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# The Black Book of Chilean Justice

ALEJANDRA MATUS

Each time I tell my story, I do so thinking that it will be the last time, that I will write my next column in the past tense in my native Chile. But once again here I am, searching for words that have not lost their meaning.

When I first wrote these words some months ago, I had been living in exile in the United States for two years, and although I've built up hope with each step, reality came close to crushing my hope. I could have remained in exile for thirteen years or faced immediate detention, prosecution, and a probable sentence for up to five years in prison if I returned to my country. That is not because I stole something, or injured someone. It was merely the consequence of exercising my right to freedom of expression and my professional duty to inform.

This was not exactly what I had in mind when I attended the April, 1999 launching of my second book, *El Libro Negro de la Justicia Chilena* [*The Black Book of Chilean Justice*].<sup>1</sup> I knew there were some risks involved in publishing an exposé about the Chilean judiciary, but hoped Chile's democracy had become a lot stronger in the nine years after Augusto Pinochet's dictatorship ended in 1990.<sup>2</sup>

There was not much evidence, however, to support my hope: just before I finished writing the *Black Book*, four journalists had been prosecuted for publishing material that might be considered offensive to a public official.<sup>3</sup> I felt concerned that the same fate could await me. As I wrote in my book: "[I]t appears absurd and perhaps ridiculous to admit that I have felt these fears, and that in some ways I still live with them, even though Chile recovered its democracy almost a decade ago."<sup>4</sup>

With these concerns in mind, I wrote down the names and phone numbers my husband would have to contact in case I was arrested after the publication day. I also contacted some organizations in the United States to ask them to react if something did happen to me. I wished that these precautions were unnecessary, but never really considered not publishing the book. At least, I knew I was not going to be killed; that was

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1. ALEJANDRA ACUÑA MATUS, *EL LIBRO NEGRO DE LA JUSTICIA CHILENA* (1999).

2. Calvin Sims, *Chile's Ex-Dictator Tries to Dictate his Future Role*, N.Y. TIMES, Feb. 1, 1998, at A3.

3. Sebastian Rotella, *Chile's Insult Laws Take Slap at Democracy*, L.A. TIMES, May 1, 1999, at A2.

4. MATUS, *supra* note 1, at 12.

one of the differences between persecution of journalists under dictatorship and the new, more sophisticated “legal” persecution that existed under “democracy.” Unfortunately, if unsurprisingly, my fears were confirmed on May 14, 1999, one day after my book was published, when Supreme Court Justice Servando Jordán issued a ban on my book. This was accompanied with a warrant for my arrest.

*The Black Book of Chilean Justice* is a six-year investigation that recounts the observations of an inconspicuous witness. It is also an account of the history of the Chilean judicial system. I did my best to remain true to the facts in the book’s six chapters. You won’t find in it any “offense.” If there is any sort of thesis in those 350 pages, it would be that the judicial system in Chile has never been independent. To the contrary, the book contains evidence that the judiciary has bent easily to political, economic, and military pressure. The Chilean Judiciary, is far from being adapted to a democratic system of government and it would work better in a monarchical system. In fact the judiciary actually was created by a monarchical system and has never been truly reformed.

The *Black Book* is divided into six chapters. The first chapter is entitled “The Degraded Power.” It is about the decadence and cases of corruption, abuse of power, political tensions in the Chilean Supreme Court immediately after the post-Pinochet era from 1990-1994. The second chapter, “The Rosende Era,” is about the efforts of the Secretary of Justice (a kind of Attorney General) during Dictator Augusto Pinochet’s regime to perpetuate a Supreme Court loyal to the dictatorship. The next chapter, “From the *Real Audiencia* to the *Golpe de Estado*,” relates the history of the Chilean judiciary, a topic rarely mentioned in Chilean history. Chapter four, “The Power Rituals,” concerns the complacency of the Supreme Court at the beginning of Pinochet’s dictatorship, around 1973. The next chapter, “Docudrama in Five Chapters: Justice and Human Rights,” is about the treatment that the Chilean judiciary gave to complaints of human rights violations under Pinochet’s dictatorship. “It’s Reform Time,” the final chapter, concerns recent efforts to change the Chilean judicial system and describes some changes on the Supreme Court during the late 1990s.

The book starts in the present, travels to the past to search for explanations, and then comes back to the present. Throughout the book, I attempt to describe the unique characteristics of the Chilean Criminal System. My intention is not to describe the whole content of the *Black Book*, but to give the reader an idea of how very different the Chilean judiciary is from the American and modern European systems.<sup>5</sup> For

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5. See generally JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE & LATIN AMERICA* (2d ed. 1976).

example, in a criminal case in the United States, the prosecutor's office (state or federal) conducts an investigation and may subsequently file charges. In open court, both the prosecution and the defense would have an equal opportunity to argue their positions and try to persuade a jury. The fundamental principle of the American system is the presumption of innocence. In the American system, the judge is more an arbitrator than part of the process. He or she makes sure that the rules are applied fairly.

