

# CHILE

## PROGRESS STALLED Setbacks in Freedom of Expression Reform

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## I. SUMMARY AND RECOMMENDATIONS

In February 2001, six individuals, three of them former political prisoners under the military dictatorship, three of them journalists working for a Santiago newspaper, were accused of insulting public authorities, a crime under Chile's notorious State Security Law. They faced trial and possible imprisonment for exercising their right to free expression. This sudden crop of new State Security Law prosecutions has once more thrown into sharp relief the Chilean state's long-standing failings in the area of freedom of speech.

Since Human Rights Watch's report *The Limits of Tolerance: Freedom of Expression and the Public Debate in Chile* was published in November 1998, Chile has publicly recognized the need to make extensive legal reforms to protect freedom of expression. Progress toward these reforms, however, has been dismally slow. Indeed, most of the reforms described in our 1998 report as pending in Congress still await enactment more than two years later.

The most glaring example of the sluggish pace of reform is the bill to regulate the press and to protect the rights of journalists (hereinafter referred to as the "Press Law"), which has languished in Congress for a full eight years. The bill was expected to finally become law during the first year of the government of President Ricardo Lagos, who entered office in March 2000, but such hopes were dashed when legislators failed to agree on the package before Congress began its summer recess in February 2001.

The draft Press Law includes long-overdue provisions to eliminate the crime of contempt of authority (*desacato*) from the State Security Law, and to strip judges of their powers under that law to confiscate publications. It was not until April 1999 (nine years after Chile returned to democracy) that the administration of Lagos' predecessor, Eduardo Frei Ruiz-Tagle, first announced legislation to repeal these sections of the State Security Law, which clearly violate binding international norms on freedom of expression. Since then, twelve journalists, editors, politicians, and ordinary citizens have been convicted, charged, or face trial under the State Security Law for exercising their right to freedom of expression.

A consensus has emerged, albeit painfully slowly, on the need to do away with these antiquated provisions, which make criticism of public authorities a public order offense subject to especially severe penalties. While this is an advance on earlier years, the political will needed to repeal them has been lacking. Moreover, even assuming that these undemocratic laws are soon rescinded, the principle on which they depend — that authorities of state deserve special protection against "unreasonable" criticism — has still not been seriously challenged by Chile's lawmakers. Indeed, during the congressional debate on the Press Law, a government effort to repeal the contempt of authority provisions of the ordinary criminal code (which are very similar in wording to the questioned articles of the State Security Law) was decisively rejected. Some members of Congress, faced with the prospect of these provisions' repeal, even sought to introduce a measure that would make criticism of government authorities an especially grave form of libel.

Proposals like this run counter to international freedom of expression principles now well established in democracies across the world. Indeed, international human rights law holds that the limits of permissible criticism must be wider with regard to a person in public office than with regard to a private citizen, because of the overriding need in a democracy for public authorities to be held accountable to public opinion. Tolerance of criticism, even ill-founded and unfair criticism, is one of the obligations of public office in a democracy. Chile's politicians have shown little sign that they appreciate the overriding importance of this principle. To implement it, *all* crimes of contempt of authority and criminal defamation protecting government officials must be eliminated from the legal system. Until that is achieved, the repeal of sections of the State Security Law will only be a partial, even if important, advance.

Other reforms in the proposed Press Law address additional concerns that Human Rights Watch highlighted in its 1998 report. They include an end to judicial bans on press coverage of criminal investigations, known in Chile as reporting bans (*prohibición de informar*). They also include the transfer to civilian courts of all cases of journalists prosecuted for offenses connected with their trade (some crimes of opinion, such as "sedition," are still dealt with by military courts). Under the new law, fines would replace prison sentences for journalists convicted of criminal libel.

Journalists (but only those with an officially recognized professional title) would enjoy an exemption from the obligation to reveal the identity of their sources to the courts. All of these long-overdue reforms still await approval in Congress.

In other areas relating to free expression, as well, progress has been painfully slow. Congress has moved at snail's pace to push through a constitutional reform, first introduced by the Frei government in 1997, to eliminate film censorship. While the Chilean government does not currently censor films, it still enjoys the legal authority to do so, authority that is expressly granted it in the Chilean constitution. Representatives of the armed forces and Carabineros, the uniformed police, still sit on the official film censorship board. The board may review any video that enters the country in a traveler's suitcase or a mail-order package, and prevent its owner from seeing it, even in private. Films prohibited in earlier years, including many banned for ideological reasons under the military government (1973-1990), still may not be seen in cinemas or on broadcast television or video. The persistence of film censorship in Chile was recently condemned by the Inter-American Court of Human Rights in a case challenging the judicially-imposed ban on Martin Scorsese's *The Last Temptation of Christ*. Yet the film still cannot be seen legally in Chile.

Access to official information is the only free expression right that has been strengthened under Chile's center-left government coalition, the Concertation of Parties for Democracy, which has ruled without interruption for a decade. A Bill on Honesty in Public Administration, establishing that "the acts of the organs of public administration are public, apart from the exceptions established by law," was promulgated in December 1999. The bill amends the law that regulates public administration and local government in Chile, establishing that the public has a right of access to official documents except in certain defined circumstances, and providing a mechanism of redress if requests for information are ignored or arbitrarily denied. Some key cases in 2000, however, reveal that public authorities are still reluctant to concede ordinary members of the public access to such information.

Thus, although the restrictions of earlier years have been somewhat relaxed, Chile's balance sheet on freedom of expression is still deeply in debit, and will remain so even if the Press Law is approved in its present form. A great deal remains to be done to bring Chile's laws into line with international standards. As noted, even if it is eventually expunged from the State Security Law, the crime of contempt of authority will live on in the Criminal Code, and in military laws. Judges will still have powers to remove publications of public interest from circulation to protect the honor of litigants. Privacy laws currently in force unnecessarily limit the press in covering matters of public interest. Journalists remain at risk of criminal prosecution and imprisonment for violating secrecy rules. In sum, Chile has failed to embrace the tolerance of divergent opinion that a vibrant democracy requires.

### **Reform of the State Security Law: Only a Partial Solution**

The repeal of Article 6(b) of the State Security Law, which prohibits insult or defamation of the president, the commanders-in-chief of the armed forces, senior members of the judiciary, and legislators, should be approved in the near future. After almost a decade in which the issue was scarcely addressed by successive governments, a consensus in favor of repealing the provision emerged in the late 1990s. This was in large part due to the use made of the law by questioned public figures in 1998 and 1999. Moreover, the survival of a law based on the notion that political criticism threatened public order and the security of the state was unacceptably at odds with the democratic principles professed by most of Chile's politicians.

In April 1999, the Frei government promised, with cross-party support, to repeal the law and it backed legislation to do so. Yet it is doubtful whether the growing consensus in support of reform of the State Security Law amounted to a genuine acceptance of the principle that government officials and legislators should lose their special protection against unfair or offensive criticism. The Chilean Congress has mauled every proposal placed before it, demonstrating an obvious reluctance to do away with the special provisions that protect members of Congress as well as executive-branch officials.

In the meantime, prosecutions under the law have continued unabated. Since the publication of our 1998 report, twelve individuals have been convicted, charged, or are currently facing accusations of contempt of authority under the

State Security Law. As this report went to press in February, Gen. Hernán Gabrielli Rojas, then acting chief of the air force (in replacement of Gen. Patricio Ríos, who was recovering from heart surgery), opened a state security lawsuit against three former political prisoners who alleged that Gabrielli participated in their torture at the Cerro Moreno airbase in Antofagasta, just after the September 1973 military coup. While government officials said they deplored Gabrielli's resort to the law, they failed to persuade him to file an ordinary libel suit instead. The armed forces, whose commanders-in-chief had themselves recently been accused in court of obstructing justice by withholding information on the "disappeared," backed Gabrielli's decision. The case demonstrated, once again, the proclivity of senior military officers to utilize repressive national security legislation to penalize or deter their critics or those who question their records.

Chile is unique in Latin America in considering insulting expressions about those who hold office or power to be a crime against public order and state security. Such offenses are indeed subject to more drastic punishment than ordinary libel. The State Security Law, promulgated in 1958, goes well beyond the legitimate prohibition of actions that might threaten public order or the stability of democratic institutions, and also punishes criticism considered contemptuous or defamatory by public officials. In practice, this means that all criticism of those in authority must remain within certain undefined limits. While the right to criticize is accepted, the principle underlying the law is that, to merit legal protection, criticism must be responsible and respectful. The use of criminal sanctions to enforce such deference to authority unnecessarily restricts freedom of expression, thereby stifling public debate.

The most authoritative standards by which to assess laws that restrict freedom of expression in Chile are set out in the human rights treaties Chile has ratified. Particular relevant are Article 19 of the International Covenant on Civil and Political Rights and Article 13 of the American Convention on Human Rights, as well as the jurisprudence of the bodies that monitor the implementation of these standards.

Although not legally binding on Chile, the standards interpreted by the European Court of Human Rights, which has developed a particularly rich jurisprudence on freedom of expression issues, are also pertinent. The Inter-American Commission on Human Rights, which monitors observance of the American Convention, has often cited decisions of the European Court as legal precedent. In landmark cases like *Lingens v. Austria* (1986) and *Castells v. Spain* (1992), the court has consistently held that government officials and politicians should expect to tolerate a greater degree of criticism than ordinary citizens, given that they have voluntarily entered the public arena. In the *Castells* case, the court held that such tolerance must extend not only to ideas that are "favorably received," but also to those that "offend, shock or disturb." Although the accountability of government in a democratic system is tied to the rule of law and the separation of powers, its deeper roots lie in a vigorous and uninhibited public debate. As the court explained in *Castells*: "In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion."

In his 1998 report, Santiago Cantón, the Special Rapporteur on Freedom of Expression of the Organization of American States (OAS), called on all OAS member states to repeal their contempt of authority laws. He quoted extensively from the 1994 Report of the Inter-American Commission on Human Rights on "Desacato" Laws. This report, which cites the European jurisprudence at length, found that ~~LAWs THAT PENALIZE OFFENSIVE EXPRESSIONS DIRECTED AT PUBLIC OFFICIALS, GENERALLY KNOWN AS "DESACATO LAWS,"~~ violate Article 13 of the American Convention on Human Rights. ~~PRINCIPLE 11~~ of the Inter-American Declaration of Principles on Freedom of Expression, approved by the commission at its 108th regular session, codifies the same finding.

Nonetheless, the Chilean Supreme Court has failed to find the country's State Security Law to be inconsistent with Chile's international obligations to protect freedom of expression. These obligations are recognized in the second paragraph of Article 5 of the Chilean Constitution, which provides that "the exercise of sovereignty recognizes as a limit respect for the essential rights that emanate from human nature. It is a duty of the organs of State to respect and promote these rights, guaranteed by this Constitution, as well as by the international treaties ratified by Chile and in

force.”<sup>1</sup> The law clearly contravenes the American Convention on Human Rights and the International Covenant on Civil and Political Rights. Yet in April 2000, on hearing a legal challenge to the law, the court refused to grant a writ finding that the law was unconstitutional.

Criticism of the State Security Law in political circles was muted during most of the 1990s. During the early part of the decade, the great majority of prosecutions were brought by military officials, including Gen. Augusto Pinochet (then still its commander-in-chief), and were leveled against human rights critics. (One such prosecution is still pending and is described later in this report.) While no executive branch officials have initiated prosecutions since the return of democracy, members of the judiciary have done so on more than one occasion, and Congress itself prosecuted a former Pinochet minister (Francisco Javier Cuadra) in defense of the honor of the institution. These cases make it difficult to argue that this type of contempt allegation is merely a remnant of authoritarian attitudes typical of military rule. The Cuadra case, in particular, was revealing in that the accusation stemmed from the legislature, and that the freedom of expression issues it raised were never subject to a serious debate at the time. There was, in fact, a “blind spot” in relation to the law and its human rights implications. Proposals for the law’s repeal were not adopted by the government until 1999, even though the Press Law, designed to protect the rights of journalist, had been in Congress since 1993.

The watershed came in April 1999, when former Chief Justice Servando Jordán ordered the arrest of journalist Alejandra Matus for the allegedly libelous content of her book, *The Black Book of Chilean Justice*. Justice Jordán, who is still a member of the Supreme Court, has been responsible for no fewer than seven such prosecutions since 1998. On the day of book’s publication, he had all the copies in print impounded under Article 16 of the State Security Law, which allows judges “in serious cases” to order the confiscation of the entire stock of a publication. The actions of the former Chief Justice, who had recently escaped impeachment on corruption charges, created a political storm. A group of parliamentarians from the government coalition promptly tabled a motion in the Chamber of Deputies to amend Article 6(b) and Article 16 of the law to abolish the crime of contempt of authority and strip judges of the power to impound all copies of books and magazines.

More prosecutions followed, however, before any progress was reported in the parliamentary debate on the proposed reforms. In June 1999, two senior representatives of Matus’ publishers, Planeta, were detained overnight and charged with contempt of authority, under a provision of the law which establishes a chain of criminal responsibility extending to editors, publishers, and eventually even to the printers of an offending document. In February 2000, journalist José Ale received a 541-day suspended prison sentence for an article about Jordán’s career in the judiciary. His conviction reversed several lower court decisions absolving him of any crime.

During the Special Rapporteur on Freedom of Expression’s visit to Chile in June 1999, which took place soon after the arrest of the Planeta representatives, government officials and members of the Chamber of Deputies made a public commitment to remove contempt of authority laws from the statute books in Chile. In October 2000, the Inter-American Press Association, meeting for its 56th General Assembly in Santiago, noted with concern that, after fifteen months, Chile had still failed to implement these promises. Since then, government representatives have told Human Rights Watch repeatedly that they expected that the law would pass within a matter of months. But still there has been no progress.

After an initial consensus was reached regarding the need to amend Article 6(b), the contempt of authority provision, as well as other articles of the State Security Law, the government decided to incorporate the contempt of authority reforms into the proposed Press Law package. This appears, in retrospect, to have been a serious tactical error. The draft Press Law has undergone repeated revisions, none of which have yet succeeded in overcoming diverse objections to it made by the newspaper owners’ lobby, the journalists union, advertisers, and other interest groups, as

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<sup>1</sup>Translation by Human Rights Watch.

well as by political parties. In May 2000, the Chamber of Deputies voted overwhelmingly against a compromise draft hammered out by a joint commission of both congressional chambers, which the Lagos government had expected to pass without difficulty. In the seven months of the year that remained, the government was unable to push forward the contempt of authority reforms, which as of February 2001 still awaited Congress' final approval of the Press Law.

As noted above, members of Congress failed to accept government proposals to repeal Articles 263, 264, and 265 of the Criminal Code, which cover defamation and libel of public officials using language very similar to that of Article 6(b). All references to eliminating the crime of contempt of authority from the Criminal Code have now been dropped from the proposed Press Law. Thus, even if Chile repeals the contempt of authority provisions currently set out in Article 6(b), the Criminal Code provisions will remain in force. These provisions have rarely been invoked over the past decade, but it is reasonable to suppose that their quiescence resulted from the fact that the State Security Law was considered a more sure and rapid means of obtaining a conviction or deterring a critic. Once that law is no longer available to them, the Criminal Code provisions will still give public officials and legislators more protection from libel than ordinary citizens enjoy. Common sense suggests that these provisions may be invoked as the State Security Law was invoked previously, and that their mere existence will have a "chilling effect" on freedom of expression. Thus, the reforms now under debate in Congress will not fully meet the commitment made to the OAS by Chilean legislators in 1999. To bring its legislation into line with international standards, Chile must repeal these provisions as well.

In addition, insult, contempt of authority, and sedition continue to be offenses in the Code of Military Justice. Whereas the first offense was removed from the jurisdiction of military courts by the government of Patricio Aylwin in 1992, "sedition" continues to be tried by military courts regardless of whether the offender is a member of the armed forces or a civilian. The Press Law would strip military courts of jurisdiction over cases of this type (the last such case was in 1996). Even so, reform of contempt of authority provisions in military laws, part of a long overdue overhaul of the Code of Military Justice, is another task still pending after a decade of democratic rule.

### **Censorship of the Cinema**

Chile is the only democratic country in the hemisphere in which prior censorship of the cinema exists, and is, moreover, written into the Constitution. Film censorship violates international freedom of expression standards, in particular, Article 13(2) of the American Convention on Human Rights.

The one exception to the American Convention's general prohibition of prior censorship is to permit the censorship of "public entertainments," but only "for the sole purpose of regulating access to them for the moral protection of childhood and adolescence." Beyond restricting minors' access to the cinema, any other regulation of cinematographic content must be carried out via the imposition of subsequent liability. This holds true even in those few areas — such as child pornography, "snuff movies," or actual incitement to ethnic or racial violence — in which certain restrictions are legitimate. In other words, prevention of such material must be based on prosecutions and effective sanctions against those responsible, after the event, and on the deterrent effect of such sanctions, rather than on prior censorship. To adopt a general system of censorship to prevent the exhibition of such material is an unnecessary interference in freedom of expression.

As the country's modernization proceeds apace, the anomaly of film censorship has become ever more glaring. The board of film censors (Consejo de Calificación Cinematográfica, CCC) still includes officers of the armed forces and the police, as well as representatives of the judiciary, universities, schools, and the journalists' union. The CCC's powers extend to the prior vetting of all videos that enter the country, even those imported by individuals for their private use. The customs service has orders from the CCC to refer to it all videos, or films in other formats, found in travelers' luggage or in mail-order packages. These must be cleared by the board before they are returned to their owners, and items already prohibited by the board in earlier years are confiscated. Thus, whether or not the purchaser of a film by internet ever gets to view his acquisition is a game of chance that depends in large degree on the mood or work-load of customs inspectors. In September 2000, the Santiago Appeals Court admitted for consideration the first-ever appeal against the CCC lodged by a private citizen for violation of his privacy rights, as protected in Article 19(4) of the Constitution.

In April 1997, President Eduardo Frei Ruiz-Tagle introduced a bill in Congress aimed at amending the Constitution to eliminate film censorship and restrict the CCC's powers to classify films by age-group suitability. The bill also introduced an extra clause into Article 19(12) of the Constitution, which included among the rights protected, "to create and spread the arts." After an initial debate in a Chamber of Deputies committee, the bill was forgotten for more than two years, until November 1999, when Frei, using executive privilege, gave it priority for "immediate discussion." The Chamber of Deputies rapidly approved the bill, but it still awaits ratification in the Senate, nearly four years after it was first introduced.

