
William D. Zabel  
*Schulte Roth & Zabel*

Diane Orentlicher  
*American University Washington College of Law, orentlic@wcl.american.edu*

David E. Nachman  
*DLA Piper*

Follow this and additional works at: [https://digitalcommons.wcl.american.edu/facsch_lawrev](https://digitalcommons.wcl.american.edu/facsch_lawrev)

Part of the [Human Rights Law Commons](https://digitalcommons.wcl.american.edu/humanrights) and the [International Law Commons](https://digitalcommons.wcl.american.edu/international)

**Recommended Citation**

Available at: [https://digitalcommons.wcl.american.edu/facsch_lawrev/1722](https://digitalcommons.wcl.american.edu/facsch_lawrev/1722)

This Article is brought to you for free and open access by the Scholarship & Research at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Articles in Law Reviews & Other Academic Journals by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [kclay@wcl.american.edu](mailto:kclay@wcl.american.edu).
Human Rights And The Administration Of Justice In Chile:


By William D. Zabel, Diane Orentlicher and David E. Nachman*

TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preface</td>
<td></td>
<td>432</td>
</tr>
<tr>
<td>INTRODUCTION</td>
<td></td>
<td>433</td>
</tr>
<tr>
<td>SECTION I: OVERVIEW</td>
<td></td>
<td>435</td>
</tr>
<tr>
<td>SECTION II: PROSECUTION OF HUMAN RIGHTS VIOLATORS</td>
<td></td>
<td>441</td>
</tr>
<tr>
<td></td>
<td>A. The “Quemados” Case</td>
<td>441</td>
</tr>
<tr>
<td></td>
<td>1. The Facts</td>
<td>441</td>
</tr>
<tr>
<td></td>
<td>2. The Prosecution</td>
<td>443</td>
</tr>
<tr>
<td></td>
<td>B. The “Degollados”/AGECH Case</td>
<td>448</td>
</tr>
<tr>
<td></td>
<td>1. The Facts</td>
<td>448</td>
</tr>
<tr>
<td></td>
<td>2. The Prosecution</td>
<td>448</td>
</tr>
<tr>
<td></td>
<td>C. The “Desaparecidos” Case</td>
<td>454</td>
</tr>
<tr>
<td></td>
<td>1. The Facts</td>
<td>454</td>
</tr>
<tr>
<td></td>
<td>2. The Investigation</td>
<td>454</td>
</tr>
<tr>
<td></td>
<td>3. Application of the Amnesty Law</td>
<td>457</td>
</tr>
<tr>
<td></td>
<td>D. The Mario Fernandez Case</td>
<td>460</td>
</tr>
<tr>
<td></td>
<td>1. The Facts</td>
<td>460</td>
</tr>
<tr>
<td></td>
<td>2. Amparo Proceedings</td>
<td>461</td>
</tr>
<tr>
<td></td>
<td>3. The Prosecution</td>
<td>462</td>
</tr>
</tbody>
</table>

* The principal drafter of this report was David E. Nachman.
THE RECORD

SECTION III: PERSECUTION OF HUMAN RIGHTS LAWYERS

A. Luis Toro 468
B. Hector Salazar 470
C. Gustavo Villalobos and the Vicaria Doctors 471
D. Pamela Perreira 476
E. Enrique Palet 476
F. CODEPU 478

CONCLUSION 479

PREFACE

By Robert M. Kaufman*

This report is submitted to The Association of the Bar of the City of New York by a mission of lawyers appointed by the Association to visit Chile and inquire into the administration of justice in that country. The Association’s delegation, which also acted as the delegation of the International Bar Association, consisted of William D. Zabel, Diane Orentlicher and David E. Nachman, all representatives of this Association’s Committee on International Human Rights. Mr. Zabel is a member of the firm of Schulte Roth & Zabel; Ms. Orentlicher is associated with the Lawyer’s Committee on International Human Rights; and Mr. Nachman is associated with the firm of Paul Weiss Rifkind Wharton & Garrison. This trip, conducted under the auspices of the Committee on International Human Rights, chaired by Alice H. Henkin, is the most recent in a series of trips to various countries including Argentina, El Salvador, Pakistan and the Philippines.

I wish particularly to note that The Association of the Bar of the City of New York gratefully acknowledges the support of

*Mr. Kaufman is President of The Association of the Bar of the City of New York.
the Ford Foundation and the J. Roderick MacArthur Foundation in funding a series of fact-finding missions to inquire into human rights violations as they affect the administration of justice and the independence of judges and lawyers. The mission to Chile also was supported by the Lawyers Committee for Human Rights.

On behalf of the Association I express our special thanks to the members of the delegation for their courageous efforts, hard work, thoughtful analysis and constructive conclusions.

In view of the importance of the subject matter, this report is being made available to the Association's membership, and to interested members of the public.

*   *   *

INTRODUCTION

On September 16, 1986, the Colegio de Abogados de Chile A.G. (Chilean Bar Association) invited The Association of the Bar of the City of New York to send a delegation to Chile to conduct an inquiry into the administration of justice in that country. The authors of this report, William D. Zabel, Diane Orentlicher and David E. Nachman, members of the Committee on International Human Rights, were designated by the Association and, in response to the invitation, visited Chile from October 26 to November 1, 1986. The trip was conducted under the auspices of the Committee on International Human Rights, chaired by Alice H. Henkin. The delegation also went on behalf of the International Bar Association (I.B.A.), a federation of national legal associations, and this report is issued by both the I.B.A. and The Association of the Bar of the City of New York.

During their stay in Chile, the delegates met with government officials, judges, representatives of the United States Embassy, representatives of the organized bar and human rights organizations, and law professors. Chilean officials with whom they met included Ambassador Mario Calderon, Human
Rights Advisor to the Minister of Foreign Affairs; Juan Ignacio Garcia, Legal Advisor to the Minister of the Interior; Daniel Munizaga, head of the Legal Division of the Ministry of Justice; and Carlos Varas Vildosola, Executive Secretary of the Official Advisory Commission on Human Rights.

The delegation also met with Hon. Jose Maria Eyzaguirre, the then-Acting President of the Supreme Court of Chile; Hons. Carlos Cerda Fernandez, Jose Canovas Robles, Marcos Libedinsky and Alberto Echavarria Llorca, all judges of the Court of Appeals of Santiago; and Hon. Yolanda Maria Manriquez, judge of the Civil Court of Santiago.

The authors are especially indebted to the many lawyers and representatives of professional organizations who met with them during their visit and who so graciously shared their time, experiences, frustrations and hopes. Among these were Raul Rettig Guissen, President of the Chilean Bar Association, and other officers of that Association, including Mario Fernandez and Alejandro Hales; numerous attorneys with the Vicaria de la Solidaridad, a human rights office operating under the auspices of the Archbishop of Santiago, and Monsignor Santiago Tapia, the Vicar; Jaime Castillo, President, and several other officers and staff of the Comision Chilena de Derechos Humanos (Chilean Human Rights Commission), a private human rights organization; Fabiola Letelier del Solar, President, and several attorneys affiliated with the Comite de Defensa de los Derechos del Pueblo (CODEPU), a private human rights organization; and numerous other professionals and legal scholars knowledgeable about the administration of justice in Chile.

Finally, the authors gratefully acknowledge the cooperation of the United States government, whose representatives in Santiago, including Ambassador Harry G. Barnes, generously shared their time and views with the delegation. Representatives of the Department of State, including Assistant Secretary of State for Human Rights and Humanitarian Affairs Richard
Schifter, also assisted the delegation in advance of its visit to Chile.¹

SECTION I: OVERVIEW

Since the regime of President Augusto Pinochet came to power in September 1973, the number of serious human rights abuses in Chile has been extraordinarily high. During the mid-1970's, thousands of persons thought to be associated with the left in Chile "disappeared" while in official custody, thousands of others were sent into forced exile, and thousands more were detained for long periods without formal charge; many were severely tortured. During the late 1970's and early 1980's the number of disappearances, cases of torture and death at the hands of the security forces declined from what it had been in the years immediately following the military coup of 1973. But, as widespread calls for political reform and democratization have gained impetus since the latter part of 1983, serious human rights abuses once again have proliferated.

The years 1985 and 1986 were marked by a resurgence of democratic opposition activity, which then seemed to place Chile within the tide that was sweeping many of her neighbors from the grip of prolonged military dictatorship to the challenge of democracy's restoration. But Chile has not yet followed the course of those nations. Instead, the military government of General Augusto Pinochet has attacked the rising opposition and flagrantly violated fundamental rights. Prolonged detentions—frequently incommunicado—have been commonplace, and many detainees have been tortured. Wholesale sweeps (allanamientos) of poor neighborhoods, during which hundreds of persons at a time are rounded up, detained and interrogated, have become a familiar pattern. Public demonstrations have been crushed by extreme forms of official violence, including the deliberate burning of demonstrators by Chilean security forces in the case known as the quemados ("the burned ones"). During the State of Siege which was imposed in September
1986, moreover, many of the traditional safeguards available in Chile to prevent or expose official acts of abuse—including the rights of *amparo* (akin to *habeus corpus*) and of a free press—were severely curtailed.

Nevertheless, it would be inaccurate to suggest that Chile is a "lawless" state. To the contrary, consistent with Chile's highly developed civil law tradition, the forms of legality continue to be adhered to with a punctiliousness uncommon among contemporary military governments. Even in cases involving human rights violations by government agents, the machinery of justice in Chile has not stopped functioning; the courts remain available to hear and determine allegations involving such abuses. Persons who claim to have been aggrieved by official misconduct (or their relatives) may file a criminal complaint, without the need for prior review by a grand jury, prosecutor or any other organ of the executive branch. Upon the filing of such complaints, Chilean courts are required to investigate the circumstances of the alleged conduct and, if the facts warrant, proceed to arrest, indict and convict the accused. As in many civil law countries, moreover, far-ranging investigatory powers are at the disposal of courts charged to consider such complaints.

Despite its scrupulous adherence to formal legality, however, the Chilean government has long failed to observe the rule of law. While some Chilean judges have acted with notable independence in efforts to dispense justice, often at great personal cost, the judiciary as a whole has shielded the government from accountability for the pervasive rights violations inflicted by agents of the state.

Since 1973, thousands of criminal complaints have been filed alleging one or more forms of unlawful violence, detention or abduction on the part of Chilean security forces. Particularly in light of the broad powers the judiciary in Chile has in investigating and prosecuting criminal complaints, one might expect to find a fair number of successful prosecutions against official
personnel in such cases. Yet we were unable to find evidence of a single case since 1973 where, after appeals, an officer of the state had been convicted of violating the rights of any individual recognized as an opponent of the Pinochet regime.\textsuperscript{4}

In the majority of cases brought to our attention, investigations had been pending for long periods, sometimes several years, without discernible progress. In a number of other cases, investigations had been closed purportedly for lack of sufficient evidence, or they had been referred to the Military Prosecutor's office because the offense against the accused was viewed as one falling under the Military Code. And, in a much smaller number of cases, indictments were issued, only to be overturned on appeal on an arguable procedural or substantive ground.

This record stands in stark contrast to the consistent record of swift and successful prosecutions involving crimes against the state, or acts of violence committed by civilians against security officers. And it gives a hollow ring to the Chilean government's claim that

\begin{quote}
In Chile, as in the great majority of countries in the hemisphere, offenses are punished according to result, and not according to motive.\textsuperscript{5}
\end{quote}

This report does not attempt to provide a comprehensive explanation for the failure of the Chilean judiciary to deal effectively with complaints involving human rights violations. Numerous interviews, however, suggest a widely shared consensus as to the contributing causes for this failure. They include the steady growth of military jurisdiction, under which cases involving allegations of abuse by military personnel are handled not by a civilian court, but by a military prosecutor, a military trial judge and an appeals court on which a majority of judges are officers in the military; the repeated failure of state security organs to abide by decisions of the civilian courts, including detention and release orders, and the absence of
judicial mechanisms (such as full criminal contempt powers) to compel adherence; the need of civilian judges to rely in conducting investigations on the very security forces whose conduct is under review; newly-enacted regulations which restrict the ability of civilian judges to interrogate military personnel in camera; the deliberate destruction or concealment of evidence; the intimidation of witnesses and even, in some instances, of judges; and the lack of security of judicial tenure.6.

