

Bogotá D.C., April 27th, 2015

Secretariat of the Committee on Economic, Social and Cultural Rights

United Nations Office of the High Commissioner for Human Rights

Palais Wilson

52, rue des Pâquis

CH-1201 Geneva, Switzerland

Re: Supplementary information on Chile, scheduled for review by the Committee on Economic, Social and Cultural Rights on its 55th Session.

Distinguished Members of the Committee on Economic, Social and Cultural Rights (ESCR Committee):

1. The Center for Reproductive Rights (the Center) is an independent non-governmental organization that works to promote women's equality by guaranteeing reproductive rights as human rights. The Center seeks to contribute ESCR Committee's work by providing independent information concerning Chile's obligations to guarantee the rights protected under the International Covenant on Economic, Social and Cultural (ICESCR). In light of Chile's upcoming review under the ESCR Committee, this letter will highlight how the total criminalization of abortion in Chile constitutes a violation to the right to health protected under the ICESCR.
2. This letter is divided in three parts. First, it presents the context of Chile's total criminalization of abortion. Second, it describes Chile's international human rights obligations with regard to protecting girls and women's reproductive rights as recognized by United Nations Treaty Monitoring Bodies (UNTB). Third, it argues how the total criminalization of abortion without exception constitutes a violation of the right to non-regression, non-discrimination, *substantive* equality, and health under ICESCR.

I. The context of Chile's total criminalization of abortion.

3. Chile's Penal Code criminalizes abortion in all circumstances,¹ but was understood to include a life exception.² This interpretation of the Penal Code was supported by Chile's 1931 Health Code that explicitly permitted therapeutic abortions.³ However, during General Augusto Pinochet's military regime in 1989, the Health Code was amended by Article 119 of Law 18.826, which states that "[n]o act whose purpose is to provoke an abortion may be carried out."⁴ This provision removed the exception for the life of a pregnant woman and re-established the criminalization of abortion in all circumstances.

4. In accordance with the Chilean Ministry of Health, there were 33,184 abortions in 2005, 31,933 abortions in 2010 and 17,434 abortions in 2013.⁵ Prior estimates have suggested that 160,000 to 200,000 clandestine abortions were performed annually in Chile, one of the highest rates in Latin America.⁶ Criminalizing abortion does not reduce the demand for the procedure, but instead provides legal obstacles which reduce the safety of obtaining an abortion.⁷ According to the Chilean's National Institute of Statistics, maternal mortality rate was 22.1% by 2012, one of the highest rates per 100,000 newborns registered since 2008.⁸
5. Chile is currently taking positive steps toward improving access to abortion through Bill N° 9895-11 introduced to the legislature in January 2015 and currently being discussed.⁹ This law would allow for abortions up to 12 weeks into pregnancy in instances of fetal abnormality, rape, or where the mother's life is at risk. Decriminalizing abortion in certain circumstances would represent a significant step in the right direction toward allowing women the right to choose whether or when to bear a child.

II. Chile's obligations with regard to protecting girls and women's reproductive rights as recognized by UNTB.

6. UNTB have urged Chile to reform its laws that criminalizes abortion under all circumstances. On 2006, the CEDAW Committee recommended Chile to review its "laws relating to abortion with a view to removing punitive provisions imposed on women who undergo abortion and provide them with access to quality services for the management of complications arising from unsafe abortion and to reduce maternal mortality rates".¹⁰ On 2007, the Committee on the Rights of the Child (CRC Committee) urged Chile "to review its criminalization of the termination of pregnancies in all circumstances, including in cases of rape, incest and situations where the life of the mother is at risk."¹¹ In 2007, the Human Rights Committee (HRC) recommended Chile to "amend its abortion laws to help women avoid unwanted pregnancies and not have to resort to illegal abortions that could put their lives at risk".¹²
7. The Committee against Torture (CAT Committee) has stated in various Concluding Observations that punitive criminal abortion laws should be reviewed because "they lead to violations of a woman's right to be free from inhuman and cruel treatment."¹³ In its 2004 Chile Concluding Observations, the CAT stated its concern that women were being coerced into confessing that they had an abortion as a condition for obtaining lifesaving medical care.¹⁴ Legislative history from the Senate states that the 2009 Ministry of Health guidance prohibiting healthcare personnel from extracting confessions from women who they suspect induced abortion was in response to CAT's Concluding Observations.¹⁵