Members of Congress from the opposition benches as well as the governing coalition have introduced draft legislation to modify the composition of the CCC, aiming to remove the four armed forces representatives and create a more flexible classification system. The bills would also allow the CCC to revise existing classifications, which would enable television stations to transmit films banned during the military government without fear of a fine by the National Television Council (at present, cable operators have to replace hundreds of scheduled films every month to avoid fines). These bills, which are also pending in the Senate, are expected to be consolidated into a single reform. Although a principle motive for movie censorship under the military government was ideological, the main political concerns affecting the current reform bills center around on pornography and violence.

### **Judicial Bans**

Prior censorship by no means begins and ends with the film censorship board. The CCC *rescinded* its ban of Martin Scorsese's *The Last Temptation of Christ* in 1996, but the Supreme Court ruled against the board's decision to allow the film's transmission on television. Indeed, the Chilean courts have been responsible for most acts of prior censorship since the restoration of democracy in 1990. Court injunctions against publications or confiscation orders following defamation or libel actions, or writs for the protection of the constitutional right to honor, have been much more common than censorship by the executive branch.

The Chilean legal norms that permit censorship are overlapping and confusing. For example, Article 16 of the State Security Law (due to be repealed if the pending Press Law clears Congress) says that courts may order the immediate confiscation of "any edition" in which a grave violation of the law has been committed. Article 30 of the law instructs judges to impound offending magazines, books or records, without reference to the number of copies the court may seize. On the other hand, Article 41 of the Law on Abuses of Publicity of 1967 (also due to be repealed in the new Press Law) states explicitly that judges investigating offenses may impound only four copies unless the offense involves public morals (pornography), national security, or incitement to criminal activity, in which case the entire stock may be impounded. To these norms must be added those of the Code of Criminal Procedures, whose Article 7 requires judges to "give protection to the prejudiced parties, deposit the evidence of the crime that might disappear, and gather and place in custody whatever may lead to the crime being proven and to the identification of the felons," and to secure the "instruments, arms and objects of any sort that appear to have been used or intended to be used to commit the crime." These norms were cited to justify a court decision in 1992 to impound all the copies of *Los Secretos de Fra Fra*, journalist María Irene Soto's expose of alleged business malpractice by a former presidential candidate.

Yet another mechanism that litigants may deploy to put a book or a film out of circulation (used, for example in the *Last Temptation* case) is a writ for the protection of the constitutional right to honor or privacy. The last instance known to Human Rights Watch in which such a *recurso de protección* (protection writ) led to prior censorship was in July 1998, when the Santiago Appeals Court granted an injunction against the magazine *Caras*, preventing it from publishing a report about a plane crash.

The notoriety of cases like this may have caught the attention of Chile's judges, encouraging them to be more sparing in their use of the injunction power. Nevertheless, Chile will not be safe from prior censorship until the laws that regulate judges' powers to impound or confiscate publications are simplified and dovetailed to ensure that, under no circumstances, are judges authorized to ban publications and transmissions in advance.

The need for clear legislation on this point is reinforced by the conservative mentality of much of the Chilean judiciary on freedom of expression issues. In several jurisprudence-setting decisions, the Supreme Court has ruled that the right to honor takes precedence over freedom of expression. The protection of honor or reputation is recognized by international human rights law as a legitimate ground on which freedom of expression may be restricted. For example, libelous and defamatory statements, made with malicious intent or with reckless disregard for the truth, are not protected even in legal systems that provide generous protection of speech and opinion. However, the question of whether or not such statements are actionable in civil proceedings must be determined in a court of law with full consideration of the particular circumstances of the case. This determination may never be made in the abstract, on the basis that one right holds precedence by its nature over another. Much less may such arguments be used to justify prior bans on publications or transmissions.

Senior judges have even argued that censorship is solely practiced by dictatorial governments that establish shadowy bodies to review, cut and suppress material for political reasons before its publication or transmission. Such judges do not accept that censorship can also come from the judicial branch or exist in a democratic system of government. They have also, without any hesitation, rejected protection writs requested by freedom of expression advocates against the confiscation of publications, as happened when a group of civil rights lawyers tried to block the prohibition of the *Black Book of Chilean Justice*. Much of the judiciary has not kept abreast of changes in international law and jurisprudence on freedom of expression issues. To remedy this lack of awareness, the Chief Justice should ensure that judges are fully briefed on the freedom of expression standards set forth in the international human rights treaties Chile has ratified, and on the decisions and jurisprudence of the entities that enforce those treaties.

### **The Right to Know**

Chile's traditionally inward-looking public bureaucracies have come under increasing challenge as the market economy generates a more intense demand for information. Public officials still enjoy discretion in deciding what material to make available to the public, and the courts have rarely accepted complaints when access is denied. Several laws penalize officials who reveal confidential state documents, without specifying what constitutes the criterion for keeping them secret from the public. Article 19(2) of the Law on Abuses of Publicity punishes anyone who knowingly publishes classified documents, or material from a court case that is subject to a secrecy order. Article 34 of the Law against Illegal Drug-Trafficking also allows judges to hold an investigation, or parts of it, secret, and warns that in a drugs investigation, "violation of the secrecy of the investigation will be punished by the penalty of imprisonment." Paula Afani, a reporter for *La Tercera*, currently faces a possible five-year prison sentence for alleged offenses under both laws, for including testimony in her reporting that the government claims was secret.

Nevertheless, the Chilean government has recognized the importance of strengthening the right of access to public information. A concern to establish more progressive norms on this issue first found expression in 1994, when the Frei administration established a Commission on Public Ethics, an advisory body that recommended measures to improve the honesty and transparency of public administration. In January 1995 the government presented to Congress a bill on Honesty in Public Administration (*Ley sobre Probidad Administrativa*), Article 21(1) of which penalizes officials who "deny information or documentation requested in accordance with the law." The Honesty Law, which finally entered force in December 1999, amends the statutes governing state institutions and local government.

Article 11(1) of the amended law on state administration establishes the principle that records and documents of the state or of private enterprises that serve a public interest are in the public domain. If officials fail to respond to a request for information within forty-eight hours, a petitioner may lodge a complaint to a civil judge, and appeal it upwards to the Supreme Court.

The law, however, contains certain catch-all grounds that could serve as loopholes for officials seeking to evade their responsibility to meet demands for information. Although it recognizes the general right of access to official information, Article 11 also establishes as a legitimate ground for restricting such access that its granting could "harm the proper functioning of the organs of the State." This is a vague and inclusive criterion that could be cited by officials to restrict access without further justification, and the law does not provide a basis for assessing the "reasonableness" of

restrictions on the basis of their effect on the public interest. Nevertheless, the law constitutes a significant advance on the virtually absolute discretion previously enjoyed by public servants on the matter of public access. .

## **Recommendations**

Governments have an affirmative responsibility to reform their laws to strengthen and expand human rights protection. The fact that restrictions are imposed by branches of government other than the executive branch does not attenuate this responsibility. The government must redouble its efforts to push through legislation currently pending in Congress to ensure respect for freedom of expression.

### ***Repeal Laws That Restrict Freedom of Expression, including Contempt of Authority Provisions***

- As a top priority matter, the pending legislation to repeal Article 6(b) of the State Security Law, and the powers of prior censorship that judges currently enjoy under that law to confiscate and prohibit books and publications, should be passed.
- The government should also give top priority to the passage of legislation repealing all other contempt of authority laws, including Articles 263, 264 and 265 of the Criminal Code, and Articles 276 and 284 of the Code of Military Justice.
- The government should permanently abolish all laws that criminalize defamation in recognition of the principle that conflicts arising out of libel and calumny allegations should be resolved by civil litigation rather than criminal prosecution.
- All legislation giving judges the power in advance to impound publications and issue injunctions against the transmission of films and videos should be reviewed to ensure that they are consistent with the prohibition of prior censorship in the American Convention on Human Rights and the Chilean Constitution. All laws that refer to these powers should explicitly prohibit their use to remove publications of any kind from circulation. Libel liability should only be incurred after publication, and culpability must be established after a fair hearing.
- Congress should approve the proposal currently under consideration in the Senate to remove the crime of defamation from the Constitution.

### ***Facilitate Access to Information***

- The government should urgently review current legislation protecting privacy. Norms adopted to protect privacy should be framed so as to ensure protection of the press's right to investigate matters of public interest, defined broadly so that journalists and editors are not hampered by fear of prosecution or civil action from informing the public.
- Article 11 (bis) of the statute governing public administration should be amended to specify more precisely the categories of official documents to which access may be denied. The current criterion referring to "circumstances in which their publication may prevent or obstruct the proper functioning of the office of which the information is requested" is so vague that it makes it difficult to appeal successfully against officials who arbitrarily withhold information.
- Prosecutors' and judges' enforcement of secrecy rules should be based on the principle that any constraint on access to or provision of information must be *the least restrictive means possible* of protecting a legitimate interest such as national security, or the protection of witnesses, victims, or defendants in criminal proceedings.

### ***End Film Censorship***

- The current powers of the Film Classification Council to ban films and videos should be terminated. All classification decisions by the council should be public information and reviewable by an independent body. The council should be mandated to reclassify films previously classified by the council under the military government, and to authorize the exhibition of such films. Television channels should not be penalized for transmitting films classified by the council while ideological prohibitions were in force.
- Both the composition and the powers of the council should be reviewed to ensure that the body is democratic and representative of different sectors of society. The representation of the armed forces and police on this body is unacceptable in a democracy and should be discontinued.

### ***Ensure Judicial Respect for Freedom of Expression***

- Government and judicial authorities should review the recent decision of the Inter-American Court of Human Rights in the case challenging the ban on *The Last Temptation of Christ*, and take the necessary steps to comply with it.
- The judiciary must ensure that its decisions are consistent with Chile's international obligations under the human rights treaties it has ratified, such as the International Covenant on Civil and Political Rights and the American Convention on Human Rights, and it must take note of the jurisprudence on freedom of expression of the Inter-American Court of Human Rights. It must comply in full with decisions of the court in cases in which the Chilean State is a party.
- The government should provide the judiciary with updated information on decisions on freedom of expression issues reached by international human rights bodies, including relevant United Nations bodies such as the Human Rights Committee, and the Inter-American Commission and Court of Human Rights. Judicial training programs should include a full briefing on international legal standards and jurisprudence relating to freedom of expression.

## II. BACKGROUND

Although Chile is a stable representative democracy, it retains more legal restrictions on freedom of expression than any other country on the continent. Many of these restrictions predate the military dictatorship that lasted from 1973-1990. The country's repressive legal framework inhibits the vigorous public debate that is the basis of a democratic political system.

Several of Chile's institutions have fallen short of their obligations in this area, but the judiciary, in particular, often fails to protect freedom of expression. Despite significant judicial reform in recent years, top judges have been slow to challenge the privileges of authority. They often give undue preeminence to the rights to honor and privacy of public officials over legitimate comment or criticism. Moreover, many do not even acknowledge the fact that injunctions or confiscations of publications, if ordered by the courts, constitute acts of censorship.

Although politicians of all parties pay lip service to freedom of expression, in practice their commitment to it has proved to be lukewarm. Tolerance of criticism is fragile. When political controversies become heated, politicians of all ideological tendencies often bring criminal charges of defamation against their opponents in court, or threaten to do so. Even debates over historical issues can lead to criminal litigation, if one of the parties feels aggrieved by what it sees as a slur, misrepresentation, or distortion of the facts. In this sense, underlying the laws and jurisprudence, there exist powerful informal controls on freedom of expression, and a widespread tendency toward self-censorship. What is missing, beyond the detailed legislative changes currently under debate, is a deep-seated conviction that a democratic state benefits from the cut-and-thrust of a vibrant public debate.

Such an appreciation of the value of open public debate is essential for ensuring government accountability and avoiding abuses of power, for protecting individual rights, and for providing a climate in which a plurality of ideas can flourish. So far, most of Chile's politicians have not provided the leadership required to promote such debate and pluralism effectively.

### **Little Fervor for Reform**

The slow progress on freedom of expression reform is not due to a lack of stated government interest. President Ricardo Lagos and his center-left coalition government have repeatedly declared their commitment to removing the constitutional obstacles that have prevented Chile for a full decade from becoming fully democratic. Recently, for the first time in years, an agreement with the parliamentary opposition on essential constitutional reforms has emerged as a serious possibility. The government sees the removal of controls on freedom of expression as an essential part of the democratization process. But the country has waited ten years in vain for the seeds of reform to bear fruit.

The topic does not generate a sense of urgency among Chile's political elite. A population long subjected to the crude restraints of the military government does not chafe at today's lesser restrictions, except in certain areas such as censorship in entertainment. Unlike issues like crime, public health and education, politicians apparently believe that they can avoid reform without facing a strong public reaction. Moreover, as we note in this report, they have been slow to discard the shield against public criticism that antiquated criminal defamation laws provide. Only a small group of legislators drawn from the liberal wing of the Christian Democrats and the center-left parties of the governing coalition as well as a handful of right-wing politicians have demonstrated any real commitment to the issue.

### **The Reemergence of Minority Options**

The house arrest in London of former dictator Augusto Pinochet on October 16, 1998 presented an important challenge for the Chilean press, which has been frequently accused of timidity and conservatism. News coverage in Chile, as well as internationally, of the arrest, the prolonged government offensive to have Pinochet returned to Chile, the evolution of his trial and of other human rights trials after his return to Chile on March 3, 2000, was intense. The human rights legacy of the dictatorship became, for the first time, the dominant issue in the Chilean news media, and it still is at this writing. The coverage has been more objective than might have been expected given the unconditionally pro-Pinochet stance adopted by the country's two major newspapers, *El Mercurio* and *La Tercera*, during the years of the military dictatorship. Nevertheless, editorials in both these papers consistently upheld the arguments of Pinochet's

supporters.

By contrast, no mass circulation daily paper presented the other side's point of view, although surveys repeatedly showed that more than half the Chilean population supported legal action against Pinochet. The duopoly of the Mercurio and Copesa chains (the former being owners of *Las Ultimas Noticias* and *La Segunda*, the latter owners of *La Tercera*, *La Cuarta*, and the political weekly *Que Pasa*) continued unchallenged by any serious competition in the print media. Many on the left of the Concertation of Parties for Democracy object to this concentration of ownership, and believe that pluralism and alternative viewpoints are stifled by it. Ironically, measures they proposed in the Press Law to counteract this imbalance have held up approval of freedom of expression reforms by incurring the determined opposition of newspaper owners.

Remembering Chile's divided past, and the controversial role of the right-wing press before and after the military coup, it is not difficult to see why many in the government coalition headed by Lagos also distrust the removal of press controls. A perception that both the Mercurio and the Copesa chains have an axe to grind against the government coalition and the socialist president lingers on. Given the enormous power of these two chains in shaping the country's political agenda, this contributes to a widespread distrust of the press in general. The high profile investigations conducted by *La Tercera* into alleged influence-trafficking and favoritism by certain judges and government officials who played a prominent role in the prosecution of Pinochet revealed the dilemma starkly. Politicians and legislators of the left accused the newspaper of participating in a conspiracy with a group of rightist parliamentarians to discredit the judiciary, at a moment in which judges were effectively investigating past human rights atrocities for the first time in living memory. *La Tercera*, however, insisted in editorials that by investigating corruption and abuse of power it was merely carrying out the essential functions of a newspaper in a democracy.

Yet, some alternative news sources did emerge in the period covered by this report. These included *MTG*, a daily newspaper owned by the Swedish Metro chain, which is distributed free outside Santiago's metro stations. Originally called *El Metro*, the paper appeared for the first time in February, 2000. It was originally to be handed out inside the city's underground transportation system. Distribution inside the stations and the use of the name was forbidden, however, after the Supreme Court accepted a complaint of unfair business practice lodged by the National Press Association. After the success of *MTG*, *La Hora*, Santiago's second evening newspaper (also owned by Copesa), which had been facing economic difficulties, also relaunched as a free handout. Both provided condensed versions of the news and neither attempted to compete with the major newspapers in editorial coverage and opinion-formation.

The political satire weekly *The Clinic* (named for the London clinic where Pinochet was arrested) is now on regular sale in kiosks across the city, carrying satirical political comment and humor unimaginable in the early years of the transition. On the Internet, alternative news sources now range from informal bulletins to electronic newspapers, such as *El Mostrador* and *Primera Linea*.<sup>2</sup> *El Mostrador*, launched in March 2000, publishes opinion columns expressing a left or libertarian viewpoint, and has often led the rest of the press on important human rights stories.<sup>3</sup> *Primera Linea* is owned by the newspaper *La Nación*, of which the government is the major shareholder. Its editorial independence came under question in January 2001, when its editor, Juan Pablo Cárdenas was fired, due reportedly to the site's reporting of a major political scandal involving the payment of excessive severance payments to officials in

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<sup>2</sup>See <http://www.elmostrador.cl> and <http://www.primeralinea.cl>.

<sup>3</sup>*El Mostrador* scooped the major dailies on important human rights stories, such as the leaking in April of a secret military government decree linking General Pinochet to a counter-terrorism unit alleged responsible for extrajudicial executions in the 1980s. It also posted on its webpage recordings of interventions in the Santiago Appeals Court's hearing of the petition for the removal of Pinochet's parliamentary immunity. The Appeals Court's arrangements for the proceedings to be televised had to be abandoned after the Supreme Court, acting under pressure, prohibited live coverage and moved the proceedings to a smaller court room.

public corporations.<sup>4</sup>

These innovations have somewhat offset the impoverishment of the Chilean print media over the last decade due to the economic collapse of newspapers and periodicals presenting an alternative viewpoint, which flourished in the last years of the military government.<sup>5</sup>

### **Divisions over History**

One of the most divisive themes in Chile is its own history. It is not uncommon for threats of litigation to cast a shadow over debates that revive old political divisions, ideological disputes, or historical characterizations. For a few days, the papers report that a citizen is “studying” libel litigation, after which he or she usually, but not always, desists.

Most conflictive of all are the interminable discussions of who was to blame for the 1973 military coup. In May 2000, for example, right-wing parliamentarians, with the backing of the Jaime Guzmán Foundation (set up in memory of Jaime Guzmán Errázuriz, founder of a pro-military conservative opposition political party and one of the authors of Chile’s authoritarian constitution), tried to persuade the Lagos government to withdraw a Ministry of Education primary school history textbook which covered the events leading up to and following the September 11, 1973 military coup. One of the nineteen “tendentious” or “biased” assertions flagged by the Guzmán Foundation was the use of the word “coup” to describe the events of September 11:

Although the authors admit that September 11 may be referred to as a coup or a “pronouncement,” on both occasions in which the students are assigned tasks, the word “coup” is used.