Above all, the performance of the Chilean judiciary has mirrored the failure, at the highest levels of the Chilean executive branch, to encourage respect for the rule of law on the part of government officials. Many observers ascribe primary responsibility for the courts' subservience in this regard to the members of the judiciary themselves. Whether because of intimidation, a historical tradition of judicial deference to the executive branch, or ideological affinity with the present regime and the national security rationale which it invokes to justify its human rights record, there is a pervasive perception within the Chilean legal community that most judges are at best indifferent to claims of governmental human rights violations, and that they view the attempt to obtain judicial redress in such cases as a fundamentally political act directed against the institutions of the state.

There are, to be sure, a few judges who view the function of the judiciary as very different terms, and who have used the power of their office to pursue evidence of official misconduct wherever it may lead. Where these efforts have resulted in indictments or the serious prospect of conviction in human rights cases, however, the appeals courts or, in the end, the Supreme Court, consistently have blocked further progress.

The role of Chile's Supreme Court deserves special mention here. Although it lays claim to judicial independence and neutrality, the Supreme Court more typically has acted as a political ally of the military government. Its conduct in the highly-publicized quemados case is illustrative. That case, discussed
more fully below, involved the deliberate burning of two teenagers participating in a general strike last July, allegedly by Chilean soldiers. When the Archbishop of Santiago criticized the failure of the civilian trial court to find criminal responsibility on the part of the accused military officers, the Supreme Court departed from its tradition of silence on matters of public debate and issued a formal statement upbraiding the Archbishop for his remarks.

In another case, also discussed below, the Supreme Court reversed its own pronouncements in quashing the prosecution of several high-ranking present and former military officers, and went out of its way to discipline the highly respected judge who had been handling the case. In numerous other instances, the Supreme Court put an end to proceedings against government officers through a variety of dubious precedents, or delayed so long in reversing clearly erroneous lower court decisions that the opportunity for a successful prosecution had passed. In short, the common perception is that, at least in those cases that matter to the military government, most Chilean judges—and certainly the Supreme Court—can be counted on to do the government's bidding. From the evidence available to us, we found no reason to question that assumption.

*       *       *

Despite the lack of discernible progress in the field of human rights, a small but committed number of Chilean lawyers continue to devote their energies to the prosecution of human rights cases and the defense of those who are victims of official abuse. These lawyers have taken upon themselves a Sisyphean task. Without their efforts, the rule of law in Chile, which survives today only as the exception, would be crushed altogether.

Almost daily, these lawyers are subjected to a level of intimidation which lawyers in most civilized societies would find difficult to imagine. The intimidation takes many forms. During our trip, we heard credible accounts of outright attempts at assassination; death threats; summary detention and prolonged
incarceration of attorneys, frequently without charges being filed against them; prosecution, or threats of prosecution, for making statements to the press concerning specific cases or for protecting the confidences of clients; raids on offices; the burning of files; surveillance, by electronic means and otherwise—the list goes on.

This intimidation occurs against a backdrop of consistent efforts by the government of Chile to blur the distinction between lawyers and the clients they represent. Some of those efforts are overt: President Pinochet and other high-level officials, for example, publicly and repeatedly have linked human rights activists with "international terrorism." Some of the efforts are less direct: the prosecution of one staff attorney in the legal office of the Vicaria de la Solidaridad, a church-based human rights organization, has been assigned to the same prosecutor handling the case involving the discovery, in September 1986, of a large arms cache and the case of the assassination attempt against Gen. Pinochet, an assignment viewed by some as an attempt to link the Vicaria with the armed opposition to the regime. Some of the efforts, though insidious, cannot be attributed conclusively to the government. In the subways of Santiago, for example, posters have appeared bearing the photographs of human rights lawyers with the legend "These are the ones who make terrorism possible." The posters are the work of CORPAZ, a private organization whose funding has not been traced, but which is thought to be a government "front" organization.

During our visit we examined in detail several specific cases of intimidation and harassment of human rights lawyers and activists. In certain cases, particularly those involving assassination attempts and death threats, the responsibility of the government has not been, and may never be, established. Nevertheless, even when the violence or the threats of violence come from paramilitary or anonymous sources, signs of some government involvement exist. The victims of these forms of
intimidation uniformly expressed the view that it could not occur without the approval, tacit or explicit, of the regime. And even the government ministers with whom we met conceded that little, if anything, had been done to bring to justice those involved in the violent intimidation of human rights lawyers and activists.

The accounts of persecution of lawyers included in this report may represent only the most visible cases, and they may omit many equally serious attacks on the independence and safety of lawyers and other human rights workers. But, taken as a whole, they illustrate the obstacles that confront human rights advocates, and the dangers, sometimes mortal, which attend their work. We dedicate this report to our courageous colleagues in the Chilean bar who have persevered in the cause of human rights, each of whom has suffered for that undertaking.

SECTION II: PROSECUTION OF HUMAN RIGHTS VIOLATORS

The cases described below exemplify many of the problems that mar the administration of justice in Chile. While these cases have achieved notoriety within Chile and abroad, the course they have followed is typical of the vast majority of human rights complaints that are filed with the courts year after year. Despite the substantial publicity—and sustained public call for justice—in each of these cases, not one has culminated in a successful prosecution. In that sense, none of them is remarkable. What is remarkable is that, despite the results here and in virtually all such cases, victims of official lawlessness continue to seek redress in the courts.

A. The “Quemados” Case

1. The Facts

On July 1, 1986, Rodrigo Rojas de Negri, a nineteen year old Chilean-born resident of Washington, D.C. on a visit to his homeland, travelled to one of Santiago’s poblanos (poor neighborhoods) known as Los Nogales. He had come to Los Nogales to photograph a public demonstration announced by
student supporters of a national strike which had been called for the following day. Early on the morning of July 2, he joined up with a number of students and neighborhood youths as they made their way to Avenida General Velasquez, a major roadway to Los Nogales. Among them was Carmen Gloria Quintana Arancibia, an eighteen-year-old student, and her sister.

At approximately 7:30 in the morning, shortly after Rojas and the neighborhood demonstrators had arrived at a spot a block or two from the planned protest, a blue truck containing soldiers with blackened faces sped down Calle Veteranos del 79 from Avenida General Velasquez. The group of students, who had been preparing to assemble and ignite a barricade of wood and tires in what has become a widely-repeated symbol of resistance, scattered in several directions. Giving chase, the soldiers seized Rojas and Quintana while a second vehicle, believed to have carried civilian and military government officials, arrived upon the scene. Shortly thereafter, more soldiers and government officials arrived in a third vehicle.

The account of what happened next, although disputed by the Chilean government, is based on the reports given to the attorneys representing the victims by more than ten civilian witnesses: The soldiers searched, interrogated and threatened Rojas and Quitana and began to beat Rojas. The government officials then forced Quintana to hold a rubber tire and a container of gasoline while a military official photographed her. The soldiers continued to beat Rojas and began to beat Quintana, causing bleeding and multiple serious injuries to both victims. One of the officers then doused Rojas and Quintana from head to toe with gasoline and threw an incendiary device between the two victims. As the flames engulfed them, and as Rojas and Quintana attempted to put out the flames, the soldiers struck them with their rifles, knocking the youths to the ground.

After the flames subsided, Rojas and Quintana were wrapped in blankets and driven to Quilicura, an area at least 10
kilometers from the location of the burning. After lying in a drainage ditch for several minutes to an hour, Rojas and Quintana arose and stumbled along the road in search of help. The sight of the heavily burned victims, both in a state of shock, frightened away the first passers-by, although at least one of them summoned the police. Finally, after approximately two hours, a passing truck loaded with merchandise took them to the local Quilicura medical clinic. After a brief stay, the clinic sent them to the Posta Central Hospital.

The medical facilities at Posta Central Hospital were neither designed nor adequate for the treatment of severe burn wounds. Nevertheless, attempts to have the victims transferred to a hospital with superior burn-treatment facilities were blocked by the government officials who had by this time arrived at the Posta Central Hospital. The rationale was that the two youths were under arrest.

After four days of suffering from the burns which covered more than 60% of his body, Rodrigo Rojas died on July 6, 1986. On that same day, Quintana, who also was burned over the major portion of her body, finally was transferred to a hospital equipped with the burn-treatment facilities needed to save her life. Two months later, Quintana and her family moved to Montreal, Canada where she currently is undergoing extensive treatment in a slow and painful recuperation process.

The brutal burnings of the two youths provoked an enormous outcry within Chile. Demonstrations were held throughout Santiago and in various other Chilean cities. A burial procession for Rodrigo Rojas was attended by thousands of citizens representing the full range of Chilean political life, as well as by United States Ambassador Harry Barnes. The event also has attracted extensive press coverage and commentary within the United States, perhaps in part because Rojas had resided for many years in this nation’s capital.  

2. The Prosecution

The investigation into the burnings of Rojas and Quintana
began on July 2, 1986, the day of the incident. That day, a local judge from Quilicura took declarations from both Rojas and Quintana as they lay in the hospital. Shortly thereafter, the local judge declared herself incompetent to adjudicate. On July 4, Judge Alberto Echavarria of the Santiago Appeals Court was appointed *Ministro en Visita* with responsibility for the investigation and prosecution of the *quemados* case.\(^9\)

In the days following the incident, the government denied all responsibility, even going so far as to deny that any military patrol was in the area at the time that the burnings took place. As the accounts of eyewitnesses began to surface in the press, however, and as public outrage grew, the government was compelled to acknowledge that in fact the army had been involved in the detention of the two victims. On or about July 18, the military placed some twenty-five members of the patrol under preliminary detention at the disposal of Judge Echavarria. Earlier, the OS-7, an investigatory branch of the *carabineros*, had commenced its own investigation into the circumstances surrounding the apprehension and burning of Rojas and Quintana. Sources who were present at the interrogations conducted by OS-7, which lasted nearly a week, indicated that they were extremely detailed and pointed to the army's culpability. By all accounts, however, Judge Echavarria conducted a much more cursory examination, declined even to accept the OS-7's investigatory report, and relied almost exclusively on the testimony of military officials while discounting the evidence offered by civilian eyewitnesses.

On July 23, Judge Echavarria issued his decision. He accepted the explanation, offered by members of the military patrol, that Rojas and Quintana had been burnt when Quintana "dropped" an incendiary device which in turn ignited some spilt gasoline. All but one of the previously detained military officers were released without charge. The remaining officer—Lieutenant Pedro Fernandez Dittus, the commander of the patrol—was indicted ("*encargado reo*") on the quasi-criminal
charge of *negligently* causing the death of Rojas and severe injury to Quintana. The officer’s negligence, according to Judge Echavarria, lay in having “released” the two youths in a place and under circumstances that were inappropriate given their extreme physical distress.

Judge Echavarria’s decision was greeted, at least outside government circles, with near-universal disbelief and dismay. The Chilean Bar Association, which traditionally refrains from comment on pending cases, was moved to note the following, among other glaring deficiencies in Judge Echavarria’s decision:

—It appeared to be based solely on the testimony of the military witnesses, and failed to credit any civilian eyewitness testimony;

—The military officers had not been cross-examined on the basis of the testimony offered by the non-military witnesses;

—Although the decision recognizes that Rojas and Quintana were detained by the military patrol, it is silent on their physical condition at the time they were seized;

—It was implausible to assume that the “spilt” gasoline spread only so far as to burn the two youths, but not so far as to even touch any of their military captors;

—If Rojas and Quintana were detained for the commission of violent, unlawful acts in the first place, there was no credible explanation for why they subsequently were “released,” let alone in a place so far from the site of the original detention; and

—Assuming that the patrol leader was negligent in failing to take Rojas and Quintana to an appropriate medical facility, the failure to charge the remaining members of the patrol with similar negligence lacked rational basis.
Judge Echavarria also concluded that, because Lieutenant Fernandez committed the offense while acting in his capacity as a military officer, the matter was not within his jurisdiction and had to be transferred to a military court. On August 8, the military court upgraded the charge against Lieutenant Fernandez to "unnecessary violence" resulting in the death of Rojas and severe injury to Quintana. Though this constituted a serious charge of intentional wrong under Chile’s Code of Military Justice, the court declined to indict any of the remaining officers on any charges.