To understand the Chilean system, the familiar American concepts have to be turned upside down. In Chile, the same judge will conduct the investigation, file the charges, and pronounce the sentence. He is the FBI, the prosecutor, the jury, and the judge all rolled into one. There is neither jury, nor open proceedings. Everything is kept in papers, and, for the most part, in secret even to the defendant. This process is considered by many scholars as an "inquisitive" one, because, in contrast to the United States, guilt, not innocence, is the presumption.<sup>6</sup>

Administratively, the Chilean Judiciary is an extremely hierarchical system, comparable to a military infrastructure or to the Vatican. The Supreme Court, at the top of the pyramid, annually examines the qualifications of its members to determine which should be promoted to a higher position (from judge to magistrate of the court of appeals, for example). The government eventually selects from those designated for promotion from the lists. Citizens do not participate in the selection of judges, nor does any government department oversee the conduct of the highest court officials. The singular and dramatic method of political control is solely Congressional impeachment. Until recently, the last word on nominations to the Supreme Court and courts of appeals came from the executive branch of the government. Recent changes in the law, however, require ratification from two thirds of the Senate.

As one can imagine, with such a structure, a judge may feel the need to favor the desires of his superiors in order to be promoted. Since most of the judicial decisions are made in secret, lawyers and lobbyists can visit the judges *ex parte* after work hours without any sign on the public record. The secretitive nature of the Chilean process invites corruption, abuse of power, nepotism, and other irregularities. The situation is well documented in my book.

Argentinean professor Luis Moreno Ocampo, author of *En Defensa Propia: Cómo Salir de la Corrupción*<sup>7</sup> asserts that regarding systems,

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6. Robert G. Vaughn, *Proposals for Judicial Reform in Chile*, 16 *FORDHAM INT'L L.J.* 578, 582 (1993); see also MERRYMAN, *supra* note 5, at 134-39; see generally Carlos Rodrigo de la Barra Cousino, *Adversarial vs. Inquisitorial Systems: The Rule of Law and Prospects for Criminal Procedure Reform in Chile*, 5 *SW. J. L. & TRADE. AM.* 323 (1998).

7. LUIS MORENO OCAMPO, *EN DEFENSA PROPIA: CÓMO SALIR DE LA CORRUPCIÓN* [IN SELF

there is a formula for corruption: "Monopoly (M) plus discretionality (D) less transparency (T) equals corruption (C)."<sup>8</sup> According to Moreno, "the greater the monopoly of an entity, the greater the discretion its executives and employees have to take decisions, and the lesser the transparency in the process, the greater the possibility of acts of corruption:  $C=M+D-T$ ."<sup>9</sup>

This equation was created to analyze business corporations, but applies perfectly to a public organization like the Chilean judiciary. However, this application carries an even greater consequence, as it is not the money of private investors at risk, but tax payers money. More importantly, the trust of the people in the independence and fairness of their judiciary, the only institution (along with the press, I would say) that they can turn to in order to stop the abuses of the government. Clearly, it is the influence of the powerful in the judiciary's decision-making that is the most serious problem.

This environment was idyllic for Pinochet's dictatorship. The most dramatic consequence of the defects of Chilean judiciary was the Supreme Court's complete obedience to General Augusto Pinochet during his dictatorship. Indeed, that body did virtually nothing to save the lives and protect the rights of Chileans during the Pinochet regime. For example, of the approximately 5,000 habeas corpus petitions presented from 1973 through 1979, only one was accepted, but to my knowledge, never enforced.<sup>10</sup>

In an attempt to obstruct any further human rights violations accusations, Pinochet appointed Hugo Rosenda as secretary of justice. Rosenda was charged with nominating judges to the Supreme Court who he believed would be loyal to Pinochet.<sup>11</sup> In 1990, when the first democratic President, Patricio Aylwin, took power, sixteen of the seventeen judges in the Supreme Court had been appointed during Pinochet's dictatorship. They did not make Aylwin's life easy. One of those judges was Servando Jordán.<sup>12</sup>

Let me share an excerpt from my book to provide a clearer understanding of the situation:

Barely had he assumed his position as Minister of Justice [equivalent to the United States General Attorney] in January of 1984, [when Hugo] Rosende took a step that had been rejected by the Supreme

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DEFENSE: HOW TO ESCAPE FROM CORRUPTION] 171 (1993) (passage translated by Alejandra Matus).