It is stated that seventeen years had to pass before Chilean society would recover democracy, as if the latter were an anonymous achievement of the masses, without any reference to the itinerary, perfectly traced and implemented by the armed forces, to reconstruct democracy in Chile.<sup>6</sup>

The foundation also complained that:

[I]t is stated that the Constitution of 1925 recognized a “lay society (sociedad laica), when in reality it established freedom of religion. The use of this expression tries to impose this type of organization — without God — on the

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<sup>4</sup>See International Freedom of Expression Exchange (IBEX), e-mail alert, “Despiden arbitrariamente a periodista de periódico digital,” January 23, 2001. Cárdenas was a well-known investigative journalist during the military dictatorship.

<sup>5</sup>The demise of Chile’s pro-democracy press after the return to democratic rule is described in Human Rights Watch, *The Limits of Tolerance: Freedom of Expression and the Public Debate in Chile* (New York: Human Rights Watch, 1998) pp. 37-39.

<sup>6</sup>“Llamado a retirar textos de Historia de Ed. Básica,” *El Mercurio*, May 16, 2000. Supporters of the coup use the word “pronouncement” rather than “coup” to describe the military’s action.

future of Chile.

One of those who commented in the debate that followed the publication of the foundation's objections was historian Cristián Gazmuri, who noted that the textbook's "crime" was to express a viewpoint distinct from the orthodoxy of the military government:

It was the detention of Pinochet in London that broke the mold of this official history and enabled the negative aspects of the military government, especially the "disappearances" and the policy of state terrorism to be considered as, or more, important historically than the economic successes. A school history text takes up this new viewpoint, partially and moderately in my opinion, and immediately a polemic breaks out.<sup>7</sup>

In any event, the ministry's textbook was retained unaltered. Nevertheless, one of Santiago's upscale boroughs, Las Condes, issued its own alternative textbook in September.<sup>8</sup>

Publication of Cristián Gazmuri's 1000-page biography of Eduardo Frei Montalva, one of Chile's best-known post-war presidents, and father of former President Eduardo Frei Ruíz-Tagle (in power from 1994-2000) was halted for two years due to objections lodged by members of the Frei family to several passages of the text which were less than adulatory.<sup>9</sup> Some of the objections centered on Frei's well-known initial support for the military intervention, and concerned descriptions of meetings between Frei (father) and army generals in the months leading up to the coup, and a meeting between Frei and Pinochet in December 1973, three months after the coup. When, after the long stand-off, the book was finally launched on October 10, 2000, Frei's daughter, Senator Carmen Frei, challenged its veracity and the objectivity of one of its co-authors in a debate in the Senate.<sup>10</sup>

In November 2000, several Mapuche indigenous organizations filed a libel suit in Santiago's 33rd Criminal Court against a prize-winning historian, Sergio Villalobos, for a newspaper article which they alleged cast aspersions on the honor of the Mapuche people. The article, entitled "Araucania: Errores Ancestrales" appeared in the May 14, 2000, edition of *El Mercurio*. It dealt with events that took place in the 16th and 17th century colonization of the Araucaria by the Spanish *conquistadores*. Prominent historians came to the defense of Villalobos, arguing that it was unprecedented and quite inappropriate for a historical controversy to be aired in a court of law, while others defended the Mapuches'

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<sup>7</sup>Cristián Gazmuri, "La verdadera via de reconciliación," *La Tercera*, May 31, 2000.

<sup>8</sup>"Las Condes elaboró un texto alternativo de historia reciente," *El Mercurio*, September 29, 2000.

<sup>9</sup>Cristián Gazmuri is director of the History Institute at Chile's Catholic University. The biography, *Eduardo Frei y su Epoca*, was commissioned by the Frei Montalva Foundation with financial support from the West German Konrad Adenauer Stiftung.

<sup>10</sup>"Carmen Frei: Mi padre no apoyó el golpe," *El Mercurio*, October 12, 2000.

action.<sup>11</sup>

## **Mutual Intolerance**

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<sup>11</sup>“Presentan querrela contra historiador Villalobos,” *El Mercurio*, November 16, 2000; “Mario Orellana: ‘Es inaudito llevar a historiador Villalobos a los tribunales,’” *El Mercurio*, November 17, 2000.

The bitterness that still surrounds events in Chile's recent past explains much of the climate of intolerance that still exists. It was well exemplified in August 1999, when Father Raúl Hasbún, a priest who appears regularly on television and is either loved or hated for his anticommunist tirades, delivered a stinging attack on socialists at the anniversary of the pro-military Bernardo O'Higgins University. He denounced "marxist-leninist socialism" (sic) as "intrinsically unpatriotic" and "parasitical." Amid a political storm over Hasbún's declarations, the Chilean Socialist Party, defended by two prominent human rights lawyers, launched a libel suit against the priest, who received the public backing of Santiago's archbishop, Francisco Javier Errázuriz. Both Hasbún and the archbishop criticized the terms used by the socialists and their defenders against him as derogatory and insulting. After difficult negotiations to reach a settlement, the Socialist Party finally withdrew its suit, but not before attempting to extract a public apology from Hasbún. The dispute was headline news for several days.<sup>12</sup>

### Artistic License

Considering the constraints imposed by the country's political and religious establishment, the Lagos government has taken a stand in favor of cultural pluralism, and on occasion has not shirked taking risks. Cultural life sometimes takes the form of a stand-off between artists and conservative opinion-leaders. An example was the so-called Nautilus Project, a transparent glass "house" erected in a busy downtown Santiago street in late January 2000, in which a young actress lived day and night for several days in full view of passers-by. The work was designed and built by two young architects from the Catholic University with a grant from FONDART, the state Fund for the Development of the Arts and Culture. It caused a commotion after a television news sequence of the girl naked in the shower brought hundreds of male onlookers to the site.<sup>13</sup> Although opinion polls showed support for the project, a private citizen lodged criminal charges against the artist, the organizers, FONDART and the leasers of the site for "public outrage against modesty and good customs," an offense which under Chilean law can lead to a three-year jail sentence. Significantly, on March 27, judge Carlos Escobar of the Second Criminal Court dismissed the case after finding that no offense had been committed.

Earlier projects backed by FONDART also ran into problems, like Mauricio Guajardo's phallic sculpture celebrating pre-Columbian fertility symbols. Following objections from the mayor and local council of Machali, the town for which the work had been commissioned, the sculpture was relocated to the city of Rancagua. In April 1999, a collage by Jorge Cerezo, with the face of Chilean Independence hero Bernardo O'Higgins superimposed on a woman's body, was removed without explanation from an exhibition in a cultural center in Maipu, a suburb of Santiago, after it had been on show for a week. The exhibition's curator said that the exhibit had been taken down by a local government official after he had received complaints from the O'Higginsian Institute, a body dedicated to the memory of the patriarch.<sup>14</sup>

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<sup>12</sup>In an op-ed published when the argument was at its height, the president of Universal Movement Against Censorship, a civil liberties group, was one of the very few who argued that the socialist libel suit was a step back for freedom of expression, and warned: "we should be careful about resorting to lawsuits that affect freedom of expression, because we do not want to get into a procession of lawsuits, and find that we Chileans, champions of self-censorship, are even more inhibited about expressing our opinions." Patricio Westphal, "Tolerancia, Hasbún y PS," *La Tercera*, August 28, 1999.

<sup>13</sup>After being mobbed for several days she was given a police escort, and was eventually replaced by a less attractive male occupant.

<sup>14</sup>Andrés Gómez, "O'Higginianos estarían tras censura de obra de Maipu," *La Tercera*, April 19, 1999.

### III. FREEDOM OF EXPRESSION IN THE CHILEAN CONSTITUTION

#### General Norms

Article 19(12) of the Chilean Constitution protects the “freedom to express opinions and to inform,” and prohibits prior censorship. It also requires that legislation introducing restrictions on freedom of expression be approved by an absolute majority of the Congress. Even when a majority is assured, no law restricting freedom of expression may interfere with the exercise of the right “in its essence.”<sup>15</sup>

Despite these formal protections, the Constitution contains no language addressing the circumstances in which freedom of expression may legitimately be restricted. The International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights, both of which Chile has ratified, stipulate that the only legitimate grounds for such restrictions are to safeguard the rights and reputations of others, to protect national security, and to preserve public order, health or morals. Such restrictions, moreover, must not violate the prohibition of prior censorship found in Article 13 of the American Convention.

#### Defamation and Contempt of Authority

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<sup>15</sup>Constitution of Chile, Article 19(26).

The rights to honor, reputation and privacy are protected in Article 19 of the Constitution, which explicitly makes defamation a criminal offense.<sup>16</sup> While in some instances truth is a defense to a claim of defamation, such a defense does not exist in cases involving libel “against private persons.” Thus, while the Constitution may protect a journalist investigating corruption allegations against a public official if he or she can prove the allegations to be true, it does not protect a commentator who reveals information, true or false, about a celebrity or official’s private life.<sup>17</sup> In any case, the onus is on the person accused of publishing defamatory information to prove that his or her statements or allegations refer to a matter of public importance. The Constitution leaves unresolved where the division between private and public life should be drawn. In practice, press criticism or debunking of public figures can easily lead to a criminal defamation suit since judges often give the benefit of the doubt to the “offended” party in such cases. Fear of being prosecuted for criminal defamation, and the difficulty of mounting a defense if a public interest cannot be proven, is a strong disincentive to outspoken press criticism. Furthermore, even if able to prove a public interest, a critic who finds him or herself unable to establish the truth of a statement in court stands at risk of conviction for defamation.

The inclusion of the crime of defamation in the Constitution, which was recommended by the Council of State (an appointed legislative body under the military government), still has its defenders, particularly among rightist members of the Senate. However, in 1998 the Senate rejected by a large majority a bill punishing defamation proposed by a pro-Pinochet senator. In early January, 2001 the Senate’s Committee on Legislation and Justice unanimously approved a constitutional reform to eliminate the defamation clause. However, the Constitution requires a majority of two-thirds of Congress to approve a constitutional reform.

According to a recent expert study, “defamation laws cannot be justified if their purpose or effect is to prevent legitimate criticism of officials or the exposure of official wrong-doing or corruption.”<sup>18</sup> The same study calls for criminal defamation laws to be abolished and replaced, where necessary, with appropriate civil defamation laws.<sup>19</sup>

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<sup>16</sup>Article 19(4) of the Constitution guarantees: “respect and protection of private and public life and of the honor of the person and his or her family. The infraction of this precept committed in a medium of social communication, and which consists of the imputation of a false fact or action, or which unjustifiably causes harm or discredit to a person or his or her family shall constitute a crime and shall be punished according to the law.” (Translation by Human Rights Watch.)

<sup>17</sup>This distinction is made in Article 420 of the Criminal Code, which allows the defense of truth only if the injurious statement concerns a public official and his or her official function.

<sup>18</sup>Article 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (London: Article 19, 2000), p. 5.

<sup>19</sup>A recent joint statement by three international freedom of expression monitors endorsed this study,

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specifically recommending that governments, at a minimum, consider repealing criminal defamation laws. Joint Declaration by the U.N. Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression (November 2000).

Where criminal defamation laws do exist, the expert study recommends that defamation claims be judged according to a strict set of rules: it should be proven “that the impugned statements are false, that they were made with actual knowledge of falsity, or recklessness as to whether or not they are false, and that they were made with a specific intention to cause harm to the party claiming to be defamed.”<sup>20</sup> This is a far more stringent test than that currently applied in Chile, where, as noted, to escape liability the defendant must actually prove *the truth* of the impugned statement. As noted, in cases in which a public interest cannot be proven, even the defense of truth does not excuse the person accused of defamation.

Even more glaringly at odds with democratic freedom of expression standards are provisions of the Law of State Security which prohibit contempt of authority, described in detail in Chapter IV. Many countries in the Americas retain such contempt of authority laws in their criminal codes, but in no country have public officials used them as persistently as in Chile. Moreover, Chile is the only country in the hemisphere in which contempt of authority is considered a *crime against state security*, a designation that entails an abbreviated judicial procedure and fewer possibilities for defense. Although such prosecutions are invariably initiated by government officials intent on defending their public reputation or honor, courts do not accept the defense of truth as a defense, apparently violating the constitutional precept that this defense be considered grounds for acquittal where a public interest is involved.

The special privileges thus extended to state officials are essentially in breach of international human rights law, as the Inter-American Commission on Human Rights pointed out in a report published in 1994.<sup>21</sup> The commission pointed out that public officials, like other citizens, are protected by ordinary libel laws, and any additional protection granted them by virtue of their official status would not comply with the requirements of Article 13(2) of the American

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<sup>20</sup>Article 19, *Defining Defamation*, p. 7. The same principle is upheld in the Inter-American Declaration of Principles on Freedom of Expression: “THE PROTECTION OF A PERSON’S REPUTATION SHOULD ONLY BE GUARANTEED THROUGH CIVIL SANCTIONS IN THOSE CASES IN WHICH THE PERSON OFFENDED IS A PUBLIC OFFICIAL, A PUBLIC PERSON OR A PRIVATE PERSON WHO HAS VOLUNTARILY BECOME INVOLVED IN MATTERS OF PUBLIC INTEREST. IN ADDITION, IN THESE CASES, IT MUST BE PROVEN THAT IN DISSEMINATING THE NEWS, THE SOCIAL COMMUNICATOR HAD THE SPECIFIC INTENT TO INFLICT HARM, WAS FULLY AWARE THAT FALSE NEWS WAS DISSEMINATED, OR ACTED WITH GROSS NEGLIGENCE IN EFFORTS TO DETERMINE THE TRUTH OR FALSITY OF SUCH NEWS.”(PRINCIPLE 10). THIS IS KNOWN AS THE “ACTUAL MALICE” REQUIREMENT, AND IS DERIVED FROM THE HISTORIC DECISION OF THE UNITED STATES SUPREME COURT IN NEW YORK TIMES V. SULLIVAN.

<sup>21</sup>Inter-American Commission on Human Rights, “Report on the Compatibility of ‘Desacato Laws’ with the American Convention on Human Rights,” Annual Report of the Inter-American Commission on Human Rights 1994, OEA/Ser.L/V/11.88 (1995) (hereinafter IACHR, Report on the Compatibility of Desacato Laws).

Convention. In reaching this conclusion, the Commission applied the three-pronged test now widely accepted in international law for assessing the validity of restrictions on freedom of expression. Restrictions, to be justified, must be legitimate, established by law, and “necessary in a democratic society.”<sup>22</sup> Even if contempt of authority provisions can pass the first two tests, they fail the third, since “the protection of honor in this context is conceivable without restricting criticism of the public administration.”<sup>23</sup>

Furthermore, in Chile libel suits can lead not just to prosecution, but to the confiscation of publications by the courts, violating the constitutional prohibition of prior censorship. The Law of State Security and several articles of the current Code of Penal Procedure allow judges to impound publications to prevent the circulation of material alleged to be libelous. Moreover, the enforcement by judges of a writ for the protection of a constitutional right (in this case, the right to honor or privacy) may also result in a banning order, as was the case with the film *The Last Temptation of Christ*. In general, judges do not acknowledge that such prior restraint constitutes censorship within the meaning of Article 19 (12). In practice, they are often zealous in protecting the constitutional rights to honor and privacy, much less so in protecting free expression.

### **Film Censorship: A Category Apart**

The final paragraph of Article 19(12) of the Chilean Constitution establishes “a system of censorship for the exhibition and publicity of cinematographic production,” an exception to the Constitution’s general protection of the right “to emit opinions and to inform, without prior censorship, in whatever form and through whatever medium.” The Constitution’s drafters evidently believed that the cinema merited exceptional treatment, perhaps because of the immediacy and impact of cinematographic imagery compared to the written word.

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<sup>22</sup>In a key judgment the European Court of Human Rights ruled that “the adjective ‘necessary’ . . . implies the existence of a ‘pressing social need.’” See *Sunday Times v. United Kingdom*, judgment of April 26, 1979, Series A, No. 30.

<sup>23</sup>IACHR, Report on the Compatibility of Desacato Laws, p. 210.

International standards on freedom of expression, however, recognize no such distinction, and make no special allowance for the censorship of cinema. The American Convention allows prior censorship of “public entertainments,” but “for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.”<sup>24</sup> The role of the film review bodies that exist in most countries is to protect children and adolescents from exposure to unsuitable material, not to ban films altogether from exhibition to adults. As we note in Chapter VI, this anomaly has led to a vigorous debate in Chile and to several bills aimed at bringing Chilean constitutional norms on the cinema into line with international standards. Like all the reforms that have been proposed and discussed in the legislature, they still await passage in Congress.

### **The Right to Information**

No provision of the Chilean Constitution explicitly protects the right of the individual to obtain government-held information. According to an authoritative interpretation of the Constitution, however, this right is considered to be implicit in the right to inform, which is protected in Article 19(12).<sup>25</sup> The right to receive information is recognized in both the ICCPR and the American Convention, both of which refer to a right to “seek, receive and impart (information).” In Human Rights Watch’s view this right should be interpreted as generally entailing an individual’s right of access to official information, as well as information that is generally available. Although international human rights law does not explicitly provide a right to such official information, the state *is* required to “ensure” and “give effect to” the right to inform oneself. The importance of access to official information in strengthening democratic control of public bodies and promoting accountable government has been recognized in European courts and the Council of Europe since the early 1980s. Despite the lack of formal protection of this right in the Constitution, and the absence of legal mechanisms specifically designed to protect it, successive Chilean governments have embraced the need to expand access to public information. Some of these new measures are discussed below, in Chapter VII.

There is a second interpretation of the right to information which has provoked much discussion in Chile. According to this view, the state has an obligation to ensure that the public has access to information or opinions that might otherwise be excluded from the range of publications available on the market. Although intended to safeguard pluralism and the representation of minority opinion in a market dominated by conservative views, state intervention in enforcing such a right could lead to undue state interference in editorial decisions, with negative results for freedom of expression. A bill to enforce media pluralism by law was, in fact, presented to Congress in 1993, but it was forcefully opposed by media owners and pronounced unconstitutional by the Supreme Court.