After the indictment against Fernandez was upgraded (and sustained on appeal), the military court commenced its own investigation into the incident. From the outset, observers have noted that the investigation and prosecution of the quemados case appeared to be directed, not to the determination of the truth, but to the exoneration of the military. Taken as a whole, the available evidence supports this view.

Perhaps most notable in this context has been the intimidation and harassment of the civilian eyewitnesses. On August 22, for example, Pedro Martinez was arrested for purported violations of the Arms Control Law and held incommunicado. Martinez’s brother said his face was swollen and he was limping when he appeared in court the day after his arrest; other sources have stated that Martinez was subjected, at least, to extreme psychological pressure in an effort to have him change his version of the incident. As of early 1987, this witness was still under arrest and in detention. On the same day that Martinez was arrested, another witness, Jorge Sanhueza, was abducted by unidentified men, blindfolded, driven around in a car, and threatened with death should he persist in his account of the burning; Sanhueza left Chile not long thereafter. On August 25, Quintana’s sister, Emilia, also an eyewitness, was detained along with her husband for several hours and threatened with arrest under the Arms Control Law. She too has left the country in fear. In not one of these instances did the
military prosecutor offer or attempt to assure the safety of these key witnesses.

Indeed, the prosecution has been significantly slowed by the repeated replacement of the prosecuting fiscal. After upgrading the charges against Lieutenant Fernandez and permitting Quintana to leave the country for humanitarian reasons, the original fiscal, Alberto Marquez, came under severe criticism from military quarters and promptly was replaced. The military fiscal who replaced him, Francisco Baghetti, was himself replaced not much later. The third and current fiscal, Erwin Blanco, is viewed by many as readily susceptible to influence from the military command and uninterested in a thorough investigation.

As evidence of the prosecution’s bias, observers point to the virtual exclusion from the investigatory process of the Vicaria lawyers who represent the victims and their families. Although these attorneys enjoy access to key witnesses and facts, the military court has shunned their assistance, denied them access to the sumario (the investigatory file) for many months and, in a most unusual practice by Chilean norms, attempted to schedule a re-enactment of the crime on such short notice that the attorneys would be unable to attend. (The effort failed.) Moreover, according to reliable sources, those civilian witnesses who have been willing to testify have been treated by the court with pronounced hostility, open expressions of incredulity and the threat of prosecution on various offenses. Casting further doubt on the impartiality of the process, line-ups for purposes of identification have been handled so as to make identification of any other military officers virtually impossible: on one occasion, the soldiers presented to the civilian witnesses were all the same height, all dressed the same, all wearing caps and all with faces almost entirely painted.

After approximately six months of this process, the military court determined, on January 23, 1987, to reduce the outstanding charge against Lieutenant Fernandez to the charge orig-
nally returned by Judge Echavarria: negligence in failing to provide adequate medical attention to the two victims. While the reduced charge is subject to appeal by the victims' families, the likelihood of a reversal, or of any indictment being brought against any of the other members of the military patrol, is considered slim.12

B. The "Degollados"/AGECH Case

1. The Facts

On March 28 and 29, 1985, in broad daylight and in front of witnesses, armed men in civilian clothes kidnapped three men: Manuel Guerrero, a school inspector and official of the Chilean teachers' union (known by its Spanish acronym, AGECH); Santiago Nattino, an artist; and Jose Manuel Parada, a sociologist and staff member of the Vicaria de la Solidaridad, the church-sponsored national human rights organization. The three were each members of Chile's outlawed Communist Party. Also on March 28, 1985, five other leaders and staff members of the AGECH union were abducted. The five were detained at a secret location for two days, and were released on March 30, 1985.

The same day the AGECH leaders were released, the bodies of Guerrero, Nattino and Parada were found on the outskirts of Santiago. Each corpse bore the signs of severe maltreatment, and each of the victims' throats were slit. Their case became known as "los degollados"—literally, "the ones with the slit throats."

In a country long accustomed to violence, the exceptionally brutal execution of these three victims provoked a national outcry. An estimated crowd of 15,000 joined a funeral march, and repeated mass protests were attended by a wide range of opposition groups. The breadth of public indignation was especially notable in that Guerrero, Nattino and Parada had all been communists.

2. The Prosecution

Legal developments in the degollados case seemed to trace the
limits of judicial independence in Chile. Notable progress during the early stages of investigation signaled the possibility that this might become the first case in which security-force personnel were convicted of human rights violations in Chile. But that progress was later reversed. Today, the degollados case stands as a testament to the Chilean judiciary’s paralysis in cases involving rights violations by government agents.

In mid-April, 1985, Judge Jose Canovas Robles of the Santiago Appeals Court was appointed Ministro en Visita with responsibility for handling the investigation and prosecution of the Guerrero, Nattino and Parada slayings. Within several weeks of his appointment, and based in part on the testimony of the abducted AGECH members and witnesses to the abduction of the degollados, Judge Canovas decided that the two cases were related and ordered consolidation of the investigation and prosecution of the two cases.

On August 1, 1985, Judge Canovas issued an order in the consolidated cases prohibiting 14 carabineros from leaving the country. Though the order did not call for the arrest of these 14, it was based on the same standard of proof needed for an arrest warrant—"reasonable suspicion of involvement." On the same day, Judge Canovas determined that the consolidated cases should be transferred to the military courts because the crimes possibly committed by the carabineros fell within the exclusive domain of military jurisdiction.

Judge Canovas’s decisions dealt a harsh blow to the standing of the carabineros. On August 2, General Cesar Mendoza—the carabineros’ commanding officer and a member of the four-man government junta—resigned. His successor, General Stange, ordered an immediate reorganization of the carabineros, including the dismantling of the carabineros’ DICOMCAR intelligence unit. But significant as they were, these developments were widely viewed as an attempt to limit institutional damage rather than embrace the judicial search for truth and accountability. The Interior Minister proclaimed that the
government would not be affected by what he termed "isolated" situations.

On August 4, 1985, the Military Judge of Santiago, General Samuel Rojas, issued a decision finding that, according to reports in the file, members of the carabineros were involved in both events. Going beyond Judge Canovas's preliminary findings, General Rojas further stated that the killing of the degollados had been committed in order to intimidate opponents of the regime. Finally, he held that the crimes involved were not abduction or murder punishable under the Military Code, but crimes under Chile's Anti-Terrorist Law justiciable in civilian courts. General Rojas therefore determined that the military courts lacked jurisdiction to proceed further in either the AGECH abduction or the degollados case. Faced with the prospect of a prosecution, the new carabinero leadership issued a statement questioning Judge Canovas's initial decisions and affirming the unity of the institution.

To the surprise of many, Judge Canovas resumed control over the consolidated cases. Although he disagreed with General Rojas's jurisdictional finding, he announced that he would continue with the investigation, rather than await the outcome of likely appeals, in order to expedite the truth-finding process. Large segments of the Chilean public were encouraged by Judge Canovas's unusually activist stance.

From that point on, developments in the investigation and prosecution focused on the case of the AGECH abductions. Within weeks of resuming control over the file, Judge Canovas ordered the indictment of seven of the carabineros in that case, including the former chief, director and sub-director of DICOMCAR. This was the first time that specific defendants had been charged as principals in connection with the commission of one of the two crimes under investigation. In his second resolution, Judge Canovas once again determined that the civilian courts lacked competence to proceed any further, and
for the second time transferred the combined proceeding to the Military Judge.

Three days later, General Rojas again declined to assume jurisdiction. This time, he made explicit what was implicit in his prior order—that military or quasi-military officers are as capable as civilians of committing offenses under Chile’s Anti-Terrorist Law and that, if they do, their acts are subject to the jurisdiction of civilian courts. To this day, his decision remains the sole judicial recognition of what many believe to be an oft-repeated occurrence in Chile: terrorist acts committed by the state. The practical, immediate impact of General Rojas’s decisions, however, was once again to stall the case against the carabineros. Three days later, Judge Canovas reiterated his earlier conclusion that the civilian courts lacked jurisdiction to proceed. The degollados and AGECH cases had become, in effect, a political “hot-potato” which neither the military nor the civilian court seemed willing to prosecute.

The conflict ultimately was resolved by the Supreme Court, which held unanimously in early October that Judge Canovas had jurisdiction over the consolidated proceedings. At the same time, the Court ruled against one of the defendants, who had challenged his indictment for the AGECH abductions as arbitrary and without evidentiary basis.19

With Judge Canovas’s authority to proceed thus resolved, the defendants pursued legal challenges to their indictments. Two carabineros (a captain and a major) who had not previously appealed their indictments brought an appeal challenging the sufficiency of the evidence against them. As to these two, the Appeals Court, employing an unusually stringent evidentiary standard, ruled that there was insufficient proof of their involvement to sustain the indictment.

In November, 1985, the five carabineros with charges still pending against them in the AGECH case challenged their indictments on appeal. As to some of them, the Appeals Court already had heard and rejected a prior appeal; it did the same
this time as well. Each of their defendants then brought a "recurso de queja"—in essence, a writ of mandamus sought in circumstances, like this, where an appeal from an appellate decision does not ordinarily lie—before the Supreme Court, asserting that the Appeals Court had committed serious abuse in failing to dismiss the indictments. This time, in mid-January of 1986, the Supreme Court unanimously granted their petition and dismissed the indictments. No reasons were given; the ruling stated simply that the Appeals Court had erred.

Large segments of the Chilean community, who had been so encouraged by the virtually unprecedented sight of senior officers being charged for their involvement in a politically-motivated crime, reacted with outrage to the Supreme Court's decision. Public demonstrations ensued, with banners bearing the slogan "Supreme Shame." The Vicaria de la Solidaridad issued a statement on January 17, stating its belief that the loss of faith in the judicial institutions is deeply damaging for the achievement of peace and reconciliation among Chileans, that it could lead to the repetition of crimes committed with impunity and encourage people in search for justice in their own way.

On behalf of the victims' relatives, Vicaria lawyers sought reconsideration of the Supreme Court's decision. The Court denied the petition and, in doing so, for the first time articulated the basis of its ruling. According to the Supreme Court, there was no direct evidence to establish that the five abducted AGECH members had ever been detained in DICOMCAR headquarters; the testimony of certain of the abducted unionists was invalid because they had been blindfolded during most, if not all, of the duration of the abduction; and the testimony of the remaining victims was inherently unreliable because they suffered an inevitable bias against their captors. This last point apparently is an aberration in Chilean law, and the courts' application of it to other cases is highly doubtful. By the
Supreme Court's logic in this case, no conviction could be had based on the testimony of the victim of the crime.

Since none of the proceedings described above pertain specifically to the degollados case, Judge Canovas still has the power to pursue the investigation into those slayings, to issue indictments and to return convictions. But faced with the implicit hostility of the Supreme Court, the explicit hostility of the military government, and the refusal of the armed services to cooperate any further in the investigation, most observers believe that Judge Canovas is unlikely to resume active proceedings in the case, at least until the political climate in Chile becomes more hospitable. Indeed, on January 23, 1987, Judge Canovas issued an order dismissing without prejudice the investigation into the degollados slayings. His opinion noted that there was sufficient evidence to believe that the crimes were committed by a criminal group within DICOMCAR, but that, largely as a result of military obstruction of the investigation, he was unable to establish the identities of the individual culprits.