8. *Id.*

9. *Id.*

10. See MATUS *supra* note 1, at 264.

11. *Id.* at 21.

12. *Id.*

Court the year before. He increased the number of magistrates in the highest tribunal from thirteen to sixteen. The names of three new members had been selected by the secretary even before the new spots were created. The order with which they were named was analyzed very carefully. First, Hernan Cereceda [was appointed] on January 10, 1985. The ex-minister and ex-president of the Court of Appeals counted on the minimum number of formal requirements to ascend. Of course, in addition, and most importantly, with the political merits: a complete affinity were the military government.

General Pinochet had given him an award on one occasion and Cereceda showed his gratitude. Rosende “put his hands to the fire” for him. Afterwards, Jordán [was appointed] on January 15, [1985]. Given his longevity, his appointment could not be delayed. Some members of the [Pinochet’s] cabinet, including Jaime del Valle, had an excellent opinion of him. Nevertheless, others had doubts. His personal background was well known: he had a proclivity for alcohol and brothels from his time as magistrate in Punto Arenas. However, Rosende considered him an unconditional supporter, and this was what mattered. However, Jordán was deliberately named second, to prevent the opportunity for him to ascend to the presidency of the tribunal before Cereceda. [Rosende] did not realize at the time that his preferred candidate would be removed from office by a constitutional accusation, and that it would be Jordán who would become president in 1996.

The third person on the list named on January 21, [1985] was Enrique Zurita. Zurita was a modest man, a trustworthy and friendly individual, who had overcome many difficulties arising from his poor upbringing. Historically, Zurita maintained a pro-military posture.

With the appointments of Cereceda and Jordán, both in line with the goals of the military government, people began to speak of an institution rarely discussed before. That is, the practice of the lawyers with connections to the Supreme Court. The great consortiums and business people began to retain these professionals in order to increase the likelihood of success before the highest court. Despite the complaints of the Chilean Bar [Colegio de Abogados], amongst others, asking for an end of *ex parte* communications, a somewhat organized circle was created in order to carry out the trafficking of influence. Some lawyers even asked their clients for extra payments to “sensitize” the judges. The honest and independent magistrates, even in their situation of being witnesses to these acts, were not able to react or to oppose them. The object was political control.<sup>13</sup>

As the years passed, some of those judges appointed during the Pinochet era have changed their criteria on some issues (like human

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13. *Id.* at 128-29 (passage translated by Lauren Gibling).

right cases), perhaps reading the writing on the wall. Some did so because they were unable to express their honest opinion under dictatorship. Others did so because they felt their careers depended on it. In sum, just as some of the Supreme Court judges followed the official guidance during the dictatorship to deny justice, they are now doing so to advance their careers. Moreover, most of Pinochet's Supreme Court nominees have now retired. This is a direct result of a new law that imposes an age limit of seventy-five-years-old on members of the court.<sup>14</sup>

Some important reforms in criminal proceedings have been recently enacted. In particular, orality is now allowed. Unfortunately, it could take ten years before these reforms are effective throughout the whole system.<sup>15</sup> Notwithstanding these reforms, a basic problem remains unchanged. It is still necessary for judges to pay attention to powerful parties in order to ascend in their careers, compromising a judge's most important asset: judicial independence.

The description of the Chilean judicial systems in my book, along with descriptions of specific cases, came from the perspective of a journalist who is more adept at describing facts and human behavior than writing abstract analysis. I did not have an agenda or any personal feelings either pro or con towards any people mentioned in my book. I am a journalist motivated only by a sense of professional duty. My work, however, has led to a serious crime in the eyes of the Chilean courts. According to them, my *Black Book* is a crime against national security.<sup>16</sup>

On April 14, 1999, less than twenty-four hours after the public presentation of my book, civil-police agents, the Chilean equivalent to the FBI, arrived at *Editorial Planeta*, the publisher of my *Black Book*. Along with them, they brought a tiny piece of paper empowering them to enter the building, but not offering reasons for the confiscation of the first edition of my book, nor justification for the prohibition against its reprinting. The General Editor of *Editorial Planeta*, Carlos Orellana, called me at the apartment where I was staying to tell me the news of the raid. We agreed almost instinctively to notify the press. The company's General Manager, Bartolo Ortiz, accompanied the police agents to *Editorial Planeta*'s warehouses. Waiting for them were camera crews and reporters who captured images of employees hauling out boxes of my books to turn over to the police. Those images were circulated all over the world and provoked hot discussion about Chilean politics. It seemed

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14. See United States Dep't of State, Country Reports on Human Rights Practices—2000 Chile, available at <http://www.state.gov/drl/rls/hrrpt/2000> (released Feb. 2001).