## **IV. LAWS BARRING CONTEMPT OF AUTHORITY**

The amendment of the State Security Law to eliminate the crime of contempt of authority and the prior censorship of publications, which is currently in the final stages of congressional debate, would be an important contribution to strengthening freedom of expression and democracy in Chile. As recent prosecutions show, discredited public figures have utilized this law in efforts to salvage their damaged reputations. Unfortunately, Chile’s politicians have been reluctant to relinquish the special protection these laws give them from public criticism. Moreover, even if the relevant sections of the State Security Law are repealed to eliminate contempt of authority, that crime will continue to exist in

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<sup>24</sup>American Convention on Human Rights, Article 13(4).

<sup>25</sup>See José Luis Cea Egaña, “Estatuto Constitucional de la Información,” *Revista Chilena de Derecho*, Vol. 8, No. 1-6, 1981, p.8.

other laws.

Contempt of authority or “insult” laws make it a crime, usually punished by imprisonment, to offend the honor or dignity of those holding high office. These laws differ in several respects from the more general category of criminal defamation. In most jurisdictions that embrace criminal defamation, any individual, regardless of their rank or status, may initiate a prosecution against anyone who makes an untrue assertion deemed damaging to their reputation or public standing. Insult laws, by contrast, provide additional legal protection specifically and exclusively to public officials. Also, whereas defamation usually is applicable only where there are false assertions of fact, not true facts or opinions, insult laws punish truth as well as falsehood, opinions as well as factual assertions. Their purpose is to protect the honor of representatives of the State, and they are frequently conceived explicitly to safeguard the dignity of the incumbent’s office.<sup>26</sup>

With their roots in Spanish and French legal traditions, the criminal codes of more than eighteen Latin American states have provisions relating to the crime of contempt of authority. In recent years, only Argentina and Paraguay have repealed their contempt of authority laws (in 1993 and 1998, respectively). Chile has more contempt of authority provisions than any other Latin American country. Moreover, Chile’s laws are more repressive in nature and scope, and are used more frequently. Apart from the Law of State Security, versions can be found in the Criminal Code and Code of Military Justice.

The contempt of authority provisions in the military penal codes have not been invoked in recent years, reflecting the armed forces’ gradual withdrawal from the political arena. While civilians can still be brought before military courts for the crime of sedition (Article 276 of the Code of Military Justice), the last prosecution of a civilian for this crime was in 1996. The offense of “insult to the armed forces” (Article 284 of the Code of Military Justice), frequently used against human rights critics under the military government, has not been invoked since President Aylwin transferred jurisdiction to civilian courts in 1992. Nevertheless, both of these contempt of authority provisions remain in force.

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<sup>26</sup>See Ruth Walden, *Insult Laws: An Insult to Press Freedom* (Reston, Virginia: World Press Freedom Committee, 2000), p. 7.

Articles 263, 264, and 265 of the Criminal Code also deal with insults to and threats against a broad range of public authorities, including the president, members of Congress and its committees, judges, ministers of state (or “other authorities in exercise of their office”), and even “a superior in respect of his duties.”<sup>27</sup> These articles have been rarely invoked, and when they have it is usually as a secondary charge in prosecutions under the State Security Law. As we note below, Chile’s Congress has recently voted against repealing these articles of the Criminal Code. If the contempt of authority provisions of the State Security Law are abolished, the Criminal Code articles would continue to provide parliamentarians and other officials with special protection against insult or defamation over and above that available to the private citizen.

By far the most frequently used contempt of authority law is Article 6(b) of the State Security Law, which prohibits defamation or disrespect of:

the President of the Republic, Ministers of State, Senators or Deputies, or members of the Higher Courts of Justice, Comptroller General of the Republic, Commanders-in-Chief of the Armed Forces or the General Director of Carabineros whether or not the defamation, libel or calumny is committed with respect to the exercise of official functions of the offended party.

As far as Human Rights Watch is aware, the crime of contempt of authority in the State Security Law is unique in Latin America. In no other country is contempt of authority classified as an offense against public order and state security. The penalties, rising to five years’ imprisonment, are more severe than ordinary libel, and procedures for dealing with the crime allow shorter time and fewer possibilities for the defense. Usually, the courts refuse to admit evidence that shows that public order was not endangered by the offending expression, since that risk is conceived to be implicit in the insult itself. The notion of restricting debate to safeguard public order harks back to a pre-democratic era, when by its nature criticism was seen as an act of defiance.<sup>28</sup> Indeed, the historical origins of the law can be traced back to the authoritarian origins of the Chilean state in the nineteenth century.<sup>29</sup> However, recent cases show that officials’ concern for their image or reputation is the real factor behind Article 6(b) prosecutions. This confusion between private and public interest is facilitated by a norm in the law which allows officials to initiate and also to withdraw suits at their own discretion. This makes the law a convenient tool for politicians to stifle and intimidate their critics by harassing them with prosecution or merely the threat of prosecution.

Those subject to a State Security Law contempt of authority prosecution may immediately lose their political rights even before their trial has begun. Once the investigating judge has established that the accusation is well-founded and orders the suspect formally charged, he or she loses the right to vote in national elections and to stand for public office. This is, to be sure, a general principle of criminal law in Chile and is not a special disposition of the State Security Law. Disenfranchisement of those charged with a crime incurring a possible penalty of more than three years imprisonment is mandated in the Constitution, and those affected only recover the right to vote if they are acquitted.<sup>30</sup> If they are

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<sup>27</sup>Articles 263-265 of the Criminal Code, under the chapter of crimes against order and public security. The archaic nature of these provisions can be seen from the inclusion of a norm that the “a challenge to a duel, whether private or embocado (?) shall be considered a grave threat for the purpose of this article.” (Translation by Human Rights Watch.)

<sup>28</sup>For a fuller development of this point, see Felipe González Morales, “Leyes de Desacato y Libertad de Expresión,” Universidad Diego Portales, Centro de Investigaciones Jurídicas, April, 2000.

<sup>29</sup>For a fuller account of the history, see the text cited by Gonzalez (pp. 14-17) and Human Rights Watch, *The Limits of Tolerance*, pp. 22-24.

<sup>30</sup>Article 16 of the Constitution states: “the right to vote is suspended . . . if the person is facing charges for a crime meriting an afflictive penalty or for a crime which the law classifies as terrorist conduct” (translation by Human Rights Watch).

convicted, their right to vote and to hold public office is suspended until the sentence is served, at which time they must ask to be rehabilitated by the Senate.<sup>31</sup> In Human Rights Watch's view, suspension of the voting rights of a person who has not been convicted of any offense violates due process and the right to be presumed innocent unless proven guilty.

Two provisions of the State Security Law allow the state to suppress altogether publications to which the official concerned objects. Judges are empowered to confiscate the entire stock of a book or issue of a publication to protect the plaintiff's reputation. Article 16 permits the investigating judge "in serious cases, to order the immediate confiscation of any edition in which there appears an evident abuse of publicity punished by this law." Article 30 requires that the judge "place at the disposal of the court the printed matter, books, pamphlets, records, films, magnetic tapes and any other object which appears to have served to commit the crime." Although Article 16 provides a mechanism for appeal against a judicial confiscation order, no such appeal is contemplated under Article 30. Taken together, these articles breach the prohibition of prior censorship in the Chilean Constitution.

This is not, however, how many judges see it. A self-serving doctrine has taken root within the judiciary whereby only restrictions imposed by the executive branch are considered to constitute prior censorship. This doctrine is backed by another common view, that the right to honor takes precedence over the right to freedom of expression and access to information. In banning allegedly libelous publications, it is argued, judges are simply taking appropriate action to safeguard a constitutional right, the right to honor.

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<sup>31</sup>Article 17 of the Constitution.

Human Rights Watch has documented more than thirty cases in which journalists, human rights critics, politicians and others have faced one-sided contempt of authority prosecutions under Article 6(b) since Chile returned to democratic rule in March 1990.<sup>32</sup> Twelve cases that have passed through the courts since the publication of our 1998 report are described below. Politicians who seek to justify the defamation provisions of the State Security Law (not many are prepared to speak out in support of them any more) argue that special legal protection is needed to preserve the prestige of public office and democratic institutions. Yet, most of the litigants in Article 6(b) cases during the period covered by this report have been public figures whose reputations had been already damaged by serious and credible allegations of misconduct. These people often invoked the law effectively to shield themselves from public exposure, rather than to protect the institutions they represented from discredit.

### **The Black Book of Chilean Justice**

The proposed legislation to repeal the defamation and censorship provisions of the State Security Law had its origins in an act of censorship that vividly demonstrated the most egregious aspects of this law. It occurred, moreover, at a time when the Chilean judiciary, under Chief Justice Roberto Dávila, was beginning a long-overdue process of internal reform in response to criticism from all political quarters.

Alejandra Matus' *The Black Book of Chilean Justice* is an acerbic and ironic chronicle of intrigue, nepotism and corruption in the cloistered world of Chile's top judges.<sup>33</sup> It includes a wealth of detail about their much criticized conduct under the military dictatorship, as well as controversial aspects of their private lives. Its cover, eventually to be cited as offensive in the case brought against the author by former Chief Justice Servando Jordán, depicts three monkeys (hear-no-evil, see-no-evil, speak-no-evil) enthroned on the carved chairs of the country's highest court.

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<sup>32</sup>For documentation on cases between 1990 and 1998, see Human Rights Watch, *The Limits of Tolerance*, pp. 88-101.

<sup>33</sup>Alejandra Matus, *El Libro Negro de la Justicia Chilena* (Santiago: Planeta, 1999). Available on line at <http://www.geocities.com/SoHo/Workshop/1132/index.htm>. For more than four years Matus was court reporter for the now defunct pro-democracy newspaper *La Epoca*, and had written extensively on human rights cases. In 1994 she moved to another daily, *La Nación*. Her lengthy report on the murder of former Foreign Minister Orlando Letelier in Washington, D.C., was published as a book, *Crime with Punishment*, in 1996, and earned her and her co-author the Ortega Y Gasset award for investigative journalism.

On reading an advance copy of Matus's text, Justice Jordán lodged a complaint against her under Article 6(b) of the State Security Law with the Santiago Appeals Court, which appointed Judge Rafael Huerta Bustos to investigate.<sup>34</sup> At the request of Jordán, Judge Huerta ordered all the copies of the book confiscated under Article 16 of the State Security Law.<sup>35</sup> It was the removal by police of all the copies then on sale and in the publishers' warehouse within twenty-four hours of the book's launch, on April 13, 1999, which brought the case international notoriety.

After news came of her impending arrest, Matus boarded a flight to Buenos Aires, and later traveled to the United States. Acting with unusual speed, in October 1999 the U.S. immigration authorities granted her political asylum on the grounds that if she were to return to Chile she would face a one-sided criminal prosecution and a likely conviction that would make it difficult or impossible for her to carry on with her activities as an investigative journalist.

The 337-page book contained much of interest other than the pages which referred to Jordán, and bore on matters of acute public concern. Besides the negative political reaction to Jordán's action, the book became a black-market success in photocopy, and *La Tercera*, Chile's most popular serious daily paper, posted parts of the text on a U.S.-based website, multiplying the number of its readers by thousands.

The provisions of the State Security Law had previously not been employed to censor a book since an elected government took power in March 1990. Several civil rights groups challenged the constitutionality of Judge Huerta's action in writs to the Santiago Appeals Court, citing Article 19 (12) of the Constitution which prohibits prior censorship, and arguing that their right of access to information, also guaranteed by that provision, had been violated. The court declared all of them inadmissible. It maintained that the plaintiffs, as members of the public, could not be considered affected parties. This ruling illustrated another limitation on freedom of expression in Chile. More often than not, Chilean courts fail to see a connection between the right to express oneself and the right to have access to information, although in international law the two concepts are seen as inseparable.<sup>36</sup> As noted in Chapter III, Article 19 (12) of the Chilean Constitution guarantees only the right to "emit opinions and to inform, without prior censorship, in whatever manner and through whatever medium." It does not explicitly mention the right to be informed. The draft Press Law now in Congress would, if enacted, make this connection explicit by recognizing the individual's "right to be informed about matters of general interest."

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<sup>34</sup>In the preface to *The Black Book*, Matus describes how she had to reply evasively when a journalist from *La Tercera* called her to ask her permission to print an advance extract from the book before publication, and how their conversation sparked off memories of similar fears at different moments throughout her career. The publishers consulted two experts before approving the final text. Both advised that the publication could lead to a libel suit, but that the risk was worth taking. See Accusation, dictated by investigating Judge Rafael Huerta Bustos, June 11, 1999.

<sup>35</sup>The relevant part of Article 16 provides: "In serious cases, the Court may order the immediate confiscation of any edition in which there is a manifest abuse of publicity penalized by this law. The Court may exercise similar powers with regard to any other edition that may be published ostensibly to replace that against which measures have been taken in accordance with this law." (Translation by Human Rights Watch.)

<sup>36</sup>See Felipe González, "Leyes de Desacato y Libertad de Expresión," p. 20.

Article 16 of the State Security Law allows those affected by orders to seize publications to make recourse to the Appeals Court, which must rule on their claim within twenty-four hours. The Public Interest Clinic of the Diego Portales University, this time representing the author, decided to test the mechanism. The Appeals Court heard the case, but declined, by a majority decision, to overturn Judge Huerta's order. According to one of the authors of the claim:

The majority ruling did not attempt any assessment of the merits of the prohibition in the concrete case. In other words, the decision did not attempt any analysis of the reasonableness and proportionality of the measure adopted . . . from which it must follow that it is up to the judge to determine the "seriousness" of the case and whether or not to prohibit the publication. Nor did it examine the public interest raised by the publication.<sup>37</sup>

Instead of addressing these essential matters, the court merely sought to define the meaning of the word "edition," concluding from the Royal Academy Dictionary that it referred to "all the copies of a work printed in one run from the same mold."<sup>38</sup> There is an obvious difference, both in purpose and effect, between impounding a few copies of a publication, as permitted under the Law on Abuses of Publicity,<sup>39</sup> and confiscating the entire stock. The former action may be justified to allow a court to evaluate the basis of a libel charge, whereas the latter amounts to censorship.

Unable to prosecute Matus (Chilean law does not admit trials *in absentia*), Judge Huerta opened an Article 6(b) suit to prosecute the publishers of the book. On June 16, police arrested Bartolo Ortíz Henríquez, manager of the publishers, Planeta, and the book's editor, Carlos Orellano Riera, and held them for two days. The charge invoked Article 17 of the State Security Law, which provides that criminal responsibility is first vested in the author of an article

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<sup>37</sup>Ibid, p. 20.

<sup>38</sup>Santiago Appeals Court, decision dated May 27, 1999, reprinted in *Gaceta Juridica*, Asociación Nacional de Magistrados del Poder Judicial de Chile, No. 231, September 1999.

<sup>39</sup>Article 41 of the Law on Abuses of Publicity allows the judge "to order the collection of no more than four copies of the written or printed matter, posters, films or drawings which have served to commit the crime. But this measure may be extended to all the copies of the abusive work, if it involves crimes against good customs or against the exterior security of the State, or incitation of the crimes of homicide, robbery, arson . . ." In essence this norm allows prior censorship of pornography and material likely to harm national security. Clearly, the "crime" involved in the publication of the *Black Book*, being a public order offense, did not reach the level of seriousness required for censorship under the Law on Abuses of Publicity. The court, which addressed this point, ruled that the State Security Law took precedence, being a special law dealing with matters of state security. Ibid., commentary by Jean Pierre Matus Acuña.

and the director of the newspaper or magazine in which it appears, and is then passed down the line to the owner of the publication, if neither the author or director can be located, and thence to the printer. Ortíz and Orellano were considered co-authors since they had initially commissioned the project, and had exercised editorial control and approved the text.

In July, the Santiago Appeals Court ordered the charges against Ortíz and Orellano dismissed, finding that the flow-chart of criminal responsibility referred to in Article 17 did not apply to books, and that in any case the two could only be held responsible if the identity of the author could not be established.<sup>40</sup>

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<sup>40</sup>The wording in Article 17 is “a falta de” which could be translated as “in the absence of.”

By that time, the *Black Book* case had gained international notoriety. Together with the Center for Justice and International Law, the Public Interest Clinic of the Diego Portales University had filed a request for “precautionary measures” with the Inter-American Commission on Human Rights on April 26, 1999; on June 18, the commission called on the Chilean government to implement measures to protect the liberty and security of Ortiz and Orellano. On June 23, the OAS Special Rapporteur on Freedom of Expression, Santiago Cantón, visited Santiago after deciding to bring forward a planned visit on hearing of the publishers’ arrest. On June 30, Matus herself appealed to the Inter-American Commission, designating Human Rights Watch as co-counsel in her case, claiming that the seizure of the book and the legal action taken against her and her publishers violated Article 13 of the American Convention on Human Rights. On July 19, the commission sent a letter to Chilean Foreign Minister Juan Gabriel Valdés calling on the Chilean government to guarantee the security and personal integrity of the author, in view of the fact that Judge Huerta had declared her a fugitive from justice and could issue an order for her arrest via Interpol.<sup>41</sup> In October 2000, the Inter-American Commission declared Matus’s complaint admissible.<sup>42</sup>

By then, all outstanding appeals in Chile had been rejected. On April 3, 2000, the Supreme Court threw out a plea of unconstitutionality presented in April 1999 by lawyer Hernán Montealegre against the provisions of the Law of State Security under which the *Black Book* had been banned.<sup>43</sup> Previously, however, on May 31, 1999, the court’s prosecutor, Enrique Paillas, had even recommended that the court grant the appeal, on the grounds that Article 16 of the law violated the constitutional prohibition of prior censorship.<sup>44</sup>

The investigation phase of the judicial proceedings against Matus terminated on December 19, 2000. Only one day previously was the defense attorney allowed to review the evidence, allowing far too little time, he informed Human Rights Watch, to enable him to establish Matus’s innocence of the defamation charge. Nor was he allowed, even then, to photocopy the case file, although, as he pointed out, Justice Jordán had had access to it for months. For this reason, Human Rights Watch was unable to obtain copies of court documents in the proceedings.