As a result of the Supreme Court's actions—and despite the accumulation of 8,000 pages of evidence, the testimony of eyewitnesses and an incriminating report by one of the government's own intelligence agencies—the prosecution of those responsible for the murders of Guerrero, Nattino and Parada is no further advanced today than it was in April, 1985.

The failure of justice that has characterized the degollados case has implications that reach far beyond the case itself. The following words of the Chilean Episcopal Conference reflect the sentiments of many Chileans with whom we met:

We hope there will be plenary justice on account of those who have disappeared, who have been assassinated or mistreated, including the degollados. It is not sufficient to say that "justice is slow, but it comes." Justice which is not effective when it should be is already injustice. It
deteriorates the social fabric. It does not respond to the requirements of those who are affected.

The obscurity surrounding various political crimes has created a climate of suspicion, a lack of confidence, which has generated tensions and hatreds making all Chileans ill. God wants justice and truth without ambiguities Without this, reconciliation will be difficult.24

C. The “Desaparecidos” Case

1. The Facts

The years following the military coup of 1973 were marked by thousands of mysterious disappearances of left-wing activists. Although hundreds of such cases were investigated by the courts, virtually all of them were closed long ago on the grounds of insufficient evidence. The so-called desaparecidos ("disappeared ones") case is a singular exception to this pattern. The case involves ten persons who were arrested in December 1976 by the since-disbanded DINA security force. The victims never were heard from again.

2. The Investigation

Although an investigation into the desaparecidos case was opened in early 1977, it languished for almost six years. On February 2, 1977, the Supreme Court designated Appeals Court Judge Santiago Guastavino as Ministro en Visita with responsibility for investigating the case. After an investigation lasting less than a week, he concluded that, based on travel documents provided to him by the authorities, the ten desaparecidos had left the country for Argentina. The Appeals Court ordered the investigation to be re-opened, but it was summarily closed by Judge Guastavino on two further occasions. Each time, panels of the Appeals Court (including Judges Canovas and Marcos Libedinsky) intervened and ordered the investigation to be re-opened.

In 1980, Judge Guastavino became blind and was replaced as Ministro en Visita in the case by Judge Carlos Letelier. No
significant developments in the investigation occurred during the next several years and, with Judge Letelier's elevation to the Supreme Court in early 1983, the case was transferred to a new Ministro en Visita, Appeals Court Judge Carlos Cerda Fernandez. Judge Cerda undertook what is surely the most thorough investigation ever conducted by a Chilean judge in a human rights case, and encountered formidable obstacles at every turn.

From the outset, Chile's security services and armed forces withheld their cooperation from Judge Cerda. Soon after his investigation commenced, officials began to avoid or disobey Judge Cerda's orders. But he persisted. For example, Judge Cerda decided to obtain the original version of the exit documents which purportedly showed that the ten desaparecidos had left for Argentina. The international division of the investigatory police declined to produce them; eventually, they claimed the originals could not be located. In response, Judge Cerda appeared unannounced at the division's headquarters and demanded to review the pertinent documents. He was told they were locked away in an inaccessible safe. He demanded the keys. Stunned by his reaction, the officers gave him the keys. From his review of the papers, Judge Cerda determined that the exit visas had been forged. And, in September 1983, he indicted two police officers for falsification of records, and for the illegal abduction of two of the desaparecidos (Edras Pinto and Reinaldo Perreira). On appeal, however, the indictments were dismissed—the Appeals Court held the abduction charge lacked sufficient evidence, and that the falsification charge was framed defectively under the terms of the applicable statute.

Judge Cerda nevertheless pursued his investigation through the remainder of 1983 and into 1984. In 1984, the investigation gathered momentum when a former member of an Air Force intelligence unit, Andres Valenzuela, decided to tell a human rights organization all he knew about the activities of an interservice clandestine unit that had been active in eliminating the
far-left opposition during the mid-1970's. Valenzuela's account included the identities of the members of the unit, the names of victims, and details concerning the places of detention and the treatment to which the victims had been subjected. With the benefit of this evidence, Judge Cerda made significant progress in his interrogation of a number of military officers and *carabineros* during the remainder of 1984 and most of 1985.

As the investigation moved forward, however, Judge Cerda encountered increasing opposition from Chilean security-force personnel. Officers who had been questioned by Judge Cerda complained to their superiors about the Judge's "harassment"; some officers simply ignored the court's compulsory process. By the latter part of 1985, witnesses in the case, as well as Judge Cerda himself, were placed under nearly constant surveillance. Judge Cerda made the Supreme Court aware of the harassment of witnesses, but no effective countermeasures were taken.

In September of 1985, Judge Cerda issued an indictment against Miguel Estay, a former member of the clandestine terror unit, and charged him as an accomplice in the abduction of Edras Pinto and Reinaldo Perreira. On August 14, 1986, Judge Cerda issued a further decision termed by Chilean human rights lawyers "the most important judicial resolution in Chile in the last 13 years": he indicted a total of 40 persons on charges of illegal association and kidnapping. Included among the accused were 17 members of the Air Force (three generals, four colonels, two group commanders, two squadron commanders, a doctor, a lieutenant, a sergeant and three soldiers); 14 members of the *carabineros* (a general, five colonels, four lieutenant colonels, two majors, a captain and a sergeant); two members of the Navy (a ship captain and a lieutenant); five members of the police *Investigaciones* division (a subcommissioner, three inspectors and one lower-level official); and two civilians.25

The indictments were widely hailed as a triumph of the rule
of law over security forces that had long been a law unto themselves. The opposition press was filled with photographs of some of the most senior members of the armed forces being brought to court under heavy guard, sometimes in handcuffs. One editorial proclaimed:

Carlos Cerda hit hard because he demonstrated that it is possible, despite everything, to discover the truth; that despite the pressures, the veil can be pierced. If during these past years the courts had others like him, even just half the judges, things would have come out much differently.

Surely there will be some fault, some law, discovered in order to free the 40 surprised defendants. But what matters is that one Judge demonstrated that it can be done. And that it’s worth the effort.

3. Application of the Amnesty Law

In at least one respect, the editorialist was right. On September 10, 1986, the Santiago Appeals Court, in an appeal brought by four of the accused, determined that an amnesty law enacted in 1979, which covers specified crimes committed between September 1973 and March 1978, barred the indictments handed down by Judge Cerda. Accordingly, it dismissed the indictments not only of the four appellants, but of the remaining 36 defendants as well, and ordered Judge Cerda to close the file. On October 6, 1986, the Supreme Court affirmed.

The decision seemed to exemplify a pervasive feature of Chilean justice: adhering to the formalities of law, the courts all too often invoke highly technical legal arguments to shield the state from accountability for human rights violations, however serious. Virtually every Chilean jurist with whom we met shared Judge Cerda’s view that the Appeals Court’s construction of the Amnesty Law as a bar to the indictments was erroneous. They pointed to the following major considerations:
—In kidnapping cases where, as here, the bodies have not been discovered, it is impossible to determine when the offense ended. By nature, the crime is an “ongoing” one, and the amnesty law can only apply to crimes which were completed prior to March 1978;

—Consistent with this, following the passage of the amnesty law in 1979, various courts pursued investigations into disappearances which took place between 1973 and 1978;

—On March 21, 1979, after the amnesty law was passed, the Supreme Court itself directed 11 Appeals Courts throughout Chile to investigate the circumstances of scores of disappearances between 1973 and 1977 with the aim of establishing criminal responsibility;

—The amnesty law was intended to apply, not to events which may have taken place between 1973 and 1978, but only for the benefit of persons who had been found culpable of specific offenses at the conclusion of judicial proceedings. This interpretation is supported by Monica Madariaga, the former Minister of Justice primarily responsible for the enactment of Decree Law No. 2,191. “To adopt a contrary interpretation,” she is quoted as saying, “and to apply amnesty before an investigation has been completed and the culpability of specific individuals definitively established . . . would leave society unable to prevent the recurrence of the same offenses in the future”; and

—The Supreme Court’s decision was inherently inconsistent with an earlier judgment in the same case. Miguel Estay, who as previously noted was indicted by Judge Cerda in September 1985, appealed his indictment, invoking the amnesty law. The Santiago Appeals Court rejected his appeal twice, letting the indictment stand, and the Supreme Court affirmed on July 24, 1986. By rejecting Estay’s appeal, the Supreme Court necessarily held that
the provisions of the amnesty law did not come into play at the indictment stage of the judicial process. The only apparent distinction between the cases decided by the Supreme Court on July 24 and on October 6, 1986 was the number and identity of the defendants.

On October 7, 1986, the day after the Supreme Court affirmed the Appeals Court's dismissal of the indictment, Judge Cerda issued a five-page, closely-reasoned opinion in which he rejected the conclusion reached by the appellate courts and declared his unwillingness, under the provisions of Article 226 of the Penal Code, to close the file as ordered. Article 226, which is directed specifically to the responsibilities of judges, embodies a principle, borrowed from canon and military law, known as "reflective obedience." In essence, the doctrine permits (indeed requires) disobedience of a superior's order when the order is plainly irregular, unlawful or would result in unforeseen injustice. In such cases, Article 226 provides that the judge shall communicate the reasons for his disobedience to the superior body which emitted the order; if that body insists, it may once again order compliance on the understanding that it, and not the subordinate judge, shall bear penal responsibility in the event the order is later determined to have been unlawful.

Following the dictates of Article 226, Judge Cerda transmitted a copy of his decision containing the reasons for his disobedience to his "superior"—the Santiago Appeals Court. Pursuant to the procedures set forth in Article 226, Judge Cerda expected that the response would come from the Appeals Court after due deliberation. The response came the very next day, not from the Appeals Court, but directly from the Supreme Court. By unanimous vote (President Retamal not participating), the Supreme Court held that Judge Cerda had displayed "absolute ignorance of his obligations and [committed] a grave offense against judicial resolutions, much less ones
issued by the Supreme Court." Stating that the very "basis of the organization and function of the Judicial Power" had been challenged by Judge Cerda's actions, the Supreme Court not only stripped him of any continuing power in the case (which again was ordered closed), but immediately suspended Judge Cerda from the bench for two months at half pay. The Supreme Court failed to explain why Article 226 had been invoked improperly by Judge Cerda, or why it, and not the Appeals Court, responded to Judge Cerda's decision.

By all accounts, Judge Cerda is one of the most brilliant jurists in Chile today; his rectitude, courage and honesty is unquestioned even by his opponents. Nevertheless, his future is very much in doubt. The Supreme Court retains the power to terminate his tenure or to place him on probationary status. Indeed, in January of this year, Judge Cerda received a "third list" ranking in the Supreme Court's annual review of all lower-court judges. If he receives the same ranking next year, his career as a judge will be over.29

D. The Mario Fernandez Case

1. The Facts

Mario Fernandez Lopez, a trucker and a member of the Christian Democratic Party, was detained by agents of the CNI at approximately 6:00 a.m. on the morning of October 17, 1984. He was arrested on unspecified charges while at home with his family in the town of Ovalle, approximately sixty kilometers from the city of La Serena. The agents who arrested him did not show any arrest order issued by a tribunal or other competent authority.30

Subsequent proceedings revealed that after being held at CNI headquarters in La Serena on October 17, Fernandez was taken on the following day to a hospital, where he underwent emergency surgery. He died on the evening of October 18. The autopsy report stated that the cause of death was severe shock as a result of a traumatic rupture of the abdominal area. Signifi-
cantly, when he was arrested the day before, a carabineros doctor had examined Fernandez and determined that he was in good health. Thus, there is no dispute that Fernandez's injuries were suffered during the time he was within the CNI's detention.