15. See *id.*

16. See *id.*

unacceptable to people that after nine years of democracy, Chilean authorities were confiscating books in a manner reminiscent of the Spanish Inquisition. The criticism was not enough to stem the fury of either Servando Jordán, the former Supreme Court justice who accused me of offending him, or the diligence of Rafael Huerta, who had been put in charge of my case.

Almost immediately after receiving Orellana's call, my brother Jean Pierre, a professor of law, called to advise me of the severity of the situation. He told me that authorities had accused me of violating Chile's State Security Law.<sup>17</sup> My brother urged me to flee the country before a detention order was entered that would destroy my personal and professional plans and prevent me from leaving the country for a long time.

Along with my husband Jorge Junco, a United States citizen, I packed up our belongings as fast as I could and headed to the airport. We bought plane tickets, and without enough time to say goodbye to our families and friends, we went to Buenos Aires, Argentina. We waited there for ten days until all the commotion, which I thought was temporary, died down. I soon realized, however, that the controversy was just beginning, and we were forced to move to Miami, Florida.

A great deal has happened since I left Chile. The editors of *Editorial Planeta*, Orellana and Ortiz, were jailed for two and a half days, and were accused of violating the State Security Laws, the same crimes that I had been charged with. Eventually, the courts determined that only I could be charged for that crime and my editors were released. In the United States, I filed a lawsuit against the government of Chile before the Organization of American States (OAS) Inter-American Commission on Human Rights (IACHR).<sup>18</sup> Last year, the IACHR accepted my case and I offered to settle with the Chilean government if they would repeal at least three insults laws that remained in Chilean legislation, along with some other provisions that grant judges the authority to censor the press. I did not receive any official response. It is my belief that this year the IACHR will probably punish Chile for this flagrant violation of freedom of expression, as well as the right of Chilean citizens to be informed. During this period I also requested political asylum in the United States by alleging that the fate that awaits me in Chile is illegiti-

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17. See generally CÓDIGO PENAL [CÓD. PEN.], Ley No. 12.927, Seguridad del Estado [State Security Law] art. 6(b) (1975) (Chile). Violation of this law brings with it a prison sentence of up to five years for anyone who libels or defames any of Chile's principle authorities, including the Supreme Court justices. See Brett Sebastian, *Chile Progress Stalled: Setbacks in Freedom of Expression Reform*, HUM. RTS. WATCH Vol. 13 No. 1(B), Mar. 2001, at 21.

18. See generally Case 12.142, Inter-Am. C.H.R. (forthcoming 2002), available at <http://www.cidh.org/annualrep/2000eng/chapteriii/chile12.142.htm>.



mate and persecutory. In record time, I was granted asylum in November 1999.

Journalism organizations around the world, especially those in the United States, sent letters of protest to the Chilean government. In fact, Santiago A. Cantón, the Special Rapporteur for Freedom of Expression for the OAS, visited Chile to review this case and recommended the repealing of insult laws.<sup>19</sup> Still, nothing has been done to enable my book to be back in circulation, and at the time, I believed I could not return to my country without the fear of imprisonment. The Chilean courts have rejected each and every one of the proposals that my publishers and my brother have made. Huerta retired, but his successor, Jaime Rodriguez, has not changed the government's position, nor has he even revealed the bases of the accusations against me.

Just before Christmas 2000, Rodriguez closed the case temporarily. The arrest warrant, however, remained in effect. At that time, he had the option of declaring my innocence or even dismissing all charges. In his very inquisitive way, Rodriguez took the testimony of: former President, Patricio Aylwin; former Secretary of Justice, Francisco Cumplido; and former Attorney General, Guillermo Piedrabuena. Each of them confirmed the truth of my assertions about Jordán. Nonetheless, truth is not defense under the State Security Law and the charges remained in place.<sup>20</sup>

What is the law in question? The State Security Law, a 1957 special law, purports to protect public order and national security. It provides in Article 6(b):

[t]hose who publicly insult the flag, the coat of arms or the national anthem, and those who defame, slander, or libel the President of the Republic, Ministers of State, Senators or Deputies, members of the superior courts, the Comptroller General of the Republic, Commanders-in-Chief of the Armed Forces, or the Director General of the National Police, whether or not this defamation, slander, or libel was committed by reason of the office of the victim.<sup>21</sup>

In the same law, Article 16 adds that: “[i]f through the press or printed media . . . any crime against the security of the State were committed . . . in serious cases, the judge could order the immediate seizure of the complete edition containing any abuse of publicity condemned by this

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19. See Annual Report of the Inter-American Commission on Human Rights 1999, Report of the Office of the Special Rapporteur for Freedom of Expression, OEA/Ser. L/V/II. 106, doc. 3 rev., at 47 (2000), available at <http://www.cidh.org> [hereinafter 1999 Report].