On February 5, 2001 Judge Jaime Rodríguez Espoz, who had inherited the *Black Book* prosecution from Judge Huerta (Huerta retired from the judiciary in December 1999), temporarily halted the prosecution, citing as a reason that Matus was not available to answer the charges. According to Matus’s defense attorney, the judge held that the state security charges were well-founded, rejecting the opinion of the court prosecutor, who disagreed.<sup>45</sup> The temporary closure of the investigation meant that a warrant for Matus’s arrest and the prohibition of the book would remain in force. This would make it impossible for Matus to return to Chile without being arrested until the case became subject to a statute of limitations in thirteen years’ time.

The fate of the legal appeals in the *Black Book* case showed that the courts were not prepared to strike down the offensive provisions of the Law of State Security on constitutional grounds. Yet, the case had brought Chile into disrepute internationally and aroused wide public concern within the country. By the time of the April 2000 Supreme Court decision, all but three Supreme Court judges had been appointed by democratically elected presidents. Despite this, a solid majority of the court still refused to ensure that Chile fulfilled its international obligation to respect freedom of expression.<sup>46</sup>

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<sup>41</sup>“Ordenan al Estado garantizar libertades de A. Matus,” *La Hora*, July 26, 1999.

<sup>42</sup>Alejandra Marcela Matus Acuña v. Chile, Case 12.142, Informe N° 55/00 (October 2, 2000).

<sup>43</sup>“Rechazan recurso de periodista,” *El Mercurio*, April 4, 2000.

<sup>44</sup>Submission by Enrique Paillas Peña, Fiscal de la Corte Suprema, dated May 31, 1999.

<sup>45</sup>E-mail communication from Alejandra Matus, February 5, 2001.

<sup>46</sup>In July 2000, Human Rights Watch announced that Alejandra Matus was among a diverse group of writers from twenty-two countries to receive grants recognizing their courage in the face of political persecution. The

### Teaching the Press a Lesson

An indication of what Matus could face if she were to return to Chile is provided by the case of José Ale Aravena, the court reporter for *La Tercera*. On February 15, 2000, the Supreme Court sentenced Ale to a 541-day suspended prison sentence for an article he wrote about Jordán's career in the judiciary. His conviction by the Supreme Court reversed several lower court decisions absolving him of any offense.

In January 1998, Justice Jordán sued Ale and the director of *La Tercera*, Fernando Paulsen, under Article 6(b), for a news story by Ale which appeared in the January 7, 1998 edition of *La Tercera*. It appeared under the title "Complaining of the press, former court president takes his leave," and was subtitled "Jordán: 'I retire in peace.'" The disputed passage of the article read:

Despite his positive intentions to restore his relations with his colleagues broken during the plenary that elected him — by nine votes to seven — a wave of criticisms of Servando Jordán slowly built up. These went back a long time and referred to a sort of "clique" which had enjoyed certain privileges in the judiciary.

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Hellman/Hammett grants are given annually by Human Rights Watch to writers around the world who have been targets of political persecution. The grant program began in 1989 when the estates of American authors Lillian Hellman and Dashiell Hammett asked Human Rights Watch to design a program for writers in financial need as a result of expressing their views.

This article appeared on the day of Jordán's resignation as Chief Justice. His controversial career had received much attention in the press due to two impeachment motions against him in Congress involving allegations of judicial corruption in drug-trafficking cases. The impeachment efforts did not succeed, but the Chief Justice's period in office as president of the Supreme Court was reduced from three years to two as a result of a law restructuring the court passed in December 1997. Jordán was believed to be bitter about this premature loss of office.<sup>47</sup>

On account of this disputed passage of the article, Paulsen and Ale became embroiled in two years of litigation, which eventually led to Ale's conviction, although three successive investigating judges dismissed the charges and three different panels of the Santiago Appeals Court upheld Ale's innocence. On September 16, 1998, both journalists were detained and held overnight in Capuchinos prison after the Fifth Chamber of the Santiago Appeals Court decided to press charges at Jordán's request. On July 28, 1999, however, investigating judge Alejandro Solís acquitted both Paulsen and Ale of any offense, citing freedom of expression principles in the International Covenant on Civil and Political Rights and the American Convention on Human Rights. The Santiago Appeals Court upheld their acquittals on September 8, 1999.

As a last resort, Jordán appealed to the Supreme Court, using a mechanism known as a "recourse of complaint" (*recurso de queja*), whereby the court may be called upon to rule on a fault, abuse, or irregularity in a lower court decision, and which, in practice, serves as a third-level appeal.<sup>48</sup> In a divided ruling (three votes to two), the Supreme Court's Second Chamber acquitted Paulsen, but found Ale guilty, overruling his repeated acquittal in the lower courts. The language of the decision seemed intended to send a clear message to the press. Even the minority of judges who voted against the ruling reprimanded Ale for the "flippancy" and "impertinence" of the language used in his article.

The argument of the court's majority restated the traditional doctrine on contempt of authority in the State Security Law. The judges ruled that any "public lack of respect toward relevant public authorities . . . evidently produces a serious risk of weakening of the principle of authority which must be upheld in the Republic." Evidence to prove that public order was not affected was held to be inadmissible:

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<sup>47</sup>See Human Rights Watch, *The Limits of Tolerance*, pp. 98-101, for more details about the impeachment.

<sup>48</sup>This type of appeal became widely used as a *de facto* last instance appeal, since if the sentencing court is found to be at fault, the Supreme Court may revoke or modify the sentence. In February 1996, a law was passed to restrict the use of this procedure to judgments against which ordinary judicial appeals were unavailable. In Article 6 (b) cases there is no avenue of appeal to the Supreme Court for a final cassation judgment.

Any libel, defamation or calumny directed at an authority of the Republic mentioned in the law is, in and of itself, dangerous for the maintenance of public order and the principle of respect for authority, without more proof being required other than the existence of the expressions offensive to honor, and the verification of the public office of the person alluded to.<sup>49</sup>

The court's irritation with the press, and with Ale in particular, can be read between the lines of the verdict. Indeed, on January 28, two weeks before it was delivered, Ale presented a complaint to the Supreme Court that one of the judges, Vivian Bullemore, had called him "a professional slanderer" and threatened him in a front of a group of acquaintances at a public event.<sup>50</sup> He expressed fears that he would not receive an impartial trial while Judge Bullemore was on the bench, and, moreover, responsible for drafting the sentence. The Supreme Court ignored Ale's complaint and later rejected his appeal for the sentence to be annulled on grounds that Bullemore should have disqualified himself or been replaced.<sup>51</sup>

Human Rights Watch wrote to then-President Eduardo Frei on March 8, 2000, just before he left office, urging him to grant Ale a pardon as a final act of his mandate. The letter received no reply, but on July 6 President Ricardo Lagos did grant Ale a presidential pardon.

### **Not Even *El Mercurio* is Safe**

A narrow Supreme Court decision in favor of *El Mercurio*, Chile's oldest and most venerable newspaper,

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<sup>49</sup>Judgment, February 15, 2000, paras. 8,10.

<sup>50</sup>"Caso Jordán: atribuyen inhabilidad a abogado integrante," *El Mercurio*, February 17, 2000. The event was the funeral wake of the former Chief Justice, Roberto Dávila. According to Ale's statement to the court, Bullemore refused to shake his hand on being introduced, and said: "You are a professional slanderer. I don't know how you have the nerve to turn up here, in the presence of Mr Dávila. You should not be here. You are directing a campaign to discredit me. Lots of people have called me in your name just to insult me and rubbish my honor. This won't end here. Take care, because life is full of surprises." Submission to the Supreme Court (*Tengase Presente, Excma Corte Suprema*), January 28, 2000. Bullemore later admitted having made the remarks, but claimed that he had already drafted the sentence when he made them. See Mariela Thomas and Pablo Vergara, "Bullemore: el fallo ya estaba redactado," *La Hora*, February 17, 2000.

<sup>51</sup>The Human Rights Committee of the United Nations affirmed that impartiality "implies that judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties." *Karttunen v. Finland*, (387/1989), 23 October 1992, Report of the HRC, vol. II, (A/48/40), 1993, at 120, para. 7.2.

prevented Justice Jordán from obliging the newspaper to publish his opinions on its editorial page.

The former Chief Justice took exception to an editorial entitled “Freedom of Expression” that appeared in *El Mercurio*'s September 20, 1998 edition. The editorial accused Jordán of using his influence in the judiciary to obtain the arrest of Paulsen and Ale, and to launch a 1992 lawsuit against *El Mercurio*. Although *El Mercurio* published Jordán's objections to the editorial on its letters page on September 25, and again on November 28, the former Chief Justice was not satisfied.

Chile's Constitution guarantees the right of reply.<sup>52</sup> Section II of the Law on Abuses of Publicity, require that newspapers insert, free of charge, a correction or clarification at the request of any person who feels “offended, or unfairly alluded to in any published, transmitted or televised information” (the right of reply is protected in similar terms in the proposed Press Law, which is due to replace this law). The correction must be published in full and without commentary, and on the same page as the original article. Justice Jordán brought a prosecution against *El Mercurio* for failing to comply with this norm. In November 1998, investigating magistrate Maria Antonia Morales found Jordán's complaint to be justified and ordered the paper to publish his correction on its editorial page. *El Mercurio* appealed. The Santiago Appeals Court ruled in the newspaper's favor, arguing by two votes to one that newspapers could only be obliged to publish corrections of fact, not of opinion. Justice Jordán lodged a disciplinary complaint against the two appeals court judges, Haroldo Brito Cruz and José Luis Ramaciotti, who had granted the appeal. The Supreme Court ruled in July 1999 in favor of the judges, but a minority of two Supreme Court justices supported Jordán. Thus, *El Mercurio* was vindicated, but only just.

The judges who opposed Jordán's claim based their argument on a common-sense distinction between fact and opinion. Yet, as the dissenting judges pointed out, the Constitution of 1980 does not explicitly recognize the difference between the two. In fact, the relevant constitutional provision states:

Every natural or legal personality offended or unjustly alluded to by a medium of social communication has the right to have their declaration or correction published without charge, according to the conditions that the law shall determine, by the medium of social communication in which the information was published.<sup>53</sup>

According to the dissenting judges, the Constitution deliberately *ignores* the distinction between fact and opinion. It therefore grants the right to reply, they held, not just to refute a lie but to respond to any offending criticism or opinion. In fact, the dissenters argued, the Constitution's drafters considered the Law on Abuses of Publicity far too limited, and believed that the right to reply should include the right to respond to editorials and even to headlines and photographs.<sup>54</sup> The minority judges' view finds support in the opinion of a leading constitutionalist, Dr José Luis Cea Egaña.<sup>55</sup>

The right of reply is protected by the American Convention on Human Rights. However, under no circumstances can it be invoked to force the publication of opinions. If this were so, it would constitute gross interference with the freedom of the press, and could lead to widespread self-censorship. Since past case law does not constitute binding precedent in the Chilean legal system, the issue can only be definitively resolved by a constitutional reform.

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<sup>52</sup>Constitution of Chile, Article 19(12) at paragraph 3.

<sup>53</sup>Constitution of Chile, Article 3. (Translation by Human Rights Watch.)

<sup>54</sup>Supreme Court. Don Francisco Bartucevic Sánchez v. Ministro don Haraldo Brito Cruz y don José Luis Ramaciotti Fracchia, July 29, 1999, p. 10. One of the drafters mentioned is Sergio Díez Urrutia, formerly Pinochet's ambassador to the United Nations, and currently an appointed senator.

<sup>55</sup>José Luis Cea Egaña, *Constitución de 1980*, p. 100, cited by dissenting judges Correa Buló and Pérez Zañartu.

### **Abuse of Power: The Cases of Francisco Fernández and Marcos Jaramillo**

Unlike the other instances of contempt of authority described in this report, the two cases described below have no overt political connotations. Instead, they show how the Law of State Security lends itself to abuse by politicians involved in personal quarrels and private litigation completely unrelated to their public status and functions. Here a senator invoked his status in an effort to intimidate and silence opposing litigants who, like all targets of contempt of authority suits, lacked the power to retaliate in kind. In the first case the courts rejected the suit after finding that public order was not affected by the allegedly insulting expression used. In the second, the very same court convicted and sentenced the accused, thereby transforming a private quarrel into a problem of the state.

Francisco Fernández Montero is an attorney employed by the water company ENDESA. On August 21, 1998, Fernández, accompanied by four others, landed by helicopter on a private ranch owned by supermarket tycoon and then-senator Francisco Javier Errázuriz Talavera, to witness an inspection ordered by a court investigating a civil dispute over water rights between Errázuriz and ENDESA. According to Fernández's account, Errázuriz, members of his family and employees were lying in wait for the helicopter, and when it touched down they surrounded it and chained the machine to a vehicle, preventing the visitors' escape. Errázuriz's farm hands allegedly beat Fernández and pinned him to a truck while Errázuriz punched him in the face. Fernández and ENDESA sued Errázuriz for assault and kidnapping, and in January 1999 the Supreme Court stripped Errázuriz of his senatorial immunity to face trial on these charges. It was the first time a senator had been deprived of his immunity since 1967.

Errázuriz and his wife, Maria Victoria Ovalle, who is herself a member of the Chamber of Deputies, accused the ENDESA lawyer of libel and defamation under Article 6(b) of the State Security Law for insulting them during the scuffle at the ranch. The suit was expanded to include insults Fernández allegedly made against Errázuriz from the hospital bed where he was nursing his injuries from the beating, including a cracked rib. Phrases reported in the national press included "the senator is a crazy cyst who abuses power for his own benefit," and "scoundrels have an example in a Senator of the Republic."<sup>56</sup>

The Rancagua Appeals Court rejected Errázuriz's case, but he lodged a complaint against the court, claiming, *inter alia*, that it had wrongly vacated the Article 6(b) accusation on the grounds that no threat to public order was involved.

Errázuriz's lawyers argued that it was "an abuse to demand that (public order) be endangered . . . since the juridical value protected by the norm in question is the moral patrimony of the representatives of the three powers of state."<sup>57</sup> In other words, an insult hurled at a congressman is an offense against public order purely due to the status of the target, regardless of the context, or whether the attack was related to his office or was entirely personal. This argument was in line with traditional legal rules applicable to Article 6(b) cases, in which courts have repeatedly held that real damage or threat to public order does not need to be proven in order to sustain the charge, and that it is irrelevant whether the attack relates to the target's official capacity.

Yet, in an important break with its previous approach, the Supreme Court rejected Errázuriz's arguments and acquitted Fernández. It should be noted, however, that Chilean jurisprudence is not binding.<sup>58</sup> Indeed, a very different fate awaited fifty-five-year-old farmer Marcos Jaramillo Arriagada, who was convicted under Article 6(b) by the same

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<sup>56</sup>Cited in the *Recurso de Queja* (writ of complaint) lodged by Errázuriz against the Appeals Court of Rancagua.

<sup>57</sup>*Ibid.*

<sup>58</sup>According to Article 3 of the Civil Code, "judicial sentences do not have binding force except in regard to the cases being ruled upon." (*Las sentencias judiciales no tienen fuerza obligatoria sino respecto de las causas que actualmente se pronunciaren.*)

court in February 2000, in a ruling that strictly followed established doctrine. His case, like the Fernández case, involved Senator Errázuriz .

Studying the two verdicts, Human Rights Watch could find no legal grounds to explain why one man was absolved and the other convicted. It may be relevant to note, however, that Fernández had powerful corporate backing and was defended by a prestigious law firm. Jaramillo, on the other hand, found himself facing the litigious senator alone in defense of his land and his family. He had to rely on a court-appointed lawyer, who resigned from the case hours before the deadline for a last appeal to the Supreme Court.

Marcos Jaramillo Arriagada's family have farmed land in the district of Colchagua, ninety miles south of Santiago, for generations. Jaramillo lives on a ranch bordering the Pacific ocean close to the seaside resort of Pichilemu. In 1993, his aunt sold an estate adjoining Jaramillo's property to Senator Errázuriz. Within a few years, the two men were embroiled in a dispute over their properties' respective boundaries and the ownership of a lagoon which runs between the estates. In 1996, Jaramillo denounced the senator to a local court, accusing Errázuriz of illegally erecting fences on his land and barring him access to the lagoon. The court closed the case in December 1997 without settling the ownership question. Meanwhile, without consultation, Errázuriz's employees, accompanied by his son, removed the existing fence dividing the properties. Incidents like these multiplied and by 1998 there were at least seven lawsuits pending between the two men.<sup>59</sup>

On January 18, 1998, Senator Errázuriz and his son, armed with shotguns, arrived on horseback at Jaramillo's ranch accompanied by six farmhands and a police officer traveling in a private vehicle accompanied by an Errázuriz employee. Brandishing his gun, according to Jaramillo's account, Errázuriz confronted Jaramillo and warned him that he would suffer serious consequences if he continued to uproot the palm trees the senator had planted around the lagoon. On January 29, Jaramillo filed a writ before the Rancagua Appeals Court, alleging armed trespass and death threats against him and his family. The court admitted the writ. On February 13 there was another violent standoff when Errázuriz's men, in tractors, jeeps and a bulldozer, tried to restake his claim to the disputed land and were met with physical resistance from Jaramillo, his family and employees. Matters came to a head on February 21, after the senator had announced his intention to donate the disputed lagoon to the municipality of Pichilemu as a "resort for the people."

After leaflets had been handed out inviting the public to the lagoon's inauguration and offering as "additional entertainment" the spectacle of Jaramillo's "gang" trying to defend his land, hundreds of day trippers flocked to the site. Violent skirmishes broke out after Jaramillo was unable to prevent their access to the lagoon.

Each of these incidents generated a war of words and conflicting accounts in the press and on television. While Errázuriz disparaged his enemy as "mentally unstable," Jaramillo defended himself by denouncing what he claimed to be the senator's constant abuse of his influence in the courts, the police and the media. Following the events of February 21, Errázuriz filed a criminal libel suit against Jaramillo in Santiago's 11th Criminal Court. When the judge acquitted Jaramillo after finding no intention to insult, Errázuriz filed a second suit, this time under Article 6(b) of the Law of State Security. Investigating judge Victor Montiglio Rezzio of the Rancagua Appeals Court ordered Jaramillo arrested to face charges. On August 27, 1998, police detained him while he was visiting Francisco Fernández in a Santiago hospital where the latter was recovering from his beating at the hands of Errázuriz's employees. Jaramillo was taken to Capuchinos prison, where he was held for six days before being transferred, handcuffed and shackled, to a prison in Rancagua. In all, he spent twelve days behind bars.