III) Chile's Total Criminalization on Abortion Constitutes a Violation of the Right to Non-Regression (Art. 5(2)), the Right to Non-Discrimination (Article 2 (2)), the Right to Substantive Equality (Article 3) and the Right to Health (Art. 12 (1)) under ICESCR.

- a. Right to Non-Regression (Art. 5(2)).

8. Access to legal abortion under the life exception is a minimal protection to protect the right to health of women. Restricting women's access to reproductive rights to which women previously had access amounts to retrogressive measures in violation of the right to health.¹⁶ Therefore, States may not go backwards by reducing their social, economic and cultural rights, except in cases where they are forced to do so by a demonstrable lack of resources.¹⁷
9. Article 5(2) of ICESCR states that “[n]o restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.”¹⁸ As the ESCR Committee notes in General Comment N° 3, progressive realization is seen as “a necessary flexible device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights”¹⁹. However, current retrogressive measures re-instating the complete ban on women's access to abortion diminish women's access to their reproductive health and rights and violate Chile's obligations under ICESCR.²⁰
 - a. Right to Non-Discrimination (Article 2(2)) and Substantive Equality (Article 3).
10. Reproductive health services, including access to abortion, are services that primarily women need, due to their different reproductive capacities. Therefore, ensuring access to abortion is essential to ensuring that women can equally exercise their human rights.²¹ The ICESCR establishes the principle of non-discrimination as one of its core obligations.²² As part of the immediate obligations Chile has as a State Party to the ICESCR which are not subject to progressive realization, includes the obligation to guarantee that relevant rights will be exercised without discrimination.²³ This obligation requires that States Parties prevent direct and indirect discrimination in all spheres of life, particularly around the right to health.²⁴
11. The ESCR Committee General Comment N° 14 regarding the right to the highest attainable standard of health stresses that “many measures, such as most strategies and programmes designed to eliminate health-related discrimination, can be pursued with minimum resource implication through the adoption, modification or abrogation of legislation or the dissemination of information.”²⁵ In addition, the Committee has made clear that non-discriminatory legislation is “highly desirable and in some case may even be indispensable”²⁶ to attain women's right to health.
12. The essence of article 3 of the ICESCR is that the rights set forth in the treaty be enjoyed by men and women on an equal basis, “a concept that carries substantive meaning”.²⁷ The right to *substantive equality* “provides a framework by which to effectively recognize and address inequalities faced by women.”²⁸ At its core, “substantive equality requires states to identify the root causes of discrimination,

such as power structures and social and economic systems reinforced by gender stereotypes and socialized gender roles, which lead to inequalities”.²⁹

13. Legal restrictions on abortion violate a broad range of women’s human rights by denying women the ability to make autonomous decisions about their reproductive capacities.³⁰ “When women are unable to decide whether and when to bear children, this impacts all facets of their lives, including their ability to finish school, enter the labor force, and participate equally in public and political life, and reinforces gender stereotypes characterizing women’s primary role as child bearer”³¹. Therefore, in order to protect women’s right to health on a basis of substantive equality, it becomes necessary that Chile adopts legislative measures that respects women’s reproductive health and rights. Failure to guarantee women’s reproductive rights to abortion results in violation of Article 2(2) and Article 3 under ICESCR.

b. Right to Health (Art. 12 (1)).