20. See *Chile Progress Stalled*, *supra* note 17.

21. Cód. PEN., Ley No. 12.927, Seguridad del Estado [State Security Law] art. 6(b) (1975) (Chile).

law.”<sup>22</sup> Article 30 also permits the judge to order the confiscation of any materials used in the commission of the crime, even before any investigation or hearing.<sup>23</sup>

Considered by both Human Rights Watch and the Committee to Protect Journalists as one of the most repressive insult laws remaining in effect in Latin America, the State Security Law does not stand alone in Chilean legislation. In the 1998 report *The Limits of Tolerance: Freedom of Expression and the Public Debate in Chile*, Human Rights Watch noted that:

Chile has a set of laws whose purpose is to punish expressions of contempt for those occupying high positions in any of the three branches of government. Contempt of authority provisions exist in the Criminal Code, in the State Security Law, and also in the Code of Military Justice. The underlying logic of these laws rests on the notion that people are obliged to show respect to those in authority because of their rank, reflecting a view of the ordinary person as a subject rather than a citizen.<sup>24</sup>

Contempt of authority offenses are dealt with according to special norms that reduce due process guarantees and rights of defense and prescribe higher penalties. In the case of Article 6(b), the rules of the Chilean Military Code govern. Insult laws, known generically as *leyes de desacato* (laws of contempt), have been criticized by the IACHR. In its 1995 report on these laws, the IACHR concluded that “*Desacato* laws are incompatible with Article 13 of the American Convention on Human Rights because they suppress the freedom of expression necessary for the proper functioning of a democratic society.”<sup>25</sup>

The IACHR argued that these laws are unnecessary because:

The special protection *desacato* laws afford public functionaries from insulting or offensive language is not congruent with the objective of a democratic society to foster public debate. This is particularly so in the light of a government’s dominant role in society and particularly where other means are available to reply to unjustified attacks through the government’s access to the media or individual civil actions of libel or slander. Any criticism that is not related to the official’s position may be subject, as is the case for all private individuals, to ordinary libel, slander and defamation actions. In this sense, the government’s prosecution of a person who criticizes a pub-

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22. *Id.* art. 16.

23. *Id.* art. 30.

24. HUMAN RIGHTS WATCH, *THE LIMITS OF TOLERANCE: FREEDOM OF EXPRESSION & THE PUBLIC DEBATE IN CHILE* 48 (1998) (hereinafter *THE LIMITS OF TOLERANCE*).

25. *Id.* at 51 (quoting Annual Report of the Inter-American Commission on Human Rights 1994, Report on the Compatibility of “*Desacato* Laws” with the American Convention on Human Rights, OEA/Sev.L/V/11. 88, 1995, available at <http://www.oas.org>).

lic official acting in his or her official capacity does not comply with the requirements of Article 13(2) because the protection of honor in this context is conceivable without restricting criticism of the public administration. As such, these laws are also an unjustified means to limit certain speech that is already restricted by laws that all persons, regardless of their status, may invoke.<sup>26</sup>

The IACHR considered it inevitable that contempt of authority laws have a chilling effect on the freedom of expression.

Between the restoration of Chilean democracy and the publication of the Human Rights Watch report in December 1998, I believe more than twenty-five people had been prosecuted under the State Security Law, more than half of them journalists. Other *desacato* laws, such as the Improper Sedition Law found in Chile's Military Code of Justice,<sup>27</sup> have been applied with similar effects to protect the honor of Army officials against journalists, lawyers, and even soldiers. This so-called "crime" is defined in Article 276 of the Code of Military Justice,<sup>28</sup> as the inducement of any disturbance through speech, writing or any other medium. Such crimes include informing troops of matters that may cause them discontent or half-heartedness in their service.<sup>29</sup>

In 1994, I also became a victim of these laws. I wrote an article that year exposing acts of corruption in the Military Hospital of Santiago, implicating its former director and two active-duty generals.<sup>30</sup> The report appeared on the front page of the newspaper, and resulted in immediate denials from the Army. In the hours following the publication of this piece, the newspaper received over twenty calls from unknown persons asking for my second last name, with different and improbable excuses, but probably to be able to obtain additional information regarding my background. The army commenced a legal action in the Military Courts against Ascanio Cavallo, the director of the newspaper, along with myself, based on the Improper Sedition Law.