On February 8, 2000, Judge Montiglio sentenced Jaramillo to a suspended prison term of sixty-one days, a verdict that was upheld on appeal by the Rancagua Appeals Court. The court was not swayed by Jaramillo's double jeopardy argument (Jaramillo had been acquitted in the earlier suit), ruling that some of the allegedly injurious expressions at issue in the second suit were new (although their tenor was identical to those for which Jaramillo had been acquitted).

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<sup>59</sup>Human Rights Watch interview with Marcos Jaramillo Arriagada, January 26, 2001.

Nor did it consider that the circumstances of provocation lessened Jaramillo's guilt, even though the court accepted that his conduct "was a response to permanent aggression and attacks which have greatly affected his reputation and honor, and likewise violated his property rights, a situation so unjust that it naturally provoked a reaction of anger and outrage."<sup>60</sup> Jaramillo was prevented from appealing the case further. His government-appointed lawyer resigned only hours before the deadline for the submission of a disciplinary complaint against the Rancagua judges to the Supreme Court. The lawyer said he disagreed with the action, and could find nothing wrong with the conduct of the judges.

### **Who Writes the Headlines? *El Metropolitano* under Attack**

In February 2001, Senator Errázuriz resorted once more to the State Security Law in defense of his reputation and business dealings, this time targeting *El Metropolitano*, a small Santiago newspaper. On January 27 and 31, and on February 1, *El Metropolitano* published articles linking a holding company owned by Errázuriz to a case involving forged legal documents. The newspaper claimed that the forged documents, for which a public notary and his assistant were facing criminal charges, had been used by an Errázuriz-owned company, Inverraz (Inversiones Errázuriz), to preempt a court-mandated embargo of its shares in a private pension company.

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<sup>60</sup>Decision of Investigating Magistrate Victor Montiglio Rezzio, Rancagua, February 8, 2000.

On February 5, 2001, Errázuriz filed a criminal lawsuit under Article 6(b) of the State Security Law against Enrique Alvarado Aguilera, director of *El Metropolitano*, Javier Urrutia Urzúa, its business editor and one of the authors of the articles; and Mireya Muñoz, a photographer, alleging that the articles were defamatory. In particular, the senator objected to the January 27 headline *Fra Fra Trapped by Big Scandal: Forged Document Prevented Embargo of Francisco Javier Errázuriz's Shares*, and the January 31 headline *The Testimonies that Accuse Fra Fra: Affidavit of Forgery Suspect Points to Errazuriz Attorneys*.<sup>61</sup>

On the day the first headline appeared, Errázuriz called up the newspaper and complained directly to the author, Javier Urrutia.<sup>62</sup> The senator dictated his observations over the phone to a newspaper official to whom Urrutia had referred him, expecting them to be published with a headline on the following day. Instead, the newspaper published a box on its title page with the title "Errázuriz Says Notary Was Responsible" and a half-page inside article summarizing Errázuriz's version. The senator said in his affidavit that he felt he had been cheated because there had been no headline and the space given to his version was less than he had been led to expect. He did not, however, indicate that any points of fact had been omitted.<sup>63</sup>

Instead of opening an ordinary criminal libel suit as he would have been entitled to do in believing his reputation to have been maliciously damaged, Errázuriz chose to invoke his senatorial status, with the implication that not only he, but the state, was an injured party in the case. After having been suspended from his senatorial position following the *desafuero* proceedings, it is open to question whether Errázuriz in fact had legal powers to initiate State Security Law proceedings. In fact, the President of the Senate indicated to the court that although suspended, Errázuriz had not lost his senatorial status.

The inclusion of the photographer, Mireya Muñoz, in the writ, was inexplicable and appeared to be totally arbitrary. She was not accused of any culpable action in the senator's affidavit, and the photograph attributed to her, published on January 27, showed nothing more than an unidentified person viewed from behind entering the office of the notary charged in the case.

### **A Blast from the Past: The Case of Arturo Barrios**

Arturo Barrios Oteiza still faces Article 6(b) charges lodged by General Pinochet, of whom he was a vocal critic during his days as a student leader. Now, although he works as an advisor to the Lagos government, Pinochet's legal suit against him still dogs his life. Those like Barrios awaiting judgment under Article 6(b) have their civil and political rights seriously restricted. Because of the seriousness of the alleged offense, once charged they may not vote in national elections, stand for public office, or leave the country for the full duration of the trial.

A former socialist student leader in the early years of the Frei administration, Barrios is still facing a suit under Article 6(b) lodged by General Pinochet in 1995. He has already received one sentence for contempt of authority. In April 1996 he was convicted and sentenced to a 541-day suspended prison term under Article 6(b) for shouting

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<sup>61</sup>In Chile Francisco Javier Errázuriz is popularly known as Fra Fra.

<sup>62</sup>Errázuriz tried but was unable to reach Alvarado, the newspaper's director, who was in Viña del Mar the day the article appeared. Human Rights Watch interview with Enrique Alvarado Aguilera, Javier Ignacio Urrutia Urzúa and David Hevia of *El Metropolitano*, February 19, 2001.

<sup>63</sup>Itma. Corte de Apelaciones, affidavit by Francisco Javier Errázuriz, February 5, 2001.

“Pinochet, Contreras and their henchmen are murderers” during the 1994 anniversary of the military coup. Barrios’ remark was considered to be criminal calumny in those days (well before the arrest and conviction of the former head of Pinochet’s secret police, Manuel Contreras, and years before Pinochet was stripped of his senatorial immunity to face trial for human rights violations).

Now an advisor to Social Affairs Minister Camilo Escalona and with his office in the presidential palace, Barrios is still liable to be convicted for a second offense, dating from June 25, 1995. The occasion was the twentieth anniversary of the “disappearance” of Carlos Lorca Tobar, a socialist member of the Chamber of Deputies, and one of the youngest ever to sit in the Chilean Congress. Addressing a group of some twenty young people at a busy downtown Santiago intersection, Barrios said, with unconscious foresight: “Mr. Pinochet must be judged by the justice of our country as the real culprit for the death of thousands in Chile.” In the court investigation, both the Ministry of the Interior and the governor of Santiago declared that they been unaware of the meeting at which Barrios made his comment, and that there had been no disturbance whatsoever of public order.

Despite the fact that Pinochet has subsequently been charged for kidnapping and murder, Barrios still faces defamation charges which could, in theory, lead to a six-year prison sentence if he were convicted (the judge on this occasion would not be able to suspend any prison sentence imposed on Barrios as it would be his second offense, and its repetition would be considered an aggravating circumstance).<sup>64</sup> The court investigation has been long completed and the case has now awaited a verdict by the judge, Juan González Zuñiga, for four years. According to Barrios’ defense attorney, Maria Elena Oteiza (his mother), both she and attorneys acting for the army have tried to have the case set aside, without result. Oteiza informed Human Rights Watch that in January 2000 she discussed the case with the General Auditor (senior legal official) of the army, who consulted with Commander-in-Chief Ricardo Izurieta. Their decision was to await Pinochet’s return to the country from England (where he was still under house arrest) before deciding whether to proceed or drop the case.<sup>65</sup> Pinochet has since returned to Chile and now faces trial for the very crimes Barrios denounced, but the case against the former student leader is still open. Consequently, Barrios is still disqualified from exercising his political rights.

### **A Missile from the Air Force**

Unless Congress grasps the urgency of the State Security Law reforms and approves them rapidly, Chilean democracy will be internationally discredited by further damaging prosecutions and possibly convictions of citizens who exercise their right to denounce abuses. On February 12, 2001, Gen. Hernán Gabrielli Rojas, head of the air force chiefs-of-staff and then acting commander-in-chief,<sup>66</sup> launched a lawsuit under Article 6(b) against three former political prisoners, who had alleged that he participated prominently in the torture of detainees at the Cerro Moreno airbase in Antofagasta in the days immediately following the 1973 military coup.

Carlos Bau, Juan Ruz and Héctor Vera, all of who had been held prisoner at Cerro Moreno, accused Gabrielli of

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<sup>64</sup>“Arturo Barrios podría ser condenado a seis años de cárcel,” *La Tercera*, February 8, 2000.

<sup>65</sup>Telephone interview and faxed communication from attorney Maria Elena Oteiza Mannarelli, February 28, 2001.

<sup>66</sup>The titular commander-in-chief, Gen. Patricio Ríos, was recovering from heart surgery when the lawsuit was launched.

savagely beating a fellow-prisoner, Eugenio Ruíz-Tagle Orrego, who was executed on October 19, 1973, by the military death-squad known as the Caravan of Death. The allegations were made following the publication in the electronic newspaper *El Mostrador* of official documents showing that General Pinochet (indicted only weeks earlier by Judge Juan Guzmán Tapia for allegedly ordering the atrocities committed by the Caravan of Death) had been informed by colleagues of Ruíz-Tagle's torture and summary execution, but had denied the veracity of the accounts.

While Gabrielli's decision to invoke the State Security Law (reportedly taken with Commander-in-Chief Patricio Ríos's express consent) alarmed government officials, attempts by Minister of Defense Mario Fernández to persuade Gabrielli to change his mind fell on stony ground. Nor was Fernández successful in persuading Ríos to reassume his duties as soon as his medical leave expired, thereby ending Gabrielli's entitlement to represent the institution in the lawsuit. Compounding the impression of military pressure, government ministers made statements criticizing as irresponsible judicial actions for torture brought by citizens against active members of the armed forces, an ominous departure from the government's stated policy of not intervening in the judicial arena.<sup>67</sup> The actions questioned by officials included an obstruction of justice suit filed on January 16 by lawyer Julia Urqueta against all four commanders-in-chief, for allegedly withholding information on the "disappeared."<sup>68</sup> As this report went to press, *El Mercurio* reported that Chile's military top brass were considering the action an attack on military honor and had not "discarded" action against the litigants under the State Security Law.<sup>69</sup>

At the time of writing, the future of Gabrielli's suit remained unclear. Lawyers acting for the three accused pointed out that the impugned allegations were published in the press before Gabrielli moved into the position of acting commander, and argued that he was not, therefore, entitled to invoke the status.

## V. REFORM INITIATIVES: THE POLITICIANS GET NERVOUS

The defamation provisions of the State Security Law should have been among the first targets of an elected civilian government intent on establishing effective democratic controls after a long period of dictatorship and authoritarian rule. These provisions should have been abolished quickly after the restoration of democracy in 1990. Yet, almost a decade passed, during which time the law continued to impose invisible limits on public debate and to encourage self-censorship in the media, before any serious reform initiative was introduced in Congress.

As noted previously, the detonating factor for reform was the seizure of *The Black Book of Chilean Justice* in April 1999. The introduction immediately afterwards of a bill to eliminate the crime of defamation from Article 6(b) seemed to offer hope of rapid reform, given the almost universal condemnation of the book's censorship and the cross-party support apparently enjoyed by the reform initiative. But many parliamentarians hedged when it came to approving

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<sup>67</sup>The most forthright such appeal came from Interior Minister José Miguel Insulza. "Torturas en 1973: Insulza pide que no proliferen las denuncias," *El Mercurio*, February 15, 2001.

<sup>68</sup>Chilean human rights groups, and relatives of victims of human rights violations during the military government, were convinced that the armed forces had withheld information provided in January 2001 following an agreement reached at the so-called Dialogue Round-Table (*Mesa de Diálogo*).

<sup>69</sup>"FF.AA. y Carabineros alistan defensa en conjunto," *El Mercurio*, February 17, 2001.

changes that would deprive them of part of their own shield against inquisitive public scrutiny. As of February 2001, twenty-one months after the reform was first proposed, its future is still uncertain. The complete removal of the crime of contempt of authority from the statute books, a basic condition for a vigorous public debate, seems almost as remote as ever. A brief history of the initiative shows the nervousness aroused in Congress by the reform.

### **The Politics of Reform**

On April 21, 1999 some members of the Chamber of Deputies from the Socialist Party, the Party for Democracy, and the liberal wing of the Christian Democrats introduced a bill to remove the contempt of authority provisions from the State Security Law. The bill was quite modest in scope. It proposed to repeal Article 6(b), except for a (rarely invoked) prohibition against acts defiling the national flag, crest and name of Chile. It would also amend (but not abolish) Article 16, and thus would still permit the confiscation of any publication deemed to offend national security, internal security or public order. The bill would, however, eliminate Article 17, which refers to the “flow-chart” liability of directors, editors, publishers and printers.

Initial discussions over the bill took place in the Chamber of Deputies’ Committee on Constitution, Legislation and Justice. Here, the Frei government introduced several modifications expanding the scope of the initiative, the most important of which was to propose the repeal, in addition, of the contempt of authority provisions of the Criminal Code.<sup>70</sup>

These more radical reforms proposed by the “abolitionists” in the executive branch alarmed influential right-wing parliamentarians as well as many on the government’s own benches, particularly in the Christian Democrat Party. As a result, and as a trade-off for the Criminal Code reforms, the “retentionists” on the committee won support for a proposal to amend Article 429 of the Criminal Code, which deals with the offense of ordinary libel and calumny, in such a way that defamation of certain public authorities would be considered a more serious offense than ordinary libel, with tougher penalties.<sup>71</sup> Even with this major concession, when the committee presented its report to the plenary of the Chamber of Deputies, objections were raised on all sides. Members of the right-wing opposition party, the Independent Democratic Union, opposed any change to Article 6(b). The Christian Democrats were divided, as was National Renovation, the other opposition party.<sup>72</sup>

The objections led the committee to drastically water down its original draft. It dropped altogether the proposal to repeal the Criminal Code’s contempt of authority provisions. Even so, it persisted with the new version of Article 429, which would give public figures greater protection from libel than ordinary citizens. Thus, although public authorities would no longer be able to deploy Article 6(b) against critics, they would still have the Criminal Code provisions at their disposal. Moreover, the higher penalties contemplated in the proposed new version of Article 429 would be applicable to offenses under the Criminal Code articles. There was, therefore, a serious risk that contempt of authority

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<sup>70</sup>Articles 263-265 of the Penal Code penalize defamation of the President, members of Congress, judges, ministers of State or other authorities, and even “a superior in exercise of his authority.” They have been rarely invoked, an exception being the prosecution of Francisco Javier Cuadra for insulting the honor of Congress in 1995. Their disuse, however, can be explained by the existence of the more severe provisions of the State Security Law. Were the latter to be repealed, it is very likely that the Criminal Code articles would be relied upon as a substitute.

<sup>71</sup>The proposed amendment to Article 429 reads: “If the libel or calumny affects the President of the Republic, Ministers of State, Deputies, Senators, members of the High Courts of Justice, Controller General of the Republic, Commanders-in-Chief of the Armed Forces, General Director of Carabineros of Chile, or the Director General of the Investigations Police of Chile, in relation to their office, aggravating circumstance no. 13 of Article 12 of the code will be held to apply.” The aggravating circumstance mentioned here applies to offenses “committed with disrespect or contempt of a public authority, or in the place where he (or she) carries out their functions.”

<sup>72</sup>Marcelo Pérez and Gabriela de la Maza, “Las dificultades para cambiar la Ley de Seguridad del Estado,” *La Tercera*, August 31, 1999.

would actually end up being even more heavily penalized than it is at present under Article 6(b).<sup>73</sup>

On the issue of confiscation, the committee's final proposal was also diluted, being limited to the repeal of Article 16, which had been used for the censorship of *The Black Book*. The government had also proposed to abolish Article 30 of the State Security Law, which requires judges to place before the court any materials (books, pamphlets, tapes, records, etc.) used to commit an offense of libel against a state authority, since, it was believed, this could also be used in its current wording to permit prior censorship. However, the committee approved only the amendment of this article, according to which judges would be allowed to confiscate only "the number of copies strictly necessary," a wording that carried the risk of being interpreted to mean *all* the copies of an offending publication, if the offense was considered particularly serious. The lower house of Congress finally endorsed the committee's proposals on October 6, 1999.

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<sup>73</sup>For a detailed analysis of the parliamentary debate, see Felipe González, "Leyes de Desacato," pp. 38-45. Our observations in this section are also based on a discussion with Rodrigo Medina, the Ministry of the Secretariat of Government's representative during the debate in the Chamber of Deputies, at a session of the Chilean Forum on Freedom of Expression, at the Diego Portales University Law Faculty, on April 28, 2000.

Fearing rejection of the package in the Senate, the government adopted a different strategy. It decided to incorporate the reform of Articles 6(b), 16 and 17 of the State Security Law, together with some provisions of lesser importance, into the proposed Press Law, which was then in the final stages of debate in a joint committee (*comision mixta*) of both houses after a tortuous seven-year sojourn in Congress. The government calculated that the incorporation of its reform proposals into this comprehensive bill would be the surest way to have them approved. In parallel, it retained as a separate initiative the original bill to reform other articles of the Law of State Security, including Article 30.<sup>74</sup> Government ministers expressed optimism in early May 2000 that the Press Law would pass the Chamber of Deputies without difficulty.

On May 16, 2000, however, the Chamber of Deputies rejected the text of the Press Law approved in the joint committee by a large majority, to the chagrin of President Lagos's ministers and protests from the Senate. From the government benches, only five members gave their support. In part, the contempt of authority reforms, limited as they were, fell victim to other issues in the Press Law that had proved highly divisive in the past, in particular the issues of pluralism and media concentration. Many on the left objected to the bill's proposals to reinforce pluralism and diversity in the media as lukewarm and ineffectual. However, these disagreements about concentration and pluralism in the media by no means accounted for all the objections to the bill. Among its changes to the draft approved in October 1999 by the Chamber of Deputies, the joint committee had agreed to dispense with the controversial proposal to amend Article 429. As *La Tercera* reported:

Some deputies . . . were not prepared to approve the bill without re-introducing this new prerogative which compensated for the loss of the privileges provided by the State Security Law. This position crossed all the benches.<sup>75</sup>

Following this reverse in the Chamber of Deputies, President Lagos vetoed the little that remained of the Press Law as unviable. After arduous negotiations with his Concertation party colleagues in Congress, Minister of the Secretariat of Government Claudio Huepe introduced a revised version of the Press Law in August 2000, retaining the amendment to Article 6(b) and the repeal of Article 16. The new version contained no reference to the contempt of authority articles of the Criminal Code. The revised proposal was approved in committee on November 7, but as of the end of the year still had not cleared the Chamber of Deputies.