2. Amparo Proceedings

On October 17, the day Fernandez was arrested, his family sought a recurso de amparo (habeas corpus petition) from the Appeals Court in La Serena. That same morning, the judge sent inquiries to three entities asking them whether the detainee was within their control, how the detainee was detained, by whom he was detained and by what order. The inquiries were directed to the regional office of Investigaciones (the police), the chief of the CNI in La Serena, and the Intendente of the Fourth Region (in which La Serena is located), and requested responsive information as soon as possible.

On October 18th, Investigaciones informed the Appeals Court that Fernandez was not within their possession. On October 19, 1984—a day later than it was required to respond and the day after Fernandez had died—CNI submitted a written response to the habeas petition, informing the court that Fernandez had been arrested and was in CNI custody. In its response, CNI sought to justify its arrest by citing a decree signed by the Minister of the Interior which purportedly was issued prior to Fernandez's arrest. The decree was dated October 17 and was signed in the capital city, Santiago. Fernandez's arrest, however, also took place on October 17, at 6:00 a.m., in a town over 100 miles away. Thus, the decree appears on its face to be a transparent post hoc justification for an arrest which at the time lacked any legal authority.

Upon receiving the response of the CNI, the Appeals Court in La Serena was required to decide whether to grant the recurso de amparo. By this time, however, the court had been informed that Fernandez had died. The court nevertheless
ruled that Fernandez had been detained by a competent authority acting under lawful process, and denied the petition.

Despite Fernandez's death, his family's lawyers appealed the denial of the recurso to the Supreme Court. They petitioned the Supreme Court to hold that the documentation purportedly justifying the arrest was defective. On November 12, 1984, after obtaining copies of the underlying documentation relating to the arrest (as well as the autopsy report), the Supreme Court decided, by a 3-2 vote, to uphold the lower court's denial of amparo on the basis that the issue presented by the original amparo petition had been rendered moot by Fernandez's death.

The courts' handling of the amparo petition in this case exemplifies a pervasive failure of this potentially vital safeguard against official violence and arbitrary detention. Theoretically, recursos de amparo are available to challenge the lawfulness of an arrest or the place or conditions under which an accused is being held. By statute, the amparo petition is supposed to be processed within 24 hours—a useful protection where, as in Chile, unlawful detentions and torture have not been uncommon. In practice, however, amparo is rarely granted: we were advised that Vicaria lawyers had filed over 10,000 recursos de amparo in the past several years, but that fewer than five persons had been freed from custody as a result. The police and security services routinely do not respond to judicial inquiries into the circumstances of detention, or they respond tardily, or they respond untruthfully.

The case of Mario Fernandez also demonstrates how judicial foot-dragging, and the processes of the military courts in particular, can prejudice irreparably the opportunity to impose sanctions on human rights violators.

3. The Prosecution

A criminal complaint (querella) was filed by Fernandez's family on October 24, 1984 before the Third Criminal Court of La Serena against the unknown individuals responsible for
the homicide of Mario Fernandez. By then, Judge Herman Brucher, a criminal judge of the Third Court of La Serena, already had commenced an investigation into the circumstances surrounding Fernandez's death. The autopsy report, which noted that Fernandez's injuries were the result of a "severe external trauma" which "may or may not" have been caused by third persons, suggested the need for such an investigation.

On November 21, 1984, Brucher decided that a crime had been committed—the crime of "unnecessary violence resulting in death"—and identified the two CNI agents whom he believed to be responsible. Having gone this far, however, the court also determined that it lacked competence to proceed further, and did not indict the two CNI agents. Instead, the court referred the case to the military tribunals because, in the court's words, "the crime having been committed in a location designated as a military one pursuant to Articles 1 and 2 of Decree Law 1878 of 1977, as modified by Decree Law 2882 of 1979, this case ought to be pursued before Military Justice." While he did not issue an indictment at the time, Judge Brucher ordered the arrest and incommunicado detention of the two CNI agents he had identified.

Upon receiving the case from Judge Brucher, the military court had five days within which either to indict the two CNI agents or to release them, without prejudice to the filing of charges at a later date. Rather than investigate within the five-day period, however, military fiscal (prosecutor) Renato Valencia Querci determined on the very next day that there was insufficient evidence to proceed against the two named agents, and set them free unconditionally. The fiscal found that Fernandez's death was the result of "self-inflicted" abdominal wounds caused by the prisoner's bumping up against a chair or a table in the room where he had been detained. The decision of the lower military court was appealed to the Martial Court of Appeals. On May 16, 1985, after several months of reviewing
the file, the Martial Court rejected the appeal by a 3-2 vote, with the two civilian members of the court dissenting.

An appeal, by way of recurso de queja, was filed with the Supreme Court on May 22, 1985. Upon receiving the queja, the Supreme Court asked the three judges who had formed the majority vote below to transmit an explanation of their vote within eight days. After repeated delays and orders to respond, the report finally arrived at the Supreme Court on July 12. The military judges explained that they had accepted without reservation the CNI version of the death—i.e., that the injuries from which Fernandez died were "self-inflicted."

The Supreme Court then asked to see the fiscal's entire file. Apparently sensing that the CNI version would not withstand scrutiny, however, the fiscal suddenly decided, on September 4, 1985, to indict (encargar reo) the two previously-identified CNI agents. Only then, on September 6, did the fiscal send his file to the Supreme Court. The Supreme Court's review having been mooted by the interviewing indictment, the case file was returned to the military fiscal in La Serena. Notwithstanding his indictment against the two CNI agents, the fiscal did not order their arrest or detention.

Immediately after the Supreme Court had rejected the appeal on grounds of mootness, the military judge proceeded to replace the military fiscal handling the case with an ad hoc appointment. The new fiscal, Lieutenant Colonel Jorge Puentes Vasquez, was not a lawyer and had no legal training. He proceeded to interrogate the two doctors who were present when Fernandez was detained in good health and later transferred to the hospital in critical condition. Although these doctors already had testified before Judge Brucher, and although the new fiscal took no further investigatory steps in the case, on December 30, 1985, he dismissed the two indictments on the asserted basis of "new reports."

On March 13, 1986, the Martial Court affirmed the lower court's decision to dismiss. A further appeal was taken to the
Supreme Court, which on June 25, 1986 granted the appeal and directed the lower military court to reinstate the indictment against the two CNI agents. The file thus went back to La Serena, and the fiscal was ordered to demand the detention of the two accused. By this time, however, the two CNI agents could no longer be found. There is an arrest warrant out for them, but to the knowledge of the lawyers involved, no steps have been taken to determine their whereabouts or apprehend them.

As matters now stand, the lawyers representing the family of Mario Fernandez plan to request that a new fiscal be appointed and that an investigation be conducted into the cover-up committed by other CNI agents as to the causes of Fernandez's death. They further intend to seek an investigation into the failure of the CNI doctor to denounce the killing of Mario Fernandez.

SECTION III: PERSECUTION OF HUMAN RIGHTS LAWYERS

To lawyers who practice in a legal order in which neutral principles are applied more or less neutrally, the work of defending human rights victims in Chile may seem a perplexing exercise in futility. That futility is in part reflected by the fact that Chilean lawyers have filed more than 10,000 amparo petitions in the 13 years since Gen. Pinochet assumed power, and have achieved a small measure of success in only three known cases. And, as noted in Section II, successful prosecution of those responsible for human rights violations remains more elusive still.

With virtually no prospect of the sort of success that fuels most lawyers' professional aspirations, attorneys who undertake human rights work in Chile assume formidable risk to their personal safety. Since the early years of Gen. Pinochet's rule, human rights work has been a perilous undertaking. In the past year, lawyers affiliated with the leading human rights organizations in Chile have come under heightened pressure.
In Santiago, the majority of lawyers active in the field of human rights are affiliated with one of two institutions. The larger and more visible of the two is the Vicaria de la Solidaridad (Vicariate of Solidarity). Established in early 1976 by the Archbishop of Santiago, the Vicaria is the successor to the Comite de Coperacion Para la Paz en Chile, which was created in October, 1973 and was shut down in late 1975 in the face of extreme pressure from the Government. The Comite was created to respond to flagrant violations of fundamental rights that proliferated in the days and months following the coup that brought Gen. Pinochet to power. In the wake of that coup, civilian institutions that formerly upheld the rule of law and provided a check against arbitrary excess of the executive power ceased to function. The national Congress was suspended and remains so to this day. And, as discussed in Section II, the judiciary adopted a subservient posture vis-a-vis the military government, more typically shielding it from accountability for official acts of violence than acting to protect citizens against such acts. In this context, the Church emerged as the most effective and independent defender of fundamental rights.

Although it receives much of its funding from international Protestant and ecumenical organizations, the Vicaria exists under the wing and protection of the Roman Catholic Church; it is housed in Church-owned quarters adjacent to the Cathedral of Santiago, much of its staff is drawn from Church-affiliated workers, and its director is the Monsignor Santiago Tapia. The moral and spiritual support of the Church provides a measure of protection to the activities of the Vicaria without which many believe those activities could not take place.

In addition to a number of other services—including counseling to the families of desaparecidos and victims of torture, publications, limited economic assistance and the maintenance of an impressive archive—the Vicaria provides free legal representation to the victims of state violence in its many forms, and to the families of such victims. Some lawyers work for the
Vicaria on a full-time basis; a larger number of other lawyers (colaboradores) donate their services several days a week.

The cases handled by Vicaria lawyers generally fall into two classes: the filing of petitions of amparo on behalf of those who have been detained, or who remain detained, under irregular circumstances; and the prosecution of complaints by the victims of torture and other forms of official abuse (or, when the victims have died, the representation of their family members). Consistent with its mandate as a Church-sponsored human rights organization, the Vicaria does not defend persons charged with criminal violence or "terrorist" acts against the State.38

The representation of criminal defendants in such politically-charged cases of violence falls almost entirely to the lawyers affiliated with another human rights organization, the Comite de Defensa de Derechos del Pueblo (Committee for the Defense of the Rights of the People), known as CODEPU. Composed predominately of activists openly affiliated with the parties of the far-and center-left in Chile, CODEPU performs some of the same functions as the Vicaria, including medical and psychological assistance to the victims of torture and their families, assistance to the families of exiled persons and those who have recently returned from exile, and legal representation.

CODEPU's primary legal work is the defense of persons who, in their own view or by their own actions, are defined as political opponents of the Pinochet regime. On the premise that every accused person has the right to effective and vigorous legal assistance, CODEPU provides representation even to the "untouchables" in the machinery of Chilean law—those accused of terrorism (i.e., violence against the State), of terrorist acts, or of supporting terrorism.

The philosophical differences that may divide certain lawyers and organizations, however, are less significant than the common dangers that confront virtually all human rights lawyers.
A. Luis Toro

On September 7, 1986, an armed group attempted to assassinate President Pinochet as he was traveling by motorcade from his country home to Santiago. In the attempt, five of Pinochet's bodyguards were killed, and Pinochet himself was wounded. Within days of the attack, a paramilitary death squad, calling itself the "September 11 Commandos," announced its intent to avenge these five deaths.

Vengeance came swiftly, and bloodily. Beginning early on the morning of September 8, four civilians—none of whom was known to have had any connection with the armed opposition or with the attempt on Pinochet's life—were dragged from their homes, beaten and executed. In each case, the modus operandi was the same. Heavily armed men in civilian clothes, traveling in the same two or three cars during curfew hours, came to the home of the victim, apprehended him in the presence of his family, beat him severely, thereafter shot him repeatedly with "dum-dum" (explosive) bullets, and left the body miles from the victim's home.

On September 12, the sister of Luis Toro, a full-time lawyer on the staff of the Vicaría, received an anonymous call informing her that the September 11 Commandos were going to kill all the lawyers at the Vicaría, and that Toro would be the first. The telephone number of Toro's sister is unlisted. Along with Hector Salazar, Toro had been (and still is) prosecuting the highly-publicized quemados case on behalf of the families of the burned victims. Other than his work on behalf of the Vicaría, and his association with the quemados case in particular, he is not engaged in any activities that would have singled him out as a target of the September 11 Commandos' terror campaign. Having received anonymous threats in the past, however, Toro already had taken certain precautions to secure as best he could his home and the lives of his family.