Simultaneously, the generals mentioned in my article brought suit for libel and slander in civilian criminal court. This could have both penal and civil consequences if sustained, under another restrictive law affecting freedom of expression, the Law on Abuse of Publicity.<sup>31</sup> Pressured by the demands and against my advice, the editor of the paper

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26. THE LIMITS OF TOLERANCE, *supra* note 24, at 52 (quoting Annual Report of the Inter-American Commission on Human Rights 1994, *supra* note 25, at 201).

27. Delitos Contra el Orden y Seguridad, art. 276 (1986) (Chile).

28. *Id.*

29. *Id.*

30. See Alejandra Matus, *Indagan Presunto Fraude en Hospital Militar*, LA EPOCA, Aug. 12, 1994. See also THE LIMITS OF TOLERANCE, *supra* note 24, at 84.

31. Delitos Contra el Orden Publico, art. 6(b) (1992) (Chile).

gave in and retracted my article on the front page. I believed that we should continue investigating in order to demonstrate the article's accuracy. Four years later, the Army, overcome with the weight of the evidence, finally acknowledged that the accused generals had been under investigation since the publication of my article. They were finally prosecuted for the very irregularities that I had revealed in my article. I am unaware if the case against Cavallo and I was ever dismissed since the investigator for Human Rights Watch was denied access to any relevant information by the Military Courts.

The extensive quantity and the severity of Chilean regulations against freedom of expression have led Human Rights Watch to declare that the freedom of expression "so central to democracy, is more restricted in Chile than possibly any other democratic country in the Western hemisphere." José Miguel Vivanco, the Human Rights Watch Executive Director to the Americas, recently said in a radio interview that in Latin America, with the exception of Cuba, Chile has the most repressive legislation on freedom of expression. For a country held out as a bastion of democracy in the region, the comparison to Castro is shameful. While admittedly no one has been executed in Chile for expressing his or her opinion in the last ten years, I believe public debate is probably more restricted in Chile than in Argentina, Colombia, and Mexico, where such killings of professionals have indeed taken place.

Human Rights Watch explained this unexpected phenomenon:

Violations of freedom of expression in Chile are atypical when compared with other countries in the hemisphere . . . In Chile, journalists and opposition politicians do not generally face physical risk, but the public debate appears comparatively muted, attenuated and timorous, as if uninhibited expression were either personally risky or dangerous to society. Since the return to democratic rule, violations of freedom of expression can be traced not to repressive action by the executive branch but to the persistence of laws that fail to protect essential democratic values and hamper the vigorous discussion that democracy requires.<sup>32</sup>

In my opinion, only the repeal of the *desacato* laws will allow Chilean law to approach international norms and accepted principles relating to freedom of expression. Despite the fact that the current government in Chile has the requisite majorities in Congress to repeal these laws, the idea has not even been given serious consideration since the demise of the Pinochet's dictatorship. It has been a long and difficult process to even try to repeal Article 6(b) of the State Security Law. As of now, it is uncertain that it will ever happen.

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32. THE LIMITS OF TOLERANCE, *supra* note 24, at 40.

Eduardo Frei, President of Chile when my book was initially banned, had indicated his support for the repeal of Article 6(b). Although representatives of his government recognized the injustice of my situation, there has been no move to implement the recommendations of the IACHR regarding freedom of the press.<sup>33</sup> Even more telling, are remarks made by Alejandro Salinas during a celebrated event in Washington to discuss this issue before the IACHR. Salinas, a representative from the Chilean government, tried to discredit my complaints. “[Matus] faces no risk in Chile. She can go back whenever she wants.”<sup>34</sup>

As if to confirm this contradiction, President Frei’s administration supported a bill that would have repealed Article 6(b) of the State Security Law yet, at the same time, would have fortified similar laws in the Chilean Penal Code. Frei’s administration ended in March 2000 and his proposal never made it out of Congress.

Ricardo Lagos, Chile’s current president, has been more explicitly empathetic toward my situation. During his campaign, he personally called me to tell me that if elected, his government would do its best to amend Article 6(b) so that it would be possible for me to return to Chile and that the absurd censorship of my book would finally come to an end. After Congress rejected an initial proposal, the President submitted a new legislative package to Congress that included a Press Law and the repeal of Article 6(b). If approved, the Press Law would remove certain restrictions on the practice of journalism. The law, however, would also create new obstacles to freedom of press such as a prohibition on the filming or recording of private actions of public officials. For example, this law would have made it a crime to tape and show Peruvian strong man, Vladimiro Montesinos, bribing a congressmen. Such a tape led to the resignation of Peruvian President Alberto Fujimori. The future of this less than ideal bill is uncertain. As of this writing, it remains tied up in Congressional debate. That’s why I proposed to the government, through the IACHR, that the government present a bill that would only repeal all *desacato* laws, and not add other legislation that would restrict freedom of expression. The less restrictions, the better. As I said, I never got a response from the government.