### **Privacy Norms: A Recipe for Self-Censorship?**

One issue left pending in the government's latest version of the Press Law profoundly concerned the journalistic community. The Senate had voted for the repeal of the Law on Abuses of Publicity (to be replaced by the new Press Law) but, anxious to preserve politicians' protection against invasion of their sphere of privacy and intimacy, failed to include in the new Press Law any protection for journalists who reveal details of a politician's private life on grounds of public interest. While Article 22 of the Law on Abuses of Publicity banned the publication of information about a person's private life, it made an exception in several cases, including when the information revealed was relevant to the exercise of a public office, or of a profession implying a public interest. Now, Article 22 was to go, leaving in place and without any qualifying language Article 161 (a) of the Criminal Code, the so-called Otero Law. This article, introduced in 1995, punishes with imprisonment and a fine any one who:

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<sup>74</sup>Ibid.

<sup>75</sup>"Rechazan Ley de Prensa para mantener privilegios," *La Tercera*, May 17, 2000.

captures, intercepts, records or reproduces by whatever medium conversations or communications of a private nature, in private premises or in places to which the public does not have free access, without the authorization of the affected party; steals, photographs, photocopies or reproduces documents or instruments of a private nature; or captures, records, films or photographs images or events of a private nature that take place, occur, or exist in private premises or places not of free public access. The same penalty shall apply to anyone who publishes the conversations, documents, instruments, images or events referred to in the preceding paragraph.<sup>76</sup>

Representatives of the press raised concerns that the repeal of Article 22 of the Law on Abuses of Publicity would leave journalists vulnerable to prosecution and imprisonment for revealing any details of the private life of government officials and public figures, even where a public interest was clearly involved. The proposed Press Law replaced the penalties of imprisonment for libel envisaged in that law for a system of fines, a laudable advance. A reformulation of Article 22 was introduced which declared the “defense of truth” inadmissible in such cases unless “a real public interest” (which the article attempted to define) could be shown to exist. The trouble with this new formulation was that it placed the onus on journalists to prove a public interest in order to clear themselves of libel. Officials of the Secretariat of Government informed Human Rights Watch in November 2000 that, instead of this new proposal, Article 22 of the Law on Abuses of Publicity would be temporarily retained in the new legislation.<sup>77</sup> The introduction of new privacy norms would follow, once the issues had been fully debated.

This debate is an important and overdue one in Chile, where privacy norms are traditionally strict and often invoked by public officials to deter revelations that might harm their public reputation. The right to privacy is a human right recognized in international law and many constitutions, including Chile’s. The state’s obligations in regard to privacy mainly involve the avoidance of intrusions into privacy by state agents (such as police eavesdropping, interference with private communications, etc). The state, however, also has an obligation to protect people from violations of their privacy by other parties, including the press. But in all societies, protection of freedom of expression requires that a balance be struck between the conflicting, but equally legitimate demands of privacy. Societies with an exaggerated protection of privacy are liable to inhibit scrutiny of important matters of public interest, while those with an overzealous and inquisitive press may interfere unreasonably with personal privacy. While there is no consensus on the precise drawing of the line between public interest and the right to privacy, it is acknowledged that any restrictions on a right as fundamental to a democracy as freedom of expression must be carefully delineated in law and necessary.

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<sup>76</sup>Translation by Human Rights Watch.

<sup>77</sup>Human Rights Watch interview with Ernesto Galaz, head of the legal department at the Ministry of the Secretariat of Government, Santiago, November 20, 2000.

IN SUCH CASES, THE PRECISE LEGAL STATUS OF THE PRIVACY INTEREST NEEDS TO BE CAREFULLY ASSESSED. AS ONE COMMENTATOR EXPLAINED: "RESTRICTIONS ON FREEDOM OF EXPRESSION ARE LEGITIMATE ONLY IF THEY ARE CAREFULLY TAILORED TO SERVE A PRESSING SOCIAL NEED. THIS IMPLIES THAT ONLY THE LEAST INTRUSIVE EFFECTIVE MEANS OF PROTECTING INTERESTS, INCLUDING PRIVACY, ARE ACCEPTABLE. RESTRICTIONS ON FREEDOM OF EXPRESSION TO SERVE PRIVACY INTERESTS MUST, THEREFORE, TAKE INTO ACCOUNT ALL AVAILABLE OPTIONS."<sup>78</sup> IN A RECENT STATEMENT ON FREEDOM OF EXPRESSION ISSUES, THE SPECIAL RAPPORTEURS ON FREEDOM OF EXPRESSION OF THE UNITED NATIONS AND THE ORGANIZATION OF AMERICAN STATES, AND THE REPRESENTATIVE ON FREEDOM OF THE MEDIA OF THE ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, WARNED THAT "PRIVACY LAWS SHOULD NOT UNNECESSARILY INHIBIT INVESTIGATIVE REPORTING AND THE EXPOSURE OF CORRUPT AND ILLEGAL PRACTICES."<sup>79</sup>

RESTRICTIONS ON FREEDOM OF EXPRESSION TO PROTECT PRIVACY SHOULD BE PRECISE AND NARROWLY DRAWN, WHILE THE DEFINITION OF PUBLIC INTEREST SHOULD BE AS BROAD AS POSSIBLE. WHATEVER THE NATURE OF THE CHARGES AGAINST THEM, JOURNALISTS SHOULD ALWAYS HAVE, AT MINIMUM, THE RIGHT TO CLEAR THEMSELVES BY ESTABLISHING THAT THEIR STATEMENTS ARE TRUE.

## VI. FILM CENSORSHIP REFORM

More than three years since it was first presented to Congress in April 1997, a constitutional reform to abolish film censorship is still awaiting a final vote. Meanwhile, Chile was recently censured by the Inter-American Court of Human Rights for violating the American Convention on Human Rights by prohibiting the exhibition of Martin Scorsese's film, *The Last Temptation of Christ*.

The legal regime governing the exhibition of motion pictures and videos has not changed since the early years of the military government, when prior censorship affected print as well as audio-visual media. Article 19(12) of the Constitution, promulgated by the military government in 1980, prohibits prior censorship, but provides in its final paragraph that "the law shall establish a system of censorship for the exhibition and advertising of cinematographic production." The law to which the constitutional article refers, Decree Law 679 of October 1974, established a Film Classification Council (Consejo de Calificación Cinematográfica, CCC), with powers to reject films for public exhibition, as well as trailers, film advertising and posters. Ministry of Education regulations introduced in April 1975 obliges the CCC also to vet videos, including those for private use. The composition of the CCC remains unchanged from 1974 and still includes representatives of the police (Carabineros), the army, navy, and air force.

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<sup>78</sup>TOBY MENDEL, "THE RIGHT OF THE PUBLIC TO KNOW AND FREEDOM OF ENTERTAINMENT: INFORMATION SEEN FROM THE CONSUMER'S ANGLE," published in Council of Europe, "Freedom of Expression and the Right to Privacy," Strasbourg Conference, September 29, 1999.

<sup>79</sup>"Statement Regarding Key Issues and Challenges in Freedom of Expression," agreed by Santiago Canton, OAS Special Rapporteur on Freedom of Expression, Freimut Duve, OSCE Representative on Freedom of the Media, and Abid Hussain, U.N. Special Rapporteur on Freedom of Opinion and Expression, London, February 2000.

The persistence of these anachronistic laws violates Chile's obligation under Article 13 of the American Convention on Human Rights to eliminate prior censorship. The American Convention allows film classification bodies only to protect minors, not to ban films altogether. In practice, the CCC has not exercised its powers to ban films since 1994. However, current laws still require television channels, including cable, not to exhibit any film banned by the CCC in earlier years, including many prohibited for political and ideological reasons ("those that foment or propagate doctrines or ideas that are contrary to the fundamental principles of the fatherland or nationality, like Marxism and others").<sup>80</sup> Also, the age-group classifications, which date from the military government, many of them patently absurd, have to be respected by television, since films classified as for over-18's can only be shown after 10:00 p.m.

Chile's cable television operators receive lists of films programmed by international cable companies sufficiently in advance to check them against lists of censored films provided by the CCC. Few banned films get through the net. According to the president of the television watch-dog body, the National Council of Television (Consejo Nacional de Televisión, CNTV), only three banned films were shown from 1994-1997.<sup>81</sup> The CNTV is required by law to sanction the stations responsible, but has increasingly turned a blind eye to retain some public credibility. This happened in May 2000, when the cable operator VTR Cablexpress transmitted a Film and Arts Channel screening of the film *Pepi, Luci, Bom y Otras Chicas del Montón*, by Spanish director Pedro Almodóvar. Made in 1980, the film was one of six banned by the CCC in 1992. VTR Cablexpress's competitor, Metrópolis-Intercom, replaced the feature with a documentary. While the CNTV deliberated, Chile's intellectuals and artists signed a full-page insert against film censorship in *La Tercera*, stating that "the hour has arrived to make good our intentions and stop censoring the list of forbidden films."<sup>82</sup> Eventually, the CNTV determined that the film was harmless and took no action.

Meanwhile, the Normandie art theater in Santiago pressed the CCC to reclassify the film so that it could be shown in a cycle planned by the cinema later in the year. When Human Rights Watch spoke to a member of the theater's management in August 2000 he was cautiously optimistic. However, in January 2001, the press reported that an official of the Ministry of Education had turned down a request from the theater to reclassify the film. The grounds given were that the Supreme Court had ruled in *The Last Temptation of Christ* case that the CCC had no powers to authorize the exhibition of a film rejected by the council's appeals body. Until this ruling, the council had allowed the showing of several films banned under the military government, including *Last Tango in Paris* and *Fiddler on the Roof*.<sup>83</sup>

### **Videos: Invasion of Privacy**

The powers currently enjoyed by the CCC to vet videos represent a significant interference by the state into the zone of privacy. At present, all filmed material entering the country has to pass by the CCC, regardless of whether it is for private or public use. In June 2000, for example, television scriptwriter Pablo Illanes ordered a DVD format film entitled "Vampiros Lesbos" by DHL from Amazon.com. It went to customs, which sent it to the CCC. Eager for news of his film, and unable to reach the CCC by phone, Illanes called DHL, who told him that the CCC had informed the company that the film had been retained and was going to be destroyed "because it contains lesbian material."

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<sup>80</sup>Decree Law 679 (1974). The CCC banned nearly six hundred films between 1974 and 1992. They include Norman Jewison's *The Fiddler on the Roof*, banned as subversive in 1974, and rehabilitated in 1992; Woody Allen's *All You Wanted to Know about Sex, But Were Afraid to Ask*, Fellini's *Casanova*, Monty Python's *The Life of Brian*, Ken Russell's *The Devils*, and Ingmar Bergman's *The Silence*. Some of these films have been shown on cable TV, but by law the stations could be fined for screening them. See Rafael Valle, "Los diez casos mas insólitos de la censura cinematográfica en Chile," *La Tercera*, January 12, 2000.

<sup>81</sup>Cámara de Diputados, "Informe de la Comisión de Constitución, Legislación y Justicia sobre el proyecto de reforma constitucional que consagra el derecho a la libre creación artística y elimina la censura cinematográfica, sustituyéndola por un sistema de calificación," Boletín No. 2016-07-1, November 1999, p. 8.

<sup>82</sup>"Chilenos contra la censura," *La Tercera*, June 9, 2000.

<sup>83</sup>Soledad Ortega, "El lio del CCC," *El Mostrador*, January 6, 2001 ([www.elmostrador.cl](http://www.elmostrador.cl)).

According to an unnamed CCC source reported in *La Tercera*: “as we have no (DVD viewing) equipment, we cannot evaluate it. There is a secretary who sifts out the tapes by their title. Not even the councillors get to see that material.”<sup>84</sup> The press reported later that Illanes eventually received his film from the CCC after the board had acquired DVD viewing equipment and passed it for exhibition.<sup>85</sup>

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<sup>84</sup>“Denuncian irregularidad del Consejo Cinematográfico,” *La Tercera*, July 7, 2000.

<sup>85</sup>See Claudia Urzúa, “La oportunidad de los cinéfilos,” *El Mostrador*, September 3, 2000.  
[http://www.elmostrador.cl/modules/Noticias/constructor/detalle\\_noticia.asp?id\\_noticia=9701](http://www.elmostrador.cl/modules/Noticias/constructor/detalle_noticia.asp?id_noticia=9701)

Some film fans have had the repeated experience of videos ordered through the internet being impounded in customs. Their experience suggests that chance has a big role to play in whether they eventually get to see their acquisitions. Different customs inspectors may be more or less zealous, and even CCC officials may give contradictory rulings. In September 1999, civil engineer Pedro Muga wrote to Jaime Pérez de Arce, the under-secretary of education and president of the CCC, to complain after four films he had ordered, including Ken Russell's *The Devils*, John Waters' *Pink Flamingos*, and *Emanuelle 2*, were rejected by the CCC. Pérez de Arce wrote back a sympathetic letter and returned the films to him. However, a year later, a similar letter to Pérez de Arce's replacement, José Weinstein, this time concerning Bigas Luna's *The Ages of Lulu*, which was prohibited in Chile in 1993, received a quite different response. Weinstein replied that the CCC had acted perfectly within the law and that he could not return the film to Muga. In August 2000, Muga filed a plea for protection of his constitutional right of respect for his privacy, the first ever such legal claim, with the Santiago Appeals Court, which agreed to hear it.<sup>86</sup>

### **The Last Temptation Case**

The banning in 1997 of Martin Scorsese's *The Last Temptation of Christ* can be blamed more on the judiciary's disregard for freedom of expression than it can on the CCC. Having rejected the film for exhibition in 1988, the council revised its opinion in 1996 and authorized the film for viewing by persons over age eighteen.

In November 1996, lawyers representing "Chile's Future" (Porvenir de Chile), a conservative Catholic group, lodged a protection writ with the Santiago Appeals Court, on the grounds that the CCC's decision to allow the film to be shown violated the right to honor of Jesus Christ, the Catholic Church, and of themselves as practising Catholics. As noted in Chapter III, Article 19(4) of the Constitution protects the honor of the person and the family.<sup>87</sup> A group of anti-censorship lawyers tried to make itself a party to the case in opposition to the writ, on the grounds that, if granted, it would lead to an act of censorship prohibited by Chile's Constitution and the American Convention on Human Rights. The Appeals Court, however, ruled that the ban's opponents had no direct interest in the case and could not be admitted as a party. It granted the protection writ, annulling the CCC's decision to allow the film's exhibition. The Supreme Court upheld the ruling in June 1997.

The following September, the Association of Lawyers for Public Liberties filed a complaint against Chile with the Inter-American Commission on Human Rights, asserting that the following articles of the American Convention had been violated: Articles 13 (prohibition of prior censorship), 12 (freedom of conscience), 2 (obligation to legislate to ensure rights under the Convention are protected), and 1(1) (obligation to respect and guarantee rights under the Convention).<sup>88</sup> In its response to the commission, the government of Chile did not deny the facts or contest the

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<sup>86</sup>Claudia Urzúa, "Cinéfilo presenta recurso de protección contra el CCC," *El Mostrador*, September 3, 2000.

<sup>87</sup>The legal grounds for the decision are analyzed in Human Rights Watch, *The Limits of Tolerance*, pp.137-42.

<sup>88</sup>For an analysis of the arguments adduced by the courts to ban the film, see Human Rights Watch, *The*

violation of the American Convention. It said that it did not agree with the Supreme Court decision, but asserted that it could not be held responsible for violations of the convention, since the Supreme Court is an autonomous and independent power of state, and the executive branch is prohibited under the rule of law from intervening in its decisions.<sup>89</sup> It also explained that it had proposed a bill to Congress to amend the Constitution and eliminate film censorship.

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*Limits of Tolerance*, pp.137-42.

<sup>89</sup>The situation was the exact reverse in Costa Rica, where in June 1999 the Constitutional Court ordered the government to pay damages to the distributors for censoring *The Last Temptation*. The film was banned by the censor's office in May 1989. See "Sanción a Costa Rica por Última Tentación de Cristo," *La Tercera*, July 5, 1999.

In September 1998, the commission found that Chile had violated all of the provisions of the American Convention cited by the complainants. To remedy the violations, it called on the Chilean authorities to lift the ban, eliminate prior censorship of films from Chile's Constitution and statute books, and ensure that organs of the State used their powers to protect freedom of expression, conscience and religion. It also clearly rejected the Chilean government's defense of lack of responsibility. The commission found that whatever branch of government was directly responsible for violations of the Convention (in this case the judiciary for banning the film, and the legislature, for failing to bring Chile's laws into line with its obligations under the Convention), those violations were attributable under international law to the Chilean State.<sup>90</sup>

In January 1999 the commission forwarded the case to the Inter-American Court of Human Rights.<sup>91</sup> The Chilean government again stated that it did not dispute the facts, and that it disagreed with the jurisprudence of the Supreme Court on freedom of expression.<sup>92</sup> It claimed, however, that it could not be held responsible for the actions of the Supreme Court when it did not acquiesce in those actions. It also urged the Inter-American Court to take notice of the pending reforms, by which, it claimed, Chile was in the process of eliminating prior censorship of films.

The court ruled against Chile in February 2001, finding that Chile's use of prior censorship violated Article 13 of the American Convention, and that Chile had thus failed to respect and guarantee the rights enumerated in the Convention, as required under Articles 1 and 2. Like the commission, the court rejected the government's claim that it was not responsible for the acts of censorship at issue because they stemmed from the judicial branch. (Unlike the commission, however, the court did not find any violation of the American Convention's Article 12, which protects freedom of conscience and religion.) The decision, which was unanimous, was the court's first ruling on freedom of expression issues. It was also the first time the court has ruled against Chile.

Besides requiring the Chilean government to reimburse the complainants for the costs of the suit, the Inter-American Court ruled that Chile must, "within a reasonable period," amend its domestic law to eliminate prior censorship and allow the screening of the Last Temptation. It thus ordered the government to report back to the court in six months, describing the measures taken in this regard.

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<sup>90</sup>The commission cited Ian Brownlie's *Principles of Public International Law*, which quotes Lord McNair on the Law of Treaties: "[A] State has a right to delegate to its judicial department the application and interpretation of treaties. If, however, the courts commit errors in that task or decline to give effect to the treaty or are unable to do so because the necessary change in, or addition to, the national law has not been made, their judgments involve the State in a breach of treaty." Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1990), p. 450.

<sup>91</sup>Chile has recognized the Inter-American Court's jurisdiction since 1990.

