



CASA MEMORIA
José Domingo Cañas
FUNDACIÓN 1367



centro de estudios de la mujer



Observatorio Derechos
Humanos y Legislación



COMMENTS AND CONTRIBUTIONS OF CIVIL SOCIETY FOR THE LIST OF QUESTIONS RELATED TO THE STATE EXAMINATION OF CHILE AT SESSION Nº 15 OF THE COMMITTEE AGAINST FORCED DISAPPEARANCE

(August, 2018)

Corporación Humanas, Centro Regional de Derechos Humanos y Justicia de Género
Casa Memoria José Domingo Cañas, Fundación 1367
Centro de Estudios de la Mujer, CEM
Corporación Circulo Emancipador de Mujeres y Niñas con Discapacidad de Chile, CIMUNIDIS
Observatorio Contra el Acoso Callejero, OCAC
Observatorio de Derechos Humanos y Legislación
Fundación Instituto de la Mujer
Corporación Opción
Movimiento Acción Migrante, MAM
Observatorio de Violencia Institucional en Chile - OVIC

Article 1: legal and administrative measures that establish the prohibition of being subjected to enforced disappearance

We valued the admission of a parliamentary initiative in 2014 to criminalize the crime of enforced disappearance in the Chilean Penal Code as a common crime, a project in its second constitutional stage since August 2017. However, the Congress has reported no movement since then.

On the other hand, Law No. 18.314, which Determines Terrorist Behaviors and Establishes its Penalties, has been criticized by many national and international non-governmental organizations for not complying with international human rights standards in its definition, for undermining due process and for acts of torture in its application.

- We ask the Committee to consult the State of Chile on the status of the legal project that typifies enforced disappearance as a common crime, its priority and approximated deadline for its adoption.

- We also request the Committee to consult the Chilean State on the reform to the Law 18.314 and its compliance with international human rights standards, in particular regarding the exclusion of crimes against property, limits to preventive detention and the use of protected witnesses without counterbalance for interrogation by de defense, and its use as main proof for terrorist conviction

Article 3: Measures taken to investigate and sanction enforced disappearance

In the democratic period, three cases of enforced disappearance have been verified, currently in process before the courts of justice. These are the cases of José Vergara Morales, José Huenante and Hugo Arispe Carvajal. None of them with sentence despite the time of the disappearance.

On the other hand, the State of Chile declares that in 2016 an Inter-Institutional Mechanism was created to assist the judiciary in the search of victims of forced disappearance between 1973-1989. It does not inform, however, concrete results or advances.

Finally, the State of Chile declares that the Supreme Court appointed, in 2001, for the first time, nine judges with exclusive dedication for the investigation of 114 cases of enforced disappearance perpetrated during the dictatorship. It indicates also that in 2002 and in 2004 the designations were increased and that in 2009, a Supreme Court minister was appointed to coordinate said investigations. Currently, the Supreme Court has appointed 32 Ministers of Courts of Appeals to substantiate 1,269 cases of forced disappearance and arbitrary executions. However, it does not inform on the procedural status of these investigations, particularly considering that they are being investigated under the old criminal procedure, which is much slower and more complex.

- We ask the Committee to consult the State of Chile on the procedural status of the three cases of enforced disappearance reported and currently under investigation.

- **We ask the Committee to consult the State of Chile for the concrete actions taken and the results of the Inter-institutional Mechanism to assist the judiciary in the search of victims of forced disappearance.**
- **We ask the Committee to consult the State of Chile for actualized information on the number of cases brought to justice, type of crime, number of sentences and within these, number of convictions regarding forced disappearance perpetrated under the dictatorship (1973-1989).**

Article 6: criminal liability and due obedience

The State of Chile recognizes that regarding military justice norms do not comply with international standards. This, despite the sentence of the IACHR that condemns the State in the Palamara Iribarne case. The IACHR established that military jurisdiction should only applied to crimes committed by the military, and when they affect military matters. Although currently military jurisdiction no longer applies to situations involving a civilian as a victim or as a victimizer, no progress has been made in reforming the Justice Military Code, particularly regarding the reformulation of the organizational and procedural structure, and military crimes and due process.

Regarding the need to count with internal regulations for Armed Forces and Police, Chile informs that the Investigative Police does not count among its procedures with one that allows to legitimately opposing an order to commit acts of enforced disappearance. In effect, although the disciplinary regulations of the personnel of Investigative Police contains a specific title referring to the disciplinary and due obedience regime which allows the official to represent an order considered illegal, if there is insistence by the superior, he must comply.