In March 2001, Human Rights Watch released a follow up to their 1998 report on freedom of expression in Chile. The new report stated:

In February 2001, six individuals, three of them former political prisoners under the military dictatorship, three of them journalists working for a Santiago newspaper, were accused of insulting public

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33. See 1999 Report, *supra* note 19, at 44-47.

34. These remarks were made at the IACHR conference in Washington, D.C. I repeat them verbatim. (notes on file with author).

authorities, a crime under Chile's notorious State Security Law. They faced trial and possible imprisonment for exercising their right to free expression. This sudden crop of new State Security Law prosecutions has once more thrown into sharp relief the Chilean state's long-standing failings in the area of freedom of speech.

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

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

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

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

duce a measure that would make criticism of government authorities an especially grave form of libel.

Proposals like this run counter to international freedom of expression principles now well established in democracies across the world. Indeed, international human rights law holds that the limits of permissible criticism must be wider with regard to a person in public office than with regard to a private citizen, because of the overriding need in a democracy for public authorities to be held accountable to public opinion. Tolerance of criticism, even ill-founded and unfair criticism, is one of the obligations of public office in a democracy. Chile's politicians have shown little sign that they appreciate the overriding importance of the principle. To implement it, all crimes of contempt of authority and criminal defamation protecting government officials must be eliminated from the legal system. Until that is achieved, the repeal of sections of the State Security Law will only be a partial, even if important, advance.<sup>35</sup>

Will there be any change to the law? The government recently reassured that there would be. The experience of the past two-years makes it difficult to believe, particularly when compared to cases where the politicians had a real desire for change. For example, in the first year of the Lagos administration, it took thirty-six hours for the government to approve a bill granting soldiers protection from having their names disclosed and legal immunity if they gave information leading to the whereabouts of the remains of an individual killed under Pinochet's dictatorship.

Chilean officials have not shown the same interest in freedom of expression. This is a serious situation, especially in a country proud of its democratic system. An *amicus curiae* brief presented by the Committee to Protect Journalists (CPJ) in support of my case before the IACHR, explains:

Criminal defamation laws are disfavored worldwide. Criminal prosecution of journalists is especially disfavored where a government seeks to prosecute a journalist for reporting on public officials and matters of public concern. The Commission has given vital support to the international criticism of criminal defamation laws, both with its 1994 Report on *desacato* laws and the recent Inter-American Declaration of Principles on Freedom of Expression. Article 6(b) of the Chilean State Security Law is among the worst criminal defamation laws in the hemisphere. The Commission should urge Chile to repeal Article 6(b) and other, similar provisions of Chilean law.<sup>36</sup>

In another passage, that institution asserts:

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35. See Brett Sebastian, *supra* note 17.

36. Brief of Amicus Curial Committee to Protect Journalists at 11, *Acuña v. Chile*, 12.142, Int. Am. C.H.R. (2001).

The Chilean government's seizure of *The Black Book* flagrantly violates the American Convention. The plain language of Article 13(2) of the Convention absolutely prohibits prior censorship. Indeed, only five years ago the Commission held that Chile violated Article 13 when the Santiago Appeals Court enjoined the distribution of another work of investigative journalism. By confiscating *The Black Book*, Chile has become the only democracy in the Americas in recent years to violate the American Convention's edict against censorship. CPJ is unaware of any other instance in the last four years in which the government of any nation in the Americas— except for Cuba —censored a journalistic work because it allegedly defamed public officials.<sup>37</sup>

The illegal censorship of *The Black Book of Chilean Justice* has lasted for nearly two years. The arguments of CPJ and other similar institutions have been presented by my defense to the Chilean courts with no success. The other possibility, derogation of the *desacato* laws, seems unlikely at this point. That is why my only chance of justice is the invocation of international treaties before the ICHR. Should the courts rule in my favor, it would send a powerful message to Chilean government as well as an incentive to change the laws that restrict freedom of expression.

CPJ states that there is not doubt about Chile's violations of international conventions:

*Desacato* laws originated long ago, in an era when monarchs ruled without regard to the consent of the people they governed and therefore saw no reason to permit criticism of their decisions. The very purpose of *desacato* laws is to shield the government from criticism . . . . These laws criminalize the most important form of political speech: criticism of the official conduct of government leaders. Moreover, Article 6(b) and similar laws rest on the misguided notion that insulting high government functionaries endangers "public order." Public officials cannot truly maintain order if they are immune from criticism.<sup>38</sup>

In addition, laws such as Article 6(b) do not require proof that a statement is false or that the statement was published with "actual malice," that is, with knowledge of its falsity or with serious doubt as to its truth. According to the CPJ:

Indeed, laws like Article 6(b) are often applied to punish *true* statements simply because the statements are offensive to persons in power. These laws therefore discourage honest, critical reporting and prevent the public from accurately determining whether its leaders

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37. *Id.* at 16.