Those precautions, and some good fortune, stood Toro well in the early morning of September 13. At approximately 2:00
a.m., several heavily-armed men in civilian clothes arrived at his home in a large car. Toro was awake when they arrived, and observed from a window that they scaled the wall surrounding his house and threw themselves against the doors. Toro proceeded to alert several of his neighbors through a set of prearranged telephone signals, and called the police.

Having lost the element of surprise, and apparently finding Toro's home more difficult to penetrate than they had anticipated, the group left. A different vehicle soon returned, however, and the group of six men in it tried a different tack. They rang Toro's doorbell, and claimed to be investigating the earlier disturbance. Before responding, Toro turned on all his lights and made a lot of noise; by pre-arranged agreement, his neighbors did the same. Toro declined to leave his home and, after a tense stand-off witnessed by many, the men again departed. Shortly thereafter, police arrived and transported Toro and his family to a safe location.

Since the night of September 12, Toro has continued to receive a number of threats on his life and the lives of his family. He has attempted to increase the level of security measures, but otherwise has refused to change the pattern of his life—he continues to work at the Vicaria, he continues to work on the quemados case, he continues to meet with the press, and he continues to devote himself as an attorney to the cause of human rights in Chile.

To this day, the attempted abduction of Luis Toro remains unsolved—as do each of the four abduction/murders which took place between September 8 and 12 under similar circumstances. In contrast to the generally rapid pace of investigations in Chile when the suspected perpetrators are opponents of the regime, and despite the large number of witnesses to the events, there has been no meaningful investigation into these five incidents. Governmental complicity in the crimes cannot yet (and may never) be established, but most of the Chileans with whom we met remain convinced that these acts could not
have taken place without either the active involvement or the tacit approval of the official security forces. According to one reliable informant, sources within the *carabineros* claim to know the identity of the perpetrators and of the members of the September 11 Commandos, but cannot reveal their information or prosecute these cases because of the support which the perpetrators enjoy from high levels of the Chilean government. In the meantime, the members of the September 11 Commandos remain at large.

**B. Hector Salazar**

Hector Salazar also is a full-time member of the legal staff of the *Vicaria de la Solidaridad* and, together with Luis Toro, represents the families of the victims in the *quemados* case. Like Toro, Salazar also has received numerous anonymous threats. One letter he received in his office, for example, reads “If you pursue this matter, you will be *quemado* number 3.”

In addition to these unattributable threats, Salazar has been subjected to a continuing series of official interrogations and the threat of criminal prosecution as a result of his activities in the *quemados* case. Shortly after the *ad hoc* military prosecutor rejected Judge Echavarria’s initial finding of negligence and upgraded the charge against Lieutenant Fernandez to “unnecessary violence resulting in death,” 42 Toro and Salazar were interviewed by *La Segunda*, a leading Santiago newspaper. During the course of that interview, Salazar noted that the prosecutor had rejected the military’s explanation of the event as an “accident,” and went on to state, in effect, that “the army is in debt to the courts and to Chile, and it owes them the truth.”

Within days of the publication of his remarks, Salazar was summoned (under penalty of arrest) to testify about the quoted statement before military prosecutor Enrique Olivares. Salazar was informed that he had been charged, but not formally indicted, with the criminal offense of making “statements injurious to the Armed Forces.” During his interrogation, he admit-
ted having made the statement, but denied that its purpose or effect was to "injure" the army. Subsequently, police investigators came in Salazar’s office to interrogate him once again concerning the same published remarks. To date, no formal prosecution has been commenced against Salazar on account of the article in La Segunda, but the threat of such prosecution remains.

Salazar’s difficulties with the authorities do not end here. As part of its public awareness and information efforts, the Vicaria routinely publishes and distributes bulletins on developments in the major legal proceedings which it handles. Typically, the bulletins are written by the lawyers directly involved in the case being reported. One such bulletin, concerning the quemados case and written by Salazar, formed the basis of a complaint by an army commander to the second ad hoc military prosecutor handling the quemados case. The ad hoc prosecutor summoned Salazar to his chambers for interrogation concerning the quemados case in general and the Vicaria bulletin in particular. Salazar admitted his authorship of the bulletin and its circulation by the Vicaria, but again denied any "injurious" motive or effect. Although Salazar’s sworn declaration before the fiscal may not be admissible against him, there are intimations that it may form the basis of a second charge against Salazar, brought by the third ad hoc military prosecutor now handling the quemados case, for causing "injury" to Chile’s armed forces.

C. Gustavo Villalobos and the Vicaria Doctors

In another case involving the Vicaria and its staff, the intimidation of human rights lawyers and activists has not been limited to anonymous threats or the prospect of prosecution; rather, the full weight of the Chilean legal machinery has been brought to bear against a Vicaria lawyer and doctor and several other doctors for having provided legal advice and medical attention to a man who, unbeknownst to them, may have been a member of the armed left-wing opposition. In the process, the
lawyer and doctors have been imprisoned and face lengthy jail
terms, the confidentiality of the attorney-client relationship has
been disregarded, the distinction between lawyer and client has
been ignored, and the Vicaria itself has come under intense
official pressure.

The case against the Vicaria lawyer, Gustavo Villalobos, and
his co-defendants grows out of the following incident: On the
morning of April 28, 1986, a man named Hugo Gomez Peña
arrived at the Vicaria suffering from what appeared to be a
fresh gunshot wound. He was attended by Dr. Ramiro Olivares.
Dr. Olivares quickly concluded that Gomez required medical
treatment which could not be provided on the Vicaria's pre-
mises. Gomez claimed that he had been shot in a "confusing
incident"—code-words in Chile for an altercation with uni-
formed officials during which a civilian is wounded or killed. In
the past 13 years, being wounded by Chilean security forces
has, in itself, been sufficient cause for suspicion of illegal
political activity, and such suspicions all too often have been the
basis for severe human rights violations. Against this back-
ground, and because Gomez feared retaliation for prior acts of
opposition to the regime, Dr. Olivares referred him to a private
clinic, Clinica Chiloe, rather than to a public hospital where
wounded patients are routinely turned over to the authorities
for detention. The referral was accompanied by the usual
paperwork, signed by Dr. Olivares on behalf of the Vicaria. Due
to Gomez's condition, no full interview was taken at this time.
The social worker who was present with Dr. Olivares noted,
however, that Gomez was scheduled for a legal visit in order to
file a judicial complaint.

Later the same day, the media carried sensational accounts of
an armed robbery at a bakery during which a policemen was
killed in a shoot-out. The press reported that the culprits had
fled. Upon learning of the accounts, the social worker who had
seen Gomez suspected that Gomez might have been involved,
and immediately notified the Vicaria's legal department. The
director of the department, in turn, instructed Dr. Olivares and the lawyer on duty, Gustavo Villalobos, to visit Gomez at the clinic and attempt to determine Gomez's involvement in the reported incident. After consulting with the attending physician, Dr. Ramon Rojas, the two of them conducted a lengthy interview of Gomez, during which he repeated his earlier claim that he was the victim of a police attack. Villalobos credited this account, in large part because he had checked Gomez's file at the Vicaria's office and learned that Gomez had no previous arrest record for violent crimes, but had previously "suffered repression." Specifically, Gomez's brother had been abducted by Chilean security forces, and Gomez himself had been arrested for participating in demonstrations against government policy.

Gomez's sister also arrived at the clinic, and asked that her brother be released to her care. Because Gomez's clothes—which had been bloodied during the confrontation at the bakery—were being washed by his wife, he asked Villalobos and Olivares to bring him clean clothes. They did so, and before leaving the clinic, extracted a promise from Gomez that he would return to the Vicaria the next day to prepare a criminal complaint denouncing his wounding by the police. But Gomez did not return to the Vicaria the next day; he took flight.44

On April 30, two days after Gomez was referred to Clinica Chiloe, police arrived at the clinic and arrested Dr. Ramon Rojas and another doctor and his assistant. The clinic's files were carted away.

When the three Clinica Chiloe staff members were detained, Villalobos and Olivares knew that their visit to the clinic would become known. The two voluntarily presented themselves to the military court to learn whether any action had been filed against them. They learned that a case against them had been opened, and were asked to return to the court to present a declaration. When they did so, Villalobos and Olivares were detained.
For two days, they were held incommunicado. On the fifth day, both were charged with violations of Article 8 of the Arms Control Law, which is directed against those who

organize, belong to, finance, assist, instruct, or incite or encourage the creation and functioning of, private militias, combat groups or militarily organized parties . . .

Villalobos and Olivares remained in detention for approximately three months. On August 7, the Supreme Court directed that they be released on bail. On the same day, however, the Court rejected their request that the indictments against them be annulled.

All told, 30 defendants were arrested in connection with this case, ranging from the actual participants in the hold-up and the persons who harbored Gomez during his two weeks in hiding to Gustavo Villalobos and the doctors who treated him at the Vicaria and at Clinica Chiloe. In effect, the doctors who treated Gomez and the lawyer who sought to provide legal services to him are being charged as accomplices in, and aiders and abettors of, an armed criminal conspiracy. This, despite the facts that neither of the Vicaria professionals even was aware of Gomez's role in the bakery attack in particular or in the armed opposition in general at the time they provided professional services to Gomez; that Villalobos met Gomez only once and bought clothes for him on the understanding that he would return the next day for further legal advice; and that Olivares met Gomez only twice, once to provide emergency medical care and again in the presence of Villalobos in an effort to determine Gomez's potential culpability.

The government thus seems to be using this case as an attempt to link the Vicaria's human rights work with terrorist activity. Several developments in the case underscore this possibility. First, the cases against Villalobos and his co-defendants were assigned in May to ad hoc military prosecutor Fernando Torres Silva. Torres is the same prosecutor handling the case.
against those charged with the September attempt on General Pinochet's life, as well as the investigation into the recently discovered cache of arms, believed by the government to be evidence of a large, well-financed and externally-supported guerilla movement. Although the three cases have not formally been consolidated, their assignment to the same military prosecutor is viewed by some as an effort to link the Vicaria, at least in the public eye, with an armed subversive movement.

Second, the prosecutor has asked the Vicaria to furnish a list of everyone whom the Vicaria has attended who had a bullet wound, apparently seeking to establish that such people typically were armed terrorists who were wounded in confrontations with the police. Indeed, the prosecutor has sought to use the case to conduct a sweeping search of the Vicaria's entire case files. He repeatedly has demanded production of all of the Vicaria's legal files. Thus far, the Vicaria has resisted this demand for wholesale invasion of its clients' files, but the issue remains unsettled.

In recent months, the legal attack on the Vicaria's work has been stepped up still further. On December 12, 1986, Dr. Olivares was re-arrested on the order of fiscal Torres. Charges against him were upgraded to charges under Chile's Anti-Terrorism Law, which carries stiffer penalties than the Arms Control Law. A week and a half later, a similar arrest order was issued against Gustavo Villalobos. Villalobos was able to obtain a stay of execution of the order pending a hearing before the Supreme Court and, on January 27, 1987, the Supreme Court dismissed the Anti-Terrorism Law charges against him. Villalobos continues, however, to face charges under the Arms Control Law.

The decision to file charges under the Anti-Terrorism Law seemed to lend further weight to concerns that the military fiscal is seeking to link the Gomez case to the two other terrorism cases he is handling, and thereby identify the Vicaria with terrorist activity. Both of those cases—the assassination attempt
against Gen. Pinochet and the discovery of the arms cache—involve charges under the Anti-Terrorism Law.

D. Pamela Perreira

Pamela Perreira, a lawyer in private practice who has taken several human rights cases on behalf of the Vicaria, was arrested on October 6, 1986, during the State of Siege. Though detained for three weeks, she was never charged; indeed, she was not even interrogated except for biographical information.