- **We ask the Committee to consult the State on the progress made in the area of military justice reforms, particularly in relation to the inclusion of due process norms and the definition of military crimes. We also request the Committee to consult on the progress made by the Investigative Police in order to introduce specific rules on due obedience for forced disappearance in its regulations.**

Article 7: sanction and proportionality of the penalty

As of 2013, the Courts of Appeals have been granting penitentiary benefits to persons convicted of crimes against humanity, applying the same requirements as those deprived of liberty for common crimes. This has had an impact on the families of the victims and society as a whole, since their sentences have already been reduced by the application of mitigating measures through the so called improper statute of limitations established in Article 103 of the Criminal Code. The consequence of its application strongly affects the proportionality of the punishment regarding the seriousness of the committed crime. In effect, the Chilean Penal Code contemplates the figure of the "improper statute of limitations" or "gradual prescription" conferring to the judge the discretionary power to attenuate the penalty, considering the time passed since the perpetration of the crime. This, despite the Supreme Courts almost consolidated jurisprudence that consider crimes

against human rights occurred during the civil-military dictatorship not subject to a statute of limitations.

- We ask the Committee to consult the State of Chile on the status of the bill presented in 2017 to the Congress that establishes parole and other penitentiary benefits for persons condemned for crimes against humanity that includes a higher threshold or requirements these benefits.

- We ask the Committee to consult the State of Chile on action taken to exclude gradual prescription or "improper statute of limitations" for these crimes, the number of persons convicted of crimes against humanity to which it has been applied, considering it has been declared by the WGEID as contrary to international human rights standards.

Article 8: limitation period for the crime of enforced disappearance

The State's reports that the Judiciary does not apply prescription to cases of forced disappearance not being an obstacle for the prosecution of these crimes. Indeed the last time the Judicial Power applied the criterion of prescription in this type of crimes was in 2008 in the Jacqueline Binfa Contreras case. However, no legal reform has been presented to establish explicitly the non-applicability of prescription for enforced disappearance. The State reports that there are two bills on the subject (2014), but that they have not had any movement. Either has the "Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity" ratified in 1968.

- We ask the Committee to consult the State of Chile on the progress of the bill, presented in 2014 to the Congress, that bans the application of prescription to crimes against humanity, war crimes and genocide, as well as, the bill that adapts national norms to international human rights standards on amnesty, pardon and prescription of criminal action and punishment regarding the crime of genocide, crimes against humanity and war crimes.

- We ask the Committee to consult the State of Chile on the progress of the bill that ratifies the Convention on the "Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity", of the United Nations, of 1968.

Article 10: obligation to notify another State for the detention of a national

The State of Chile reports the existence of the Inter-institutional Mechanism of Access to Justice for Migrants, created in 2014, and indicates that one of its purposes is to generate a series of instruments to improve the access of foreigners to the criminal justice system. Despite the fact that two products of the Bureau are mentioned, the Government does not inform on the results other than those mentioned, which only refer to issues of detention or deprivation of liberty.

- The Committee is asked to consult the State of Chile on all the activities, products or measures adopted or prepared by the Inter-institutional Mechanism of Access to Justice for Migrants, as well as its current situation.

Article 12: mechanisms to clarify the crime of enforced disappearance and guarantees of access to justice

The State of Chile states in its report that until 2016, the Human Rights Program Unit under the Under Secretary of Human Rights intervened in 582 processes that represent 999 victims of enforced disappearance. However, it also points out that the State, in relation to 55 cases, has not taken action to file complaints and represent victims families, despite the fact that more than two decades have passed.

- **We ask the Committee to consult the State if the number of cases in which it has not taken legal action has decreased during 2018 and how many of them have been presented to the courts for its investigation and punishment. We also would like the Committee to ask the Chilean State to give a list of this cases.**

Article 13: extradition for the commission of the crime of forced disappearance

The State of Chile reports on specific cases who's extradition is requested by the Supreme Court regarding forced disappearance, in particular the cases of Adriana Elcira Rivas González whose extradition was requested from the Republic of Australia (Role CS 8915 - 2013) for the kidnappings of Fernando Alfredo Navarro Allendes, Lincoyán Yalu Berríos Cataldo, Horacio Cepeda Marinkovic, Juan Fernando Ortiz Letelier, Héctor Véliz Ramírez and Reinalda del Carmen Pereira Plaza as author of the same and Armando Fernandez Larios United States of America for its responsibility as the author of the qualified kidnapping of David Silberman Gurovich approved by the CS on September 27, 2006. It also informs that as at the closing date of this report they have not been delivered by the authorities of the required countries.

- **We ask the Committee to consult the State of Chile for the progress made in the extradition process of said persons.**

Article 17: prohibition of arbitrary detention

The Law N° 18.314 or Anti-Terrorist Act authorizes a period up to ten days of detention before bringing the detainee in front of a judge, prior legal resolution at requirement of the prosecutor. However, considering the disproportionate application of this law in relation to Mapuche land claims and political rights demands, arbitrary detention of peaceful protesters frequently result in preventive detention for long periods for mapuche and human rights defenders, incompatible with international human rights obligations.