14. Article 12(1) of ICESCR states that States Parties to the Covenant must guarantee the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”³² However, complete criminalization leaves women with two bleak choices: to obtain unsafe abortions³³ or to incur health risks by carrying their unwanted pregnancies to term.³⁴ Criminalizing abortion without exemption is a *per se* violation of the right to health. Beyond extinguishing a woman’s right to choose whether or when to have children, criminalizing the termination of pregnancy significantly increases the risk of maternal morbidity and mortality.³⁵
15. The ESCR Committee General Comment N° 14 has specified that the right to health includes freedoms such as “the right to control one’s health and body, including sexual and reproductive freedom”³⁶ On 2004, the ESCR Committee Concluding Observations on Chile expressed its continuing concern about the women’s health consequences as a result of Chile’s complete criminalization of abortion without exception.³⁷ Therefore, not allowing Chilean women the right to decide whether to bear a child under any circumstance does not allow them to decide if and when to reproduce. Since women have no choice but to pursue clandestine, unsafe abortions, women do not “have access to safe, effective . . . and acceptable methods of family planning of their choice”³⁸ as is required under ICESCR.³⁹
16. In accordance with the CEDAW Committee, access to reproductive health care is a basic right⁴⁰, emphasizing that traditional attitudes by which women are regarded as subordinate to men and stereotyped are a violation of Article 2 under the Convention to Eliminate All Forms of Discrimination against Women (CEDAW).⁴¹ CEDAW Committee’s General Recommendation N° 19 explicitly states that “States parties should . . . ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control.”⁴² In addition, CEDAW Committee’s General Recommendation N° 24 also notes that “[o]ther barriers to women’s access to appropriate health care include laws that criminalize medical procedures only needed by women punish women who undergo those procedures.”⁴³ It therefore requires States parties to ensure

the rights of women by ensuring access to sexual and reproductive health services.⁴⁴ Chilean's restrictive legislation that criminalizes abortion under all circumstances results in violation of Article 12(1) under ICESCR.

IV) Conclusion.

17. Legal restrictions on abortion violate a broad range of women's human rights, including the rights to equality and nondiscrimination, life, health, freedom from cruel, inhumane and degrading treatment, and privacy by denying women the ability to make autonomous decisions about their reproductive capacities. In accordance with international human rights standards, Chile must reform its discriminatory laws that restrict women's reproductive rights, including its extreme prohibitions on accessing abortion.
18. We applaud the ESCR Committee for its commitment to women's rights and the strong observations and recommendations the committee has issued in the past, which stress the need to enact, implement, and monitor effective policies geared towards increasing access to the full complement of human rights for women. We respectfully request the ESCR Committee to consider addressing the following recommendations to the Chilean government during the 55th Session:
 - a. To revise its laws imposing a total abortion ban to allow for exceptions when: (a) pregnancy endangers a woman's life or health; (b) pregnancy is the result of rape or artificial insemination without the woman's consent; and (c) congenital fetal anomaly incompatible with life outside the womb.
 - b. To repeal Article 19 in the Chilean Constitution that protects the rights of the "unborn" influenced by the stereotype that protection of the foetus should prevail over the health of the mother.

Respectfully,

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¹ CHILE, CÓDIGO PENAL (1874). Arts. 342-45. The last-in-time principle mandates that laws that have come into effect later override prior, conflicting provisions with the more recent regulations.

² CHILE, CÓDIGO SANITARIO, DECRETO CON FUERZA DE LEY N° 725 (1967) MODIFIED BY LEY 18826 (1989). Art. 119; World Abortion Map, Chile, (2015), <http://www.worldabortionlaws.com/map/> (CRR Translation).

³ CHILE, CÓDIGO SANITARIO (1931). Art. 226.

⁴ CHILE, *supra* note 2.

