparation, and memory in the context of the very serious human rights violations committed by the military dictatorship. The efforts of the various truth commissions have enormously increased knowledge of these violations. The financial reparations granted have reached amounts that would be difficult to equal in other parts of the world. Judicial investigations and convictions are important milestones in combating impunity for enforced disappearances.

65. These developments have been achieved through the initiatives undertaken, promoted and carried out primarily by relatives of the victims or by civil society, as well as some State sectors. The State should show greater responsibility and leadership by ensuring that these initiatives are part of a comprehensive, coherent and consistent State policy. This would clearly reinforce the repudiation of disappearances and strengthen the foundations of a State that would never again allow serious human rights violations to be committed in its name.

66. However, important challenges remain in Chile, such as the fact that the Amnesty Decree-Law remains in force, the leniency of penalties for perpetrators, the slow progress of judicial proceedings, the continued use of military courts, even for cases of human rights violations, and the absence of a national plan to search for disappeared persons, inter alia.

³ *Report of the National Commission on Truth and Reconciliation (Rettig report)*, vol. 1, part I, p. 361. Available at www.ddhh.gov.cl/ddhh_rettig.html.

67. The Working Group reiterates its solidarity with victims of enforced disappearance and their families. Their constant suffering is tangible evidence that enforced disappearance is a continuing crime and a permanent violation of human rights until the fate and whereabouts of the victim are clarified. The Working Group also recognizes the work of the numerous human rights defenders, NGOs, lawyers, judges and all those who work tirelessly, even in adverse conditions, to bring those responsible to justice and to preserve the memory of victims of this terrible practice. The Working Group therefore calls on the State to continue to support the work of these organizations.

68. The Working Group would welcome the opportunity to continue its constructive dialogue with the Chilean State and offers its assistance in fully implementing the Declaration.

XII. Recommendations

69. Based on the above considerations, the Working Group recommends that the Chilean State:

General

- Ratify as soon as possible the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity;
- Withdraw the declaration made upon ratifying the Optional Protocol to the International Covenant on Civil and Political Rights;
- Define the offence of enforced disappearance as an ordinary offence in the Criminal Code and not exclusively as an international crime. The definition of enforced disappearance in criminal legislation should be consistent with that established in the Declaration and other relevant international instruments;
- Render null and void the Amnesty Decree-Law as soon as possible in relation to all cases of enforced disappearance and other serious human rights violations committed during the dictatorship;
- Establish an appropriate coordination mechanism with clearly defined responsibilities at every level of Government with a view to coordinating the activities of the different institutions involved in the prevention of disappearance and the search for disappeared persons, as well as in the investigation of cases of enforced disappearance;

Recognition of victims

- On behalf of the President of the Republic, send individual letters to the relatives of disappeared persons and executed persons recognized by the Valech II Commission as well as those recognized as victims by the previous Commissions, as a gesture of reparation;
- Establish a permanent classification process allowing for victims of enforced disappearance to be recognized as such, and extend the corresponding right to reparation to their relatives;

Right to the truth

- Review the provisions regulating the functioning of the Valech I and II Commissions so that the documentation compiled can be accessed by the judiciary;

- Immediately provide the Forensic Medical Service with the necessary support, bearing in mind time limits and other obstacles in the process of identification of disappeared persons;
- Define in law the role of relatives as guarantors of the process of identification of disappeared persons in order to promote trust and acceptance of results;
- Relaunch the Forensic Medical Service campaign to collect samples from the families of all disappeared persons;
- Adopt a common judicial protocol on the way in which judges must approach the process of search, exhumation and identification of disappeared persons, and on the way in which the participation and rights of relatives are communicated and guaranteed;
- Provide effective and comprehensive support to relatives and associations of relatives of victims of enforced disappearance;
- Adopt a national plan to search for disappeared persons which promotes and coordinates the activities of the various State bodies with responsibility in this matter;
- Create a central database which compiles all information on enforced disappearances, containing appropriate details regarding the circumstances of disappearance, when it was recognized, the status of the judicial investigation, reparations, and identification, inter alia. These statistical data should be disaggregated into all relevant categories and should be permanently updated. The database must have proper mechanisms for filing, storage, maintenance, availability and accessibility;

Justice

- Strengthen the Human Rights Programme by consolidating a work team with strong professional skills and relevant experience;
- Authorize the Programme to take legal action without requiring the approval of the Undersecretary of the Interior;
- On behalf of the Supreme Court, appoint additional inspecting judges or reinstate specialized judges for human rights cases. Give the inspecting judges more staff. For this purpose, the State should allocate additional funds to the judiciary;
- Continue and increase efforts until full justice is achieved in cases of enforced disappearance;
- For the judiciary, the Investigative Police and the Human Rights Programme, in particular, proceed with due urgency with the investigation, prosecution and trial of cases of enforced disappearance; and for judges especially, as leaders and guarantors of the process, avoid all delaying tactics without impairing the rights of the accused to due process;
- Impose effective penalties in cases of disappearance, in accordance with the seriousness of the crime;
- When applying mitigating factors, take account of their impact on the rights to truth and justice, and of the seriousness of the crime;
- Refrain from applying the statute of limitations or partial statute of limitations;
- Urge the Supreme Court to ensure that the coordinating judge in human rights cases provides not only administrative coordination, but also promotes and facilitates the

exchange of information between judges to speed up the investigative process and takes account of the fact that enforced disappearances were part of a systematic plan;