The basis for her arrest cannot, therefore, be known. But many believe Perreira was detained because she had aggressively pursued investigations in several highly-publicized human rights cases. One that had received special notoriety involved the shooting of Father Guido Peeters last year by two men in civilian dress. (Father Peeters previously had received several death threats.) The attack was photographed by a journalist and, after pressing diligently, Perreira was able to compel the CNI to acknowledge that the assailants' vehicle was a CNI car with false licenses; that the assailants themselves were CNI agents; and that the weapons they fired were Soviet-made rifles belonging to CNI.

Perreira, in short, publicly worked to establish facts that were highly damaging to the CNI. Her arrest was interpreted by the human rights community as a signal—in effect, a general threat—to Chilean lawyers engaged in human rights work.

E. Enrique Palet

Enrique Palet has been the Executive Secretary of the Vicaria's human rights office since May 25, 1981. For the past year, he has been the target of repeated threats against his life and the lives of his family. Though Palet is not a lawyer, we include an account of the threats against him because they shed light on the broader pattern of persecution that has affected the Vicaria's entire staff, including its legal staff.

The first threats occurred on May 13, 1986—three days after Protestant churches in Santiago had staged a noise barrage to
celebrate a prize awarded to the Vicaria in Spain, and six days after Vicaria staff attorney Gustavo Villalobos was arrested in connection with the Hugo Gomez case. (See Section III.C, supra.) On that day, pamphlets showing Palet’s face with machine guns painted on it appeared at three locations: Palet’s new home, to which he had moved two weeks earlier; the Protestant church that had organized the award celebration; and the site where Palet was to give a speech that day. The pamphlets bore the message that Palet won 300,000 pesos (in Spain) “to defend extremists.”

Over the next two or three weeks, repeated threats attempting to portray Palet as an extreme leftist were made by telephone. Both Palet and his wife received calls—at a telephone number that few people knew—asking if “Che Guevarra was there.”

Then, in July, Palet received another pamphlet showing a machine gun pointing toward Palet’s forehead, on which was painted a circle with a cross in it—a bullet target. The pamphlet was signed with the insignia of the Manuel Rodriguez Patriotic Front (FPMR), and warned that the FPMR would take revenge upon the Vicaria for turning in Hugo Gomez to the authorities (see Section C, supra). Palet believes, however, that the pamphlets came from another source, who sought to make it appear as though the threat came from the FPMR.

Three days later, a courier delivered a package to Palet’s home. Inside was the head of a pig. Painted on its forehead was a circle with a cross in it, just like the one that appeared on the pamphlets Palet had received three days earlier. More copies of that pamphlet were taped inside the box.

Shortly thereafter, Palet sought (and received) police protection, but the threats did not end. Two weeks after the police began to patrol the area near Palet’s home, two bags containing animal blood were thrown against the house on an evening when Palet and his wife were not at home. On the following day, Palet received a telegram blaming him and Gustavo Villa-
lobos for the discovery by Chilean authorities of a large arms cache believed to belong to the FPMR. The message concluded: "Our account remains pending."

On the night of September 4, the policeman guarding Palet's house was shot and wounded. Two weeks later the Reuters news service received a letter signed by the FPMR, which stated that the bullets that hit the police sentry were intended for Palet. The letter also blamed Palet and the Vicaria for Hugo Gomez's arrest, and promised to "collect" the "account" at three places: Palet's home; the school attended by his children; and the site where his wife works.

Although the identity of those responsible for these threats has not been established, Palet himself views the threats as part of a broad pattern of official persecution directed against the Vicaria. That pattern is characterized in part by the government's efforts to link the Vicaria with terrorists in the public's eye. It includes the prosecution of staff attorney Villalobos as a defendant in a case involving a violent act by an alleged member of the FPMR, and the frequent public diatribes by government officials against Vicaria lawyers for "defending terrorists."

F. CODEPU

CODEPU—an acronym for the Comité de Defensa de los Derechos del Pueblo ("Committee for the Defense of the Rights of the People")—is a private human rights organization established in 1980. Staffed by lawyers and activists openly associated with the political left in Chile, CODEPU has been subjected to fierce attack almost since its inception.

In 1982, for example, CODEPU's office in Santiago was burned in a fire of mysterious origin. Virtually all of it files were lost in that fire. In 1983, CODEPU's second Santiago office was raided, and may legal files removed, in a burglary that remains unsolved. After moving its Santiago headquarters to yet a third location, CODEPU once again was raided in 1986. On this occasion, heavily-armed and hooded men in civilian dress and
heavy boots entered the office during daylight hours, ordered everyone to lie on the floor, sprayed the office with bullets and forcibly removed identification cards from the terrorized workers and clients who were present. Again, there has been no progress in the investigation and prosecution of this highly visible attack.

The attacks to which CODEPU personnel have been subjected hardly end here. In 1984, Patricio Sobarzo Nuñez, the then-General Secretary of the organization, was killed by state security agents. While the CNI has conceded that four of its members were involved in the incident, it has vaguely described the event as a violent “confrontation” during which the agents were compelled to shoot. According to CODEPU, there is no evidence that Sobarzo carried any arms when he was killed, and eight eyewitnesses have testified that he was shot without cause. Nevertheless, the investigation into Sobarzo’s death remains in the military tribunals, where it has languished for over two years.

Despite these attacks, CODEPU refuses to be intimidated out of existence. Eleven lawyers continue to work full-time in its Santiago offices, and it maintains smaller offices in the cities of Valparaiso, Concepcion and Temuco. In addition to counseling political prisoners and the victims of torture, CODEPU continues to provide legal representation to the most “untouchable” defendants in the Chilean criminal system—those accused of violent acts against the regime. At the time the authors of this report visited Chile, for example, the only lawyers who had expressed a willingness to defend the men accused in the attempt on Gen. Pinochet’s life were two courageous young attorneys on the CODEPU staff.

CONCLUSION

When it comes to the protection of human rights, the Chilean legal system is long on procedure but short on substance. In
form, it provides the means and offers the hope of redress for the serious abuses that have marked the Pinochet regime: courts are readily available to hear complaints against the government; judges have broad powers to pursue those complaints; and lawyers have venerable weapons, such as amparo, to protect their clients' rights.

In reality, that hope has not been realized. Investigations into governmental misconduct languish for years with no discernible progress; well-documented and witnessed cases of torture, disappearance and other abuses remain unsolved; cases that the civilian courts find uncomfortably sensitive are transferred increasingly to military tribunals, where judge and judged are one and the same; and, in the rare instance that governmental abuse is prosecuted vigorously, an appellate court or, in the end, Chile's Supreme Court, slams the door shut in the face of those seeking justice.

The record of the Chilean judiciary is the best evidence of its inadequate performance: despite thousands of complaints filed on behalf of opponents to the Pinochet regime alleging unlawful disappearance, torture and murder committed by government officials, we could find not one such case where, after appeals, a conviction was sustained.

Responsibility for this record cannot fairly be attributed solely to Chilean judges. Like other segments of Chilean society, judges too operate in a climate of fear and apprehension. Many of the laws they are called upon to interpret, moreover, are laws "enacted" by the military junta which severely curtail individual liberties and give the state sweeping powers. And, in their investigation of governmental misconduct, Chilean judges are compelled frequently to rely for information on the very agencies being investigated. Thus the performance of the judiciary both reflects and is constrained by the absence of will in the Chilean government to prosecute human rights violators.

Nevertheless, the strength of Chile's civil law tradition and
the institutional respect still extended to the judiciary clearly provide the means for a Chilean judge to hold accountable those who violate the individual's basic rights. Some judges, a rare few, have exercised their powers and shown that the Chilean legal system can expose and prosecute human rights violators even at a high military level. The overwhelming majority of judges, however, have shirked their institutional responsibilities. The Supreme Court's performance is particularly disappointing. Rather than protect the integrity of the inferior courts under its control, it has chilled any sign of judicial independence (e.g., the cases of Judges Cerda and Canovas); it has entered into political debate on the side of the regime (e.g., the Supreme Court's public pronouncement on the Archbishop's remarks in the quemados case); and, in case after case involving human rights violations, it has found some questionable ground upon which to ensure that justice would be delayed or denied.

If Chilean courts are to make progress in human rights, important reforms can and should be made: the growth of military jurisdiction should be halted and reversed, and the courts given broader enforcement powers, including full criminal contempt sanctions. At a minimum, Chilean judges should make full use of the powers they now have to pursue vigorously alleged human rights abuses.

In the meantime, those Chilean lawyers who continue to struggle on behalf of the victims of state repression deserve the active support and encouragement of lawyers and jurists everywhere. At great personal danger, the lawyers of the Vicaria and other human rights organizations are waging a valiant battle for the rule of law. It is a battle they risk losing.

FOOTNOTES

1 The authors also wish to thank Marjory Appel, an attorney in New York, for assisting in the preparation of Section II.A. of this report.
2 The State of Siege was imposed immediately after the September 7, 1986 assassination attempt against General Pinochet; it subsequently has been lifted. Other "states of exception" recognized under Chile's Constitution of 1980 remain in force, as they have been nearly continuously since 1973, prior to the disputed adoption of that Constitution. Under the various states of exception, the military junta retains the broad power in many cases to suspend or ignore rights nominally ensured by the Constitution.

3 Thus, Chile's Transitory Law No. 24 has been interpreted almost uniformly to preclude judicial review of the circumstances or length of detentions, and several opposition newspapers (including Analysis, Cauce and APSI) were, until very recently, completely shut down.

4 The acting President of the Supreme Court, with whom we met, could point to no such conviction of which he was aware in the past 13 years. Two government ministers, on the other hand, stated that there had been 67 successful prosecutions against security officers for violating the rights of prisoners and others. The two (Ambassador Mario Caldeiron and Juan Ignacio Garcia of the Ministry of Justice) were unable, however, to point to a single case in which a conviction had been obtained and sustained where the victim was recognized as a member of the political opposition. Moreover, despite our request, no documentary evidence substantiating the 67 cited convictions was provided. Indeed, a report by the Chilean government itself confirms the absence of any convictions in cases alleging politically-motivated human rights violations, at least for the recent period covered by the report. In the Reply of the Government of Chile to the Report of the Special Rapporteur of the United Nations Commission on Human Rights, dated August 22, 1986 (hereinafter, "Reply"), judicial proceedings involving official human rights abuses are cited (Annex, at 83-113); in not one of them is there a reported conviction which was sustained after appeal. A random sample of the cases reported by the Chilean government is contained in Appendix A.

5 Reply, at 12.

6 Although judges in Chile are appointed for life, security in office is guaranteed only to the justices of the Supreme Court. All other judges face an annual review process conducted by the Supreme Court. Under that process, judges are graded in four ranks: placement on the "first list" is a mark of excellence; the "second list" denotes acceptable competence; the "third list" is a signal of unacceptable performance, and being placed on this list in two consecutive years results in automatic dismissal; and finally, a ranking on the "fourth list" leads to immediate dismissal from the bench.

7 There are conflicting accounts of whether, prior to being seized, Rojas or Quintana was carrying one of the incendiary devices designed to ignite the barricade. There is no dispute among the civilian eyewitnesses, who all agree that no such device was in their possession once they were seized and frisked.

8 Although he had only recently returned to his native land, Rojas was not the only member of his family to be tormented at the hands of the Chilean government. Prior to leaving Chile with her two sons in 1977, Rojas's mother, Veronica de Negri, had been imprisoned and tortured. Her torture included the insertion of live animals into the cavities of her body.

9 Under Chile's civil law system, the investigatory, prosecutorial and adjudicatory functions are combined in the person of the civilian judge. Investigations and judicial proceedings are normally assigned to the trial-level judges in the judicial
district where the event occurred. In cases of "public alarm," however, Chilean law provides for the appointment of an Appeals Court judge to handle the complaint. The Appeals Court judge functions in this instance as a trial-level judge, and is known as a Ministro en Visita.