⁵ Ministerio de Salud, Gobierno de Chile, SEMINARIO SERNAM: GÉNERO Y POLÍTICAS PÚBLICAS (AVANCES Y DESAFÍOS EN SALUD) (2012), <http://www.sernam.cl/descargas/014/doc/SALUD.pdf>; Carolina Mascareño, *Aborto: Las Cifras y Escenarios que Cruzan la Realidad de Chile*, TELE 13, 2014, <http://www.t13.cl/noticia/actualidad/aborto-las-cifras-y-escenarios-que-cruzan-la-realidad-de-chile>.

⁶ The Alan Guttmacher Institute, *Aborto clandestino: Una realidad latinoamericana*, 1994; Lavin P y col. *Informe preliminar sobre la caracterización de los casos y costos del tratamiento del aborto hospitalizado en Santiago de Chile. Ponencia presentada en el Encuentro de Investigadores sobre Aborto Inducido en América Latina y El Caribe*. Universidad Externado de Colombia. Bogotá, 1994; *cited in* Veronica Schiappacasse et al., *Chile: Situación de la Salud y los Derechos Sexuales y Reproductivos*, Instituto Chileno de Medicina Reproductiva & Corporación de Salud y Políticas Sociales, 50 (2003), available at http://www.icmer.org/documentos/salud_y_derechos_sex_y_rep/chile_situac_salud_y_der_sex_y_rep.pdf

⁷ WORLD HEALTH ORGANIZATION, SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS, 68 & 95 (2ND ED.) (2012). ¶¶ 88.

⁸ INSTITUTO NACIONAL DE ESTADÍSTICA, COMPENDIO ESTADÍSTICO (2014), http://www.ine.cl/canales/menu/publicaciones/calendario_de_publicaciones/pdf/compendio_2014.pdf. ¶¶ 116

⁹ CHILE, PROYECTOS DE LEY, BOLETÍN N° 9895-11, 3 MARZO 2015, PUBLICACIÓN OFICIAL, <http://www.camara.cl/pdf.aspx?prmID=11004 &prmTIPO=TEXTOSesion>; *see also* Chile's President Bachelet proposes end to total abortion ban, BBC NEWS, <http://www.bbc.com/news/world-latin-america-31076838> (last visited Apr 17, 2015).

¹⁰ CEDAW COMMITTEE, CONCLUDING OBSERVATIONS: CHILE, U.N. DOC. CEDAW/C/CHI/CO/4 (2006). ¶ 20.

¹¹ COMMITTEE ON THE RIGHTS OF THE CHILD (CRC), CONCLUDING OBSERVATIONS: CHILE, U.N. DOC. CRC/C/CHL/CO/3 (2007). ¶ 56.

¹² HUMAN RIGHTS COMMITTEE, CONCLUDING OBSERVATIONS: CHILE, U.N. DOC. CCPR/C/CHL/CO/5 (2007). ¶ 8.

¹³ UNITED NATIONS, INTERIM REPORT OF THE SPECIAL RAPporteur ON THE RIGHT OF EVERYONE TO THE ENJOYMENT OF THE HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH, U.N. DOC. A/66/254 (2011). ¶ 22, 22 n. 11 (citing CAT/C/PER/CO/4, ¶ 23; CAT/C/NIC/CO/1, ¶ 16; CAT/C/CR/32/5, ¶ 7).

¹⁴ COMMITTEE AGAINST TORTURE (CAT), CONCLUDING OBSERVATIONS: CHILE, U.N. DOC. CAT/C/CR/32/5 (2004) ¶ 6(j).

¹⁵ Diario de Sesiones del Senado, PUBLICACIÓN OFICIAL (CHILE) (2012), http://www.senado.cl/appsenado/index.php?mo=sesionessala&ac=getDocumento&teseid=34415&idparl=230&tema=Proyecto&nrobol=737307_P&legiid=&tagid=11.

¹⁶ ESCR COMMITTEE, GENERAL COMMENT N° 14 E/C.12/2000/4 (2011). ¶¶ 43, 48.