38. *Id.* at 26.



are doing a good job. In short, Article 6(b) is a dangerous anachronism. The Commission has concluded that *desacato* laws violate the American Convention and should be repealed.<sup>39</sup>

Indeed, Chilean legislation requires a far less stringent standard for truth as a defense against a *desacato* law than many experts suggest. Further, according to CPJ:

CPJ is aware of no evidence that Ms. Matus's allegedly defamatory statements were false, let alone evidence that Ms. Matus acted with reckless disregard for the truth. To the contrary, the facts show that Ms. Matus firmly believed *The Black Book* to be entirely true and followed standard journalistic practices in citing sources for what she wrote. Ms. Matus spent six years meticulously researching *The Black Book*. She has stated publicly that she took pains to present balanced profiles of the judges who appear in it.<sup>40</sup>

Unfortunately, the only thing that remains certain is that the books confiscated on April 14 remained locked away in a police warehouse because some judge in Chile said that my book offended him and, therefore, should be banned.<sup>41</sup> In the introduction of my book, I wrote, somewhat prophetically:

Without true freedom of the press, journalism becomes corrupt, loses its ethical standing and may be transformed into something monstrous: inquisitive, bold, biting, discrediting and, even, cruel to those who do not have laws to protect them; tolerant, compliant and servile with the powerful, including of course, those authorities journalism is called on to investigate. We believe [we, meaning the publishers and I] in freedom of expression and we believe in the necessity of hard-hitting journalism that investigates and informs, that does not try to denigrate people or institutions but that does not hesitate to go after the truth, although this will inevitably perturb some of society's powerful. This last point may be an obstacle because a book like this, written in accord to these principles, however necessary, socially and culturally, clearly runs the risk of inciting the wrath of those who have defined themselves as the incarnations of Public Virtue, Security and Patriotism.<sup>42</sup>

The prophecy became reality. These days I'm glued to my computer screen, to e-mail, to the phone. I feel as if I was suspended in an immutable reality, receiving and distributing information about my situation and the limited freedom of expression in Chile. Instead of resum-

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39. *Id.* at 25.

40. *Id.*

41. Press Release, Committee to Protect Journalists, Chile: Supreme Court, Refuses to Consider Lifting Ban on Controversial Book (Aug. 29, 2001), available at <http://www.cpj.org/news/2001/chile29aug01na.html>.

42. MATUS, *supra* note 1.

ing my role of interviewer, I was placed in the undesired role of protagonist. From my living room, I have been thrust into the role of spokesperson for a cause that seems to have as much support as it has obstacles. My life during the past eighteen months has been dedicated to keeping the spotlight on my cause and to blocking out icy moments of indifference. My personal plans have changed time and time again, subject to the ups and downs of legal proceedings, petitions, and commitments that I've taken on since the banning of my book.

I know I can't separate myself from this reality. I cannot even describe how much I miss my friends and family, but I also know that giving up now would only make the possibility of reuniting with them in Chile even more difficult. I know that even if my book is no longer banned, I will have to keep on reinventing the meaning of the words so that this case is not forgotten. So long as it is possible to censor freedom of expression and to silence political writings, my work will continue. If future books like *The Black Book of Chilean Justice* remain in a police warehouses, all my work will have been in vain. That's what the abusers are betting on. My silence would be their winning card.

#### ADDENDUM

In May 2001, the Chilean government repealed Article 6(b) of the National Security Law, which made it possible to confiscate my book. Since then, it took me a long eight months to convince the Chilean Judiciary that the law they were using did not exist any more and that they had to lift the arrest warrant against me, lift the ban over my book, and over all, put an end to this persecution. They finally did it all at the end of 2001. This allowed me to come back to my country, where I am now living and teaching. The sad part of the story is that other forms of insult laws still exist in my country and that it is still possible to go to jail for informing truthfully or giving an opinion about a public figure. I am back doing the usual in my country, but something is different. Now, I am afraid. I will publish a new book in May. The ban over *The Black Book of Chilean Justice* was lifted at the end of 2001, and it has since been republished. It has not been easy to come back. I still have some fears. My husband (he is a United States citizen) and I made difficult decisions, like selling our home in Miami, to return to Chile, but so far we are happy in Chile. I feel happy to be able to contribute with my work to Chilean society.