On the other hand, the State reports that on May 30, 2017, the Government presented before the National Congress the bill designating the NHRI as the National Mechanism for the Prevention of Torture and other cruel, inhuman or degrading treatment or punishment (MNPT), BOL No. 11.245-17, currently in first constitutional proceeding.

- **We ask the Committee to require the State for statistical information on preventive prisons by region, and in the case of Araucanía, to provide information regarding the results of trials in relation to the persons to whom preventive detention was applied during 2014-2018**

- Likewise, we request the Committee to consult the State of Chile on the priority that the bill that creates the National Mechanism for the Prevention of Torture has, considering the State committed to it in 2009

Article 18: right to access to information

Regarding access to information on enforced disappearances occurred in the period 1973-1990, the State of Chile reports that it presented a bill (Bulletin No. 10.883-2017) that modifies Law No. 19.992 with the purpose of allowing the courts of justice access to the testimonies and other relevant background documents, compiled by the Truth Commission on Political Prison and Torture (Valech I), in order to allow judicial investigations. According to the current law, these testimonies and relevant documents are secret for a period of 50 years, including the judiciary. The bill is currently in its second constitutional process, approved by the Human Rights Commission in the Senate. However, no movement has been reported since march 2018.

On the other hand, on March 20, 2015, the State reports the presentation of a bill (Bol. 9958-17) to changes the special regime the Ministry of Defense, Armed Forces and Public Order and Public Security, regarding its documental information. The legal project aims to avoid, as has happened in the past, that these institutions can evade the delivery of information in relation to victims of forced disappearance during the period between 1973 and 1989. However, no movement has been reported since its entry to National Congress.

Finally and in relation to information referring to victims of forced disappearance during the period 1973-1989, it should be noted that this information is difficult to find and incomplete. The State does not report if statistics data are available for citizens, and if the information has been updated regularly. In fact, although the Human Rights Program Unit is the entity in charge to legally represent families of victims of forced disappearance, it does not have updated information regarding the number of cases, number of victims and families still not reach by the Program in order to fulfill its legal mandate of legal representation, number of cases whose term has been the partial or definitive dismissal, number of completed cases in which “improper statute of limitations” has been applied, number of convictions, list of convicted persons and their crimes, among other relevant information. To this we must add that the information that can be found is not disaggregated by sex, ethnicity and age.

- We ask the Committee to consult the State on the current status of the process, priorities and deadlines for the approval of the bill that lifts the secret of 50 years to access relevant information that allows the courts of justice to investigate properly torture, perpetrated during Pinochet regime, in the context of crimes against humanity.

- Likewise, we request the Committee to consult the State on the status of the bill that derogates the special regime that Armed Forces and Police have regarding the treatment and elimination of records and archives related to, among others, victims of forced disappearance.

- Finally, we ask the Committee to consult the State on information regarding cases of enforced disappearance and to report on the procedures and measures taken to access updated and desegregated statistical information on cases of forced disappearance.

Article 23: action by officials and persons involved in the investigation and punishment of the crime of enforced disappearance

As indicated by the State of Chile at the time the report was presented, it does not have specific education programs on the prevention of enforced disappearances in civilian and military institutions. However, It refers to the gradual incorporation of human rights standards into the curricula as part of its training. It does not refer to whether specific training for the prevention of enforced disappearance has been incorporated or implemented, the extend of this trainings and the number if any, of participants.

- We ask the Committee to consult the State if specific contents for the prevention of enforced disappearance have been included in general and specific human rights training courses for Armed Forces and Order and Security Police personnel, or if it is within the actions to be implemented and the deadlines for that to be concrete.

Article 24: rights of victims

The State reports the efforts it has made to find the truth of the location of forced disappearance victims between 1973-1989, and the reparation measures adopted for their families (1973-1989). However, there is nothing regarding access to the benefits established in the Law N ° 19.123, Law N ° 19.980, Law N ° 18.469 of people who despite not being accredited by the Truth Commission, where consider victims by tribunals through a sentence. Nor does the State inform and explain why forced disappearance victim`s families receive a higher pension as public policy if compared to torture victims, despite the statement of the Regional Office of the High Commissioner of Human Rights, on this matter.

Likewise, in relation to the creation of a Declaration of Absence for Victims of Forced Disappearance by the Civil Service Office, and considering that this service does not include among its functions to keep a record, the State indicates that it presented a bill (Bulletin 9593 -17) establishing the duty of State organs to create a register of enforced disappearance victims contained in the final report of the Truth Commissions, creating a public registry to that effect. However, no movement has been reported since its presentation.

- We ask the Committee to consult the State on the status of the bill that allows the courts of justice to access the testimonies and other relevant documents of the National Commission of Political Prison and Torture, currently under the secret of 50 years. We also request, through the Committee that the State explains the discriminatory treatment victims of torture receive regarding force disappearance victims on pension given as a public policy of reparation. Finally, we suggest that the Committee consult the State regarding the priority it has

given to the bill that creates a Public Registry of victims of enforced disappearance and when could it be approved.