<sup>92</sup>Caso "La Ultima Tentación de Cristo," Inter-American Court of Human Rights, February 5, 2001, para. 62.

With this additional impetus, it is to be hoped that the anti-censorship bill will finally pass. The legislation has wide support in the press and public opinion, and was championed by President Lagos in his electoral campaign. In November 1999 the reform was approved by the Chamber of Deputies; it is currently awaiting approval in the Senate.

Congress has also embarked on discussions regarding a law to replace Decree Law 679, after members of the Chamber of Deputies tabled two proposals for debate. Apart from abolishing prior censorship, the bills propose to democratize the composition of the CCC (eliminating its military members), allow it to review and alter classifications made previously, allow appeals against classifications, and provide safeguards to protect minors from pornographic or excessively violent films. One of the bills proposes to establish a category of "inconvenient" films, which could only be shown in specially licensed theaters.

At the time of this writing, a government inter-ministerial working group was meeting to complete the draft of a new film classification law, taking into account these proposals, and adapted to cater for new technologies and formats. The draft law made classification dependent on a request from an interested body (thereby ending the obligation to submit material intending for private viewing). It also proposed that films designated as pornographic (a term the law attempts to define) be restricted for exhibition in special theaters distant from residential areas and schools.<sup>93</sup> All of the measures proposed dispense entirely with the powers of the CCC to reject films for public exhibition for any reason, and are therefore consistent with Chile's international obligations to protect freedom of expression.

While Human Rights Watch welcomes these measures, it is not clear that the promulgation of the new law would allow the exhibition of *The Last Temptation of Christ*, since the film was not banned by the CCC, but by the Supreme Court. Yet, the Chilean Supreme Court, as part of the Chilean State, is as bound by the rulings of the Inter-American Court as is the Chilean government. If the Supreme Court does not reconsider its decision to ban *The Last Temptation of Christ*, Chile will be in contempt of the Inter-American Court and in violation of its treaty obligations.<sup>94</sup>

## VII. ACCESS TO OFFICIAL INFORMATION

Since the publication of our 1998 report on freedom of expression in Chile, the government has taken some important steps to promote the right of access to information possessed by public institutions, such as government ministries, public agencies, and companies whose activities affect the public interest. In societies with a long tradition of secrecy in public administration, such changes are not wrought overnight. Government officials, as well as the courts, tend to be suspicious when faced by an inquisitive press and citizen's groups probing for facts. In Chile, officials still retain a good deal of discretion in deciding to hold information confidential. Moreover, numerous laws still impose restrictions on the right to know, particularly in regard to criminal investigations in the courts. Such restrictions have even graver effects when they are not clearly delineated, since they may result in legal reprisals against journalists who unknowingly cross the line, as was the case of Paula Afani, discussed below. Even less secure is the right of ordinary citizens, or members of civil society groups, to have access to official information.

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<sup>93</sup>Seminar on the new film law with Paulina Donoso, legal advisor at the Ministry of the Secretariat of Government, and Alejandro Salinas, human rights advisor at the Ministry of Foreign Affairs, University of Diego Portales Law Faculty, Forum for Freedom of Expression, August 10, 2000.

<sup>94</sup>See Rafael Valle, "La Ultima Tentación pone a la justicia chilena en trance histórico," *La Tercera*, February 17, 1999.

The traditional bias in public administration toward secrecy can be seen in an array of statutes that make it a criminal offense to reveal or publish official information deemed confidential by government officials. These include Article 246 of the Penal Code, which prohibits public officials from revealing secrets or confidential documents, regardless of the intention or effect of the revelation; the Code of Military Justice, which imposes even harsher penalties on personnel who disregard the military code of silence on institutional matters; Article 74(Bis B) of the Criminal Procedure Code, which prohibits the police from divulging information about criminal inquiries in progress; Article 19(2) of the Law on Abuses of Publicity which prohibits unauthorized disclosure in the media of secret “measures, agreements or officials documents (*disposiciones, acuerdos o documentos oficiales*), or secret documents which form part of a criminal investigation, a norm which goes back to 1925;<sup>95</sup> and Article 25 of the same law, which allows judges to prohibit the publication of any information about criminal investigations in progress. These so-called reporting bans reached their apogee under the military government but have continued to be imposed, with less frequency, until the present.

Successive democratic governments have stated their commitment to end this culture of secrecy. They consider that the need for transparency and openness in public administration is an integral part of a governmental campaign against corruption, which is seen as a priority by all political sectors. The Press Law currently in Congress would repeal the Law on Abuses of Publicity, thus ending “reporting bans.” It contains provisions to protect access to information and the confidentiality of journalists’ sources.

In April 1994, President Frei established a Commission on Public Ethics, composed of important political figures, jurists and academics, whose proposals were incorporated the following year into a bill on Honesty in Public Administration. Importantly, Article 7 of the bill established the principle that “the acts of the organs of public administration are public, apart from the exceptions established by law.”<sup>96</sup> The proposed legislation was accompanied by another bill on Access to Administrative Information, which defined procedures for gaining access to official documents, the circumstances in which access could be refused, and procedures for redress in case applications were ignored or rejected. These bills did not pass, since the government decided instead to incorporate many of their norms as amendments to the main statute governing public administration.<sup>97</sup> This amended statute entered into force on December 14, 1999.

The new law establishes the public right to know and the circumstances in which access may legitimately be refused. According to Article 11(Bis):

the only causes by virtue of which access to documents or information required may be denied are confidentiality or secrecy established in legal provisions or regulations; *circumstances in which their publication may prevent or obstruct the proper functioning of the office of which the information is requested*; the properly lodged opposition of third parties referred to or affected by the information contained in the requested; circumstances in which the revelation or provision of the documents or information may sensibly affect the right or interests of third parties, according to the reasoned opinion of the official in charge; and circumstances in which their publication may affect the security of the nation or the national interest.<sup>98</sup>

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<sup>95</sup>See Juan Pablo Olmedo and Ciro Colombada, “El derecho a acceso a información pública,” Centro de Investigación, Facultad de Derecho de la Universidad Diego Portales, 1999, pp.13-16.

<sup>96</sup>Translation by Human Rights Watch.

<sup>97</sup>The full name of the legislation is the Organic Constitutional Law of General Bases of the State Administration (Ley Orgánica Constitucional de Bases Generales de la Administración del Estado), Law No. 18,575.

<sup>98</sup>Translation by Human Rights Watch (our italics).

These provisions are an important advance in establishing in principle that an official who denies a request for information can be held responsible, rather than, as in the past, requiring the person who solicits information to convince the official why he should have it. Civil liberties groups in Chile, however, have expressed concern that the “proper functioning” of the institution or office concerned is likely to be interpreted expansively by officials as a basis for denying information, and could be difficult to challenge in court. Civil rights lawyers, however, stressed to Human Rights Watch that the new legislation needed to be tested over time and jurisprudence favoring the right to access consolidated step by step.<sup>99</sup>

### **The Trillium Case**

This is likely to be a difficult and arduous task, for politicians and officials are accustomed to their exclusive domains. Genuine respect for an inquisitive public is different from lofty pronouncements about public access. This was shown clearly in the Trillium case, currently before the Inter-American Commission on Human Rights, in which the government Foreign Investment Committee failed to respond to a request from Terram, a non-governmental ecology group, for information about investment by the U.S.-based Trillium Forestry Company in a questioned logging project. The information denied concerned the basis on which the Foreign Investment Committee had decided on Trillium’s suitability for the project. In July, 1998, the petitioners applied for a protection writ, which would have required the government to divulge the information at issue, from the Santiago Appeals Court. The judges declared that it was “manifestly without basis” and ruled it inadmissible. The Supreme Court confirmed the decision.

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<sup>99</sup>Human Rights Watch interview with Juan Pablo Olmedo, Santiago, August 11, 2000.

In its reply to the Inter-American Commission, which Human Rights Watch has reviewed, the Ministry of Foreign Affairs considered that the information to which Terram was denied access “directly affected the way in which the Committee exercises its attributions” and was therefore properly held confidential. Moreover, the government criticized Terram for arrogantly “conferring on itself watchdog powers which are not recognized in our legal system,” these being exclusively the function of the Chamber of Deputies.<sup>100</sup> The sense of these arguments is that information concerning the workings of an official body may only be granted to the legislature. If this rule were applied generally, it would deny journalists, as well as the general public and civil society groups, the information necessary to exercise their own right of criticism, independent of their elected representatives.

International norms protect freedom of expression and information for everyone regardless of their status or attributions. They do not require that those who seek information must justify their reasons for doing so. By seeking to restrict and weaken public access to information, the government’s position on this case runs counter to the principles behind its current policies on the issue. As President Frei expressed it in the preamble to the bill on Access to Administrative Information:

The transparency we advocate means that the administration of the State must open its doors to the control of the people, allowing the citizenry access to the documents in its power.<sup>101</sup>

### **Rights Limited to Journalists**

One of the persistent demands of the Chilean journalists’ union has been to restrict the legal denomination of “journalist” to those holding a professional qualification. The draft Press Law, for example, limits the legal definition of “journalist” to those holding a university degree from a recognized journalism school. It also explicitly limits the right to withhold the identity of sources to journalists so defined, journalism students who have completed their courses or are on practice apprenticeships, newspaper director and editors, and foreign correspondents.

This limitation of the right to maintain the confidentiality of sources to those holding a journalism degree is unjustifiable, in Human Rights Watch’s view, since this right exists to safeguard the public’s right to information about matters of public interest, which is not served exclusively by any professional group. As Professor Dirk Vorhoof has pointed out:

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<sup>100</sup>Case No. 12.108, communication by Juan Gabriel Valdés, Minister of Foreign Affairs, August 13, 1999.

<sup>101</sup>Message No. 387-330, January 12, 1995, p. 1 (translation by Human Rights Watch). As noted above, the bill was superseded by the public administration reform.

It is to be emphasized that it is not the profession of journalist as such which is an important factor in the examination of the pressing social need of a restriction or penalty. It is rather the journalist's *function*, and his participation in imparting information to the which amplifies the protection of his freedom of expression within the scope of Article 10 of the (European) Convention.<sup>102</sup>

### **Restrictions on Court Reporting: The Case of Paula Afani**

Nor are the rights and responsibilities of journalists who inform the public about matters of public interest adequately protected by existing legal norms. One of the most sensitive areas has been the confidentiality of criminal investigations. In common with other countries with an inquisitorial judicial process, Chilean legislation does not allow the public access to the evidence gathered in the early stages of a criminal inquiry. Police, judges and court officials are bound by law to respect the so-called secrecy of the investigation (*secreto de sumario*) until the judge declares the inquiry closed and allows the parties access to the evidence gathered, at which point the trial *per se*, or *plenario*, begins.<sup>103</sup>

Article 19(2) of the Law on Abuses of Publicity extends the prohibition to anyone who "knowingly publishes . . . documents which form part of an investigation which has been ordered to be kept in a state of secret investigation." Journalists are, therefore, obliged to respect the confidentiality of criminal investigations if the judge imposes the secrecy rule.

On top of this protection, Chilean law allows judges, at their own discretion, to ban reporting altogether on a case under investigation.<sup>104</sup> It is now widely recognized in Chile that this so-called reporting ban (*prohibición de informar*) far exceeds what is reasonable to protect confidentiality in police investigations. Judges abused it repeatedly during the military government, and all political parties as well as press institutions, have harshly criticized it.<sup>105</sup> The proposed Press Law would dispense with these reporting bans, and would protect journalists from being obliged to reveal their sources, if in receipt of leaked information about criminal investigations, with the exception on those involving terrorism or drug-trafficking. Currently, however, courts continue to impose reporting restrictions.<sup>106</sup>

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<sup>102</sup>Prof. Dirk Voorhoof, "Critical Perspectives on the Scope and Interpretation of Article 10 of the European Convention on Human Rights" (Strasbourg, The Council of Europe Press, 1995), p. 49 (our emphasis).

<sup>103</sup>A major reform of penal procedures soon to become law will abolish the *secreto del sumario*, making information on the investigation available to the parties.

<sup>104</sup>Article 25 of Law No. 16,643 on Abuses of Publicity.

<sup>105</sup>See Human Rights Watch, *The Limits of Tolerance*, pp. 64-69.

<sup>106</sup>The most recent example was in February 2000, when a judge in Concepcion, Flora Sepúlveda, imposed a one-month blanket reporting ban on a sensational case involving the disappearance of a young man from a

When the secrecy rule is breached, journalists may be harried by exasperated public officials trying to discover the source of the leak. The case of Paula Afani Saud, a reporter for the newspaper *La Tercera* who faces a possible five-year prison sentence for violating the secrecy of a criminal investigation, is an example.

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discotheque.

In June 1998, Afani wrote a series of articles in *La Tercera* and *La Hora* about a high-profile investigation being conducted by the Council for the Defense of the State (CDE) into a drug-trafficking and money-laundering conspiracy, which became known as “Operation Ocean.” The articles included testimony by former members of the criminal group who were interviewed in prison in the United States by Chilean police officials. The defense attorney of a Chilean businessman implicated in the conspiracy, Manuel Losada, lodged a criminal complaint for breach of the secrecy of the investigation. At the end of the month, Judge Marcos Felzensztein of the Sixth Criminal Court of Valparaíso applied a 120-day reporting ban to the case.<sup>107</sup>

For its part, the CDE argued that the information revealed by Afani could wreck its investigation as well as endanger the lives of the witnesses concerned. It immediately tried to discover the source of the leak, requesting the Valparaíso judge in charge of the case to investigate the courts and the police and to interview Afani, among others. But despite threats of legal action and intense pressure over several weeks, she refused to reveal her sources. On January 18, 1999, investigations police, acting on the judge’s orders, arrested her and took her to Valparaíso, where she was held for several hours and interrogated. Afani again refused to reveal any names on grounds of professional ethics. Police searched her home and her work-station in *La Tercera*’s Santiago office but they left empty-handed.

At the time of this writing (February 2001), Afani was still facing trial proceedings. In one case, based on the original denunciation of Losada’s lawyer, she was charged with breaching the secrecy of a criminal investigation (*secreto del sumario*) and of violating the above-mentioned norm in the Law on Abuses of Publicity. In addition, on April 28, 2000, the CDE asked that she be prosecuted for violating the secrecy of a criminal investigation under the Law against Illegal Drug-Trafficking.<sup>108</sup> This latter crime carries a maximum five-year prison sentence for which suspension of sentence is not applicable.

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<sup>107</sup>Ibid, p. 67. It was finally rescinded in a notable decision by the Valparaíso Appeals Court, which noted that “full observance of freedom to emit opinions and to inform without prior censorship is an integral requirement of the real functioning of a democratic state and the rule of law, and when it is exercised in relation to judicial matters it becomes the most expedite means whereby all the citizens may control the way their judges carry out the important function entrusted to them.” *El Mercurio*, July 31, 1998 (translation by Human Rights Watch).

<sup>108</sup>Article 74 of the Code of Penal Procedure; Article 19(2) of the Law on Abuses of Publicity; Article 34 of the Law against Illegal Drug Trafficking. Article 34 allows the judge to order that an investigation be kept secret if he or she considers that “ its divulgation might affect the success of the investigation or the security of undercover agents, informers, witnesses, forensic experts or, in general those who cooperate effectively in the investigation [...] The violation of the secrecy of the investigation will be punished with the penalty of imprisonment.” The prosecution of Afani indicates that, in the official view, journalists are included in this prohibition.

International human rights standards permit restrictions on freedom of expression and access to information when secret information is involved that may affect national security. The effectiveness of criminal investigations or the security of witnesses may also constitute grounds, in exceptional cases, for restricting the right to inform or be informed.<sup>109</sup> However, as in every case in which other social interests conflict with the right of access to information, restrictions must be subject to the test of necessity.

The legal action against Afani appears to have been motivated by her refusal to name her sources. Had she agreed to do so, it is likely that the prosecution would have been directed at them, not at her. No official of the CDE, of the courts, the police or the prison service has been named as co-defendant in the case, which makes the prosecution of a single journalist all the more striking.

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<sup>109</sup>See generally Article 13 of the American Convention on Human Rights, which allows such restrictions on freedom of expression that are necessary to ensure “respect for the rights or reputations of others,” or “the protection of national security, public order, or public health or morals.”

Human Rights Watch has been informed that there is no law in Chile specifically prohibiting journalists from making public information derived from criminal investigations in progress.<sup>110</sup> To require journalists to be custodians of official secrets is to pervert their essential function in a democratic society. We know of no other case in which a journalist has been prosecuted for violating the secrecy of the *sumario*. In this respect, the Afani case establishes a troubling precedent.

The protection of sources from which journalists derive information is considered in legal systems across the world to be a mainstay of press freedom. Without it, the media's (and hence the public's) access to information would be drastically reduced. The European Court of Human Rights has held that "PROTECTION OF JOURNALISTIC SOURCES IS ONE OF THE BASIC CONDITIONS FOR PRESS FREEDOM," AND THAT MANDATORY DISCLOSURE IS UNACCEPTABLE UNLESS "JUSTIFIED BY AN OVERRIDING REQUIREMENT IN THE PUBLIC INTEREST." The Declaration of Chapultepec, signed by most heads of states in the hemisphere, and by former President Eduardo Frei in March 1997, reaffirmed this principle. Point 3 of the declaration stated: "NO JOURNALIST MAY BE FORCED TO REVEAL HIS OR HER SOURCES OF INFORMATION."<sup>111</sup> THE "DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION IN THE AMERICAS" APPROVED BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS ON OCTOBER 19, 2000, ENDORSED IT TOO.<sup>112</sup>

The eventual approval of the pending Press Law would probably release Afani from prosecution, since the new law protects the right of qualified journalists to protect their sources and repeals the secrecy provisions of the Law on Abuses of Publicity. It may be expected that Afani would, therefore, benefit from the principle of the most favorable law. Until that moment, however, she remains at risk of a conviction that would violate fundamental principles of freedom of expression.

#### ACKNOWLEDGMENTS

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<sup>110</sup>Human Rights Watch interview with Ernesto Galaz Cañas, Legal Director of the General Secretariat of Government, Santiago, July 20, 2000.

<sup>111</sup>Available on the Internet at <http://www.sipiapa.org/projects/chapul-declaration.cfm> (January 2001).

<sup>112</sup>Approved by the Inter-American Commission on Human Rights at its 108th period of sessions, available on the Internet at <http://www.cidh.oas.org/declaration.htm> (January 2001).

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