10 The authors of this report met with Judge Echavarria, who offered the following apología for his ruling: Judge Echavarria stated that he did the best he could under the circumstances, and that his investigation was constrained by the need to issue a decision within five days after the military officers were placed under provisional detention. Yet while it is true that the decision to indict (encargar reo) must be made within five days of such an intitial detention, Judge Echavarria conceded that he could have released the detained officers at the expiration of the five-day period without prejudice to his ability to (a) continue the investigation; and (b) if the facts warranted, return an indictment at a later date.

11 Under military jurisdiction, trial-level responsibilities are divided between the fiscal (investigator-prosecutor) and the judge, both of whom are career military officers. Typically, military judges do not have an extensive legal education, and they normally rubber-stamp the prosecutorial decisions of the fiscal. Appeals from the military trial court are taken to a Martial Court of Appeals composed of five judges; two of them are drawn from the civilian Appeals Court, and three from the ranks of senior military officers. Appeals from the Martial Court may be taken to the Supreme Court, composed entirely of civilian judges appointed by Chile's President.

12 The quemados case continues to be the focus of great public attention and outcry. In addition, Rojas's family and Quintana have filed suit in the United States against the Republic of Chile and the Chilean Armed Forces, charging them with responsibility for the burnings and the resulting injuries and death.

13 For a description of the Ministro en Visita, see fn. 9, supra.

14 The court's investigation thereafter was aided by the investigation and report of Chile's national intelligence agency (CNI). The CNI report, it was subsequently revealed, pointed to the responsibility in both incidents of several members of the militarized police force (carabineros) and, in particular, of an intelligence unit within the carabineros known as DICOMCAR. The vital cooperation of the CNI during the early phases of the investigation, unusual in cases of this nature, was viewed by many as the result of inter-service rivalries and may have been designed to eliminate from the police corps certain elements not subject to the absolute control of the army, General Pinochet's base of power.

15 Judge Canovas issued a third decision ordering the indictment of two of the 14 carabineros—the pilot and co-pilot of a helicopter which was observed flying over the scene of the abductions—for the falsification of evidence (i.e., their flight logs).

16 Military courts in fact have jurisdiction over offenses of the Anti-Terrorist Law, but only where the victim of the crime is a member of the armed services or carabineros.

17 General Rojas did, however, retain jurisdiction over the charge of falsification of evidence brought against the two helicopter pilots. The two carabineros eventually were cleared of these charges, on the grounds that the flight logs were not "public records" within the meaning of the pertinent statute.

18 Although his ruling was confined to the AGECH case, Judge Canovas's decision triggered mass demonstrations protesting the gangland-style execution of Nattino, Guerrero and Parada, some of which ended in shooting deaths and numerous arrests. Such demonstrations reflect, in part, the importance many Chileans attach to judicial proceedings in human rights cases, and the mass
encouragement that a rare positive development in such a case is capable of generating.

19 The Supreme Court's decision was prompted by the appeal of one of the defendants from a ruling of the Santiago Appeals Court. Earlier, several of the carabineros indicted by Judge Canovas for the AGECH abductions had brought habeas corpus petitions to the Appeals Court, challenging the indictments as arbitrary and without evidentiary basis; the Appeals Court affirmed the indictments in a unanimous decision.

20 The ruling, issued by one of the three divisions (salas) of the Supreme Court, was 5-0. Supreme Court President Rafael Retamal, the only Justice known as a defender of human rights, was not on the deciding panel.

21 During one of these demonstrations, a son of Santiago Nattino was severely wounded by police and then charged with "aggression against carabineros" before being hospitalized.

22 Following the Supreme Court's decision, Judge Canovas formally severed the AGECH abduction case from the case of the degollados slayings; the former he transferred to the trial court of the region in which the abductions took place, and the latter he retained for himself.

23 The chilling effect of the Supreme Court's ruling was confirmed, in the eyes of many observers, by its decision to suspend another judge acting as Ministro en Visita in a human rights case, Judge Carlos Cerda (discussed below).

24 Declaration, entitled "Justice or Violence," dated April 7, 1986 (translation ours).

25 According to a source close to the investigation, these were just the "tip of the iceberg": Judge Cerda had accumulated evidence involving many disappearances beyond the 10 he had been assigned and, under the court's consolidation powers, indictments against officers at the highest level of the government were possible.

26 Analisis, 26 August-1 September, 1986, at 2 (translation ours).

27 Decree Law No. 2,191.

28 Solidaridad, 3-17 October, 1986, at 3 (translation ours).

29 The fate of those who cooperated with Judge Cerda's investigation is now likewise imperiled. Recognizing the seriousness of Judge Cerda's investigation, numerous witnesses came forward—for the first time—to record what they had seen. Their identities were revealed in the 12,000 pages of evidence over which Judge Cerda has lost control.

30 The CNI does not have the power to make arrests except in cases of charges under the Arms Law or where the arrest has been ordered by a military fiscal (prosecutor). Moreover, to make a lawful arrest, the arresting officer first has to declare the reason for the arrest and, second, display to the arrestee the order authorizing the arrest.

31 The Intendente is the civil or military commander of the region, much like a prefect or regional governor.

32 The CNI cited as a separate legal basis for the arrest of Fernandez an investigatory order, dated October 11, 1984, by the fiscalia (prosecutorial branch) of the Army. The only legitimate use of such an investigatory order, however, is to authorize the bringing of an accused to the fiscal. Indeed, even the CNI did not rely on this order as authority for the arrest in any subsequent proceedings relating to this case.

33 If a crime (i.e., torture or murder) takes place in Investiaciones (police) headquarters, in quarters of the civil police or in the civil jails, the case normally proceeds before the civilian courts. If, however, criminal acts take place in locations under the control of the carabineros or the military, the case proceeds in Military
Court. Although the CNI has no authority to hold prisoners except in transit, it is treated for most legal purposes as a military agency.

34 One of the first things that the new fiscal did was modify the indictment. The identities of the two officers who were previously indicted were, apparently, false identities which were used solely for internal CNI purposes; they were "service names." The names were changed to the "correct" names: Carlos Herrera Jimenez and Armando Cabrera Aguilar. (It is unclear whether these names represent new defendants or are merely the correct names of the same individuals who were previously charged under different names.)

35 Once again, the vote was 3-2, with the two civilian judges dissenting. The civilian judges would have granted the appeal and ordered the indictments reinstated "[taking into consideration that the basis on which the reo was dismissed were the declarations of the two doctors who had already testified in this case, and on whose testimony the earlier determination of an indictment was based."

36 In 1974, one person was ordered released as a result of an amparo petition, but a new detention order was immediately issued, and he remained detained. In 1977, another person was ordered released by a court, but his arrest was denied by the police, and he "disappeared." In 1986, for the first time, a detainee's release was secured through a habeas petition. Amnesty International, "The Role of the Judiciary and the Legal Profession in the Prosecution of Human Rights in Chile" (September 1986). AI Index No. AMR 22/56/86.

37 Shortly after Gen. Pinochet took power in 1973, for example, noted civil rights and criminal defense lawyer Mario Fernandez was detained by state security forces, physically and psychologically abused, and subsequently released without charge. Attorney Jose Zalaquett, a founding member of the human rights office of the Vicaria's predecessor, was forced into exile in 1976. Law students known for their concern about human rights were forced, either formally or through intimidation, to withdraw from Chilean universities and pursue their course of study abroad (usually in Spain). In 1984, one of the senior staff members of CODEPU, a private human rights organization, was murdered in a crime which to this day remains unsolved.

38 If, however, such a person has been tortured while detained, for example, the Vicaria's mandate would not prevent it from representing the victim in efforts to obtain redress for that rights violation.

39 The military coup which brought Pinochet to power took place on September 11, 1973.

40 The four were Jose Humberto Carrasco (a journalist), Gaston Fernando Vidaurrazaga (a school teacher), Felipe Segundo Rivera (a laborer) and Abraham Muskatblie Eldestein (an economist). During our visit, we met with the mother of Gaston Fernando Vidaurrazaga. Her position as a judge of the Santiago civil court did not protect the life of her son, nor did it serve to accord her any special treatment once her son was murdered. She was not permitted to have her son's corpse washed and dressed before burial, and the presiding officer of the court on which she sits gave her only one day's leave to mourn her son's death. Even then, however, she was required to furnish a doctor's letter excusing her absence.

41 This case is described in Section II.A., supra.

42 For discussion of this case, see Section II.A., supra.

43 Salazar asked whether his testimony would be sworn or not. The distinction matters: because of Chilean strictures against self-incrimination, sworn testimony can only be used as evidence against another; unsworn testimony, however, is routinely procured from and used against a suspect. On this occasion, Salazar was
sworn, and thus he believed that testimony was being sought from him solely as a potential witness.

After two weeks in hiding, Gomez showed up, appearing very ill, at the home of Dr. Macaya. Dr. Macaya contacted the Vicaria, seeking its advice on what he should do. Persuaded by Gomez’s own actions and subsequent reports that Gomez had not been truthful, the Vicaria notified the Ministry of the Interior and the fiscal that Gomez was in Dr. Macaya’s home and negotiated his surrender under circumstances where Gomez would be assured of continuing medical attention. On May 13, Gomez was taken into custody. Weeks later, Dr. Macaya also was arrested, and he remains in custody to this day.

Shortly after Sobarzo was killed, CODEPU’s leadership issued a statement accusing the CNI of responsibility. As a result, Fabiola Letelier del Solar, CODEPU’s President, was indicted and brought before the military courts on the charge of making statements “injurious to the military.” She subsequently was released, and although the charge remains pending, no further steps were taken in the case.

APPENDIX A

<table>
<thead>
<tr>
<th>Name</th>
<th>Crime Description</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paulina Alejandra Aguirre</td>
<td>Homicide; complaint filed June 18, 1985</td>
<td>Case referred to Military Prosecutor’s Office; remains at pre-trial stages</td>
</tr>
<tr>
<td>Aida Rosa Vilches</td>
<td>Homicide; complaint filed August 16, 1985</td>
<td>Case referred to Military Prosecutor’s Office; remains at pre-trial stages</td>
</tr>
<tr>
<td>Segundo Victor Burgos</td>
<td>Homicide; complaint filed July 5, 1985</td>
<td>Proceeding at pre-trial stage; “inquiries are under way”</td>
</tr>
<tr>
<td>Jose Antonio Soto</td>
<td>Homicide; complaint filed September 20, 1985</td>
<td>Pre-trial proceedings concluded; no arrest warrants issued</td>
</tr>
<tr>
<td>Domingo Salvador Yañez</td>
<td>Unnecessary violence resulting in death; complaint filed September 10, 1985</td>
<td>Proceeding at pre-trial stage; no arrest warrants issued</td>
</tr>
<tr>
<td>Manuel Rivas, Milton Muñoz, and 10 others</td>
<td>Mass abduction and homicide; pending since 1973</td>
<td>Amnesty law held bar to prosecution; appeal to Supreme Court pending</td>
</tr>
<tr>
<td>Patricio Ricardo Lopez</td>
<td>Abduction and torture; complaint filed October 21, 1986</td>
<td>Order granting indefinite stay of proceedings currently on appeal</td>
</tr>
<tr>
<td>Name</td>
<td>Description</td>
<td>Status</td>
</tr>
<tr>
<td>-------------------------------</td>
<td>--------------------------------------</td>
<td>------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Magdalena Aravena, Eduardo Jara and 6 others</td>
<td>Mass abduction and “disappearance”; complaint filed in 1984</td>
<td>Pre-trial proceedings suspended by trial judge; affirmed by court of appeals; appeal to Supreme Court pending since January 17, 1986</td>
</tr>
<tr>
<td>Arturo Francisco Barros</td>
<td>Abduction and “disappearance”; complaint filed November 18, 1985</td>
<td>Proceeding at pre-trial stage</td>
</tr>
</tbody>
</table>