- Coordinate the investigation of cases of enforced disappearance and the identification of bodies with other countries with which Chilean security forces used to coordinate and cooperate, particularly in the context of Operación Condor;
- Promote the creation of a multinational database which complies with international protocols and standards, in particular the Universal Declaration on the Human Genome and Human Rights, and the International Declaration on Human Genetic Data;
- Strengthen the Human Rights Programme of the Ministry of the Interior, the Human Rights Brigade of the Investigative Police, and the Human Rights Office of the Legal Aid Agency — this has to be set up in other cities and regions — in order to offer appropriate judicial and social support to relatives of victims and to fulfil the State's obligation to investigate enforced disappearances seriously and promptly, being a matter that is not one exclusively for the judiciary or for individual initiative;
- Establish a mechanism that allows for the appropriate review of benefits granted within the prison system to persons sentenced for enforced disappearance: due judicial oversight of benefits of all kinds; due regard for the particularly serious nature of the crime; guarantees of a transparent process and appropriate public information concerning the criteria used in granting these benefits and the particular reasons for their award in each case;
- Investigate in the ordinary courts the enforced disappearance of the young Mapuche José Huenante;
- Revise and amend domestic legislation so that the military jurisdiction, where it exists, is not competent to try cases of enforced disappearance or other human rights violations. In particular, the Carabineros of Chile must be subject to ordinary jurisdiction in the trial of any unlawful act committed by its members;
- For the Armed Forces, present all information available that may help clarify enforced disappearances or the identification of those responsible. In the event that the information is not available because it has been destroyed, serious and continuous efforts should be made to reconstruct it;

Reparations

- Strengthen the Compensation and Comprehensive Health-Care and Human Rights Programme through technical guidance and a process of periodic evaluation and adjustment which takes into consideration the impact of the passage of time on individual situations and the new and particular needs arising among relatives of disappeared persons;
- Take account of the fact that reparations under Act No. 19.123 and civil reparations in judicial proceedings are not mutually exclusive. Where appropriate, an exception for partial payment could be established;
- Do not apply the statute of limitations and, in particular, the short time limits under the Civil Code in civil claims for cases of enforced disappearance;

National Human Rights Institute

- Reinforce the independence, resources and capacity of the National Human Rights Institute, in accordance with the Paris Principles;

- Adopt measures to enhance the Institute's visibility and boost its efficiency;

Gender and ethnic perspective

- Adopt a gender and ethnic perspective and promote gender equality, as essential elements in all legislative, political and investigative activities and in the allocation of resources and in the planning, implementation and monitoring of programmes on enforced disappearance;

Preventive measures

- Include information on human rights violations committed during the military dictatorship, including enforced disappearance, in programmes on the history of the military and the police;
- Develop special information and awareness-raising campaigns on the extent of enforced disappearance committed during the dictatorship, and on the need to prevent it from ever recurring;
- Include in the training of military personnel and Carabineros, as well as of medical personnel, State officials and other individuals involved in the custody or treatment of persons deprived of their liberty, the necessary education and information on the relevant provisions of the Declaration, with the specific purpose of preventing them becoming involved in enforced disappearances, emphasizing the importance of the prevention and investigation of enforced disappearance, and promoting the need to urgently resolve cases of enforced disappearance;
- Regularly review the Carabineros' operational protocols for mass demonstrations and assess their practical application;
- Immediately register all cases of deprivation of liberty during mass demonstration. In the case of minors, families must be notified as soon as possible;
- Seriously investigate and appropriately punish any abuse committed by Carabineros during mass demonstration;
- Adopt a National Human Rights Plan of Action;

Memory

- Develop and distribute, through the Human Rights Programme, a clear protocol for approval of projects on memory and historical sites;
- Strengthen efforts to preserve memory, through a mechanism ensuring that the State is constantly aware of the state of preservation of each memorial and memorial site and assigns budgetary resources for their effective preservation;
- Ensure that Government ministers and the heads of the three Armed Forces visit museums and other memorial sites to demonstrate the State's institutional commitment to memory and human rights.

Assistance and cooperation

70. The Working Group encourages the State to seek the support of the Regional Office of the High Commissioner for Human Rights in Santiago in implementing the recommendations contained in this report.

71. The Working Group invites the Government of Chile, within 90 days from the date of publication of this report, to submit a timetable showing the steps it will take in order to implement the recommendations of the Working Group, the dates by which each measure

will be taken and the dates by which it intends to complete the implementation of the recommendations.