¹⁷ *Cfr.* AMNESTY INTERNATIONAL, BRINGING ESC RIGHTS HOME: APPLYING IRELAND'S ECONOMIC, SOCIAL AND CULTURAL RIGHTS OBLIGATIONS TO BUDGETARY POLICY (2014). ¶¶ 25.

¹⁸ INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, DEC. 16, 1966, S. TREATY DOC. NO. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3, (1966). Art. 5(2).

¹⁹ ESCR COMMITTEE, GENERAL COMMENT NO. 3: THE NATURE OF STATES PARTIES' OBLIGATIONS (1991). ¶ 9.

²⁰ ICESCR, *supra* note 18. Art. 5(2); ESCR COMMITTEE, *supra* note 16. ¶¶ 43, 48.

²¹ COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW COMMITTEE), GENERAL RECOMMENDATION NO. 24: ARTICLE 12 OF THE CONVENTION (WOMEN AND HEALTH) U.N. DOC. HRI/GEN/1/REV.9 (VOL. II) (2008). ¶¶ 11-12.

²² ICESCR, *supra* note 18. Art. 2(2).

²³ *Id.* Article 2(2).

²⁴ AMNESTY INTERNATIONAL, *supra* note 17. ¶¶ 58-59.

²⁵ ESCR COMMITTEE, *supra* note 16. ¶ 18.

²⁶ ESCR COMMITTEE, *supra* note 19. ¶ 3.

²⁷ ESCR COMMITTEE, REPORT ON THE THIRTY-FOUR AND THIRTY-FIFTH SESSIONS, SUPPLEMENT N°2, U.N. DOC. E/2006/22 E/C.12/2005/5 (2006). ¶¶ 6.

²⁸ CENTER FOR REPRODUCTIVE RIGHTS, SUBSTANTIVE EQUALITY AND REPRODUCTIVE RIGHTS: A BRIEFING PAPER ON ALIGNING DEVELOPMENT GOALS WITH HUMAN RIGHTS OBLIGATIONS (2014), http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Equality_Guide_Reduced_size.pdf. ¶¶ 4.

²⁹ *Id.*

³⁰ ESCR COMMITTEE, GENERAL COMMENT NO. 20: NON-DISCRIMINATION IN ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ART. 2, PARA. 2, OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS), U.N. DOC. E/C.12/GC/20 (2009). ¶. 31; COMMITTEE ON THE RIGHTS OF THE CHILD, GENERAL COMMENT NO. 15: THE RIGHT OF THE CHILD TO THE ENJOYMENT OF THE HIGHEST ATTAINABLE STANDARD OF HEALTH (ART. 24), U.N. DOC. CRC/C/GC/15 (2013). ¶. 31; HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO. 28: EQUALITY OF RIGHTS BETWEEN MEN AND WOMEN (2000). ¶. 20; WORLD HEALTH ORGANIZATION, SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS, 68 & 95 (2ND ED.) (2012).

³¹ CENTER FOR REPRODUCTIVE RIGHTS, HONDURAS: SEXUAL VIOLENCE AND TOTAL BANS ON EMERGENCY CONTRACEPTION AND ABORTION (2015).

³² ICESCR, *supra* note 18. Art. 12(1).

³³ *See*. WORLD HEALTH ORGANIZATION, *supra* note 7.

³⁴ Willard Cates, Jr, David A. Grimes & Kenneth F. Schulz, *The Public Health Impact of Legal Abortion: 30 Years Later*, 35 PERSP SEX. REPROD HEALTH (2003), <http://www.guttmacher.org/pubs/journals/3502503.html>. (Stating that obtaining an abortion is safer than carrying a pregnancy to term).

³⁵ ESCR COMMITTEE, *supra* note 16. ¶¶ 14 n. 12, 11.

³⁶ *Id.* ¶ 8.

³⁷ ESCR COMMITTEE, CONCLUDING OBSERVATIONS OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: CHILE, E/C.12/1/ADD.105, (2004). ¶ 26. The Concluding Observations also noted that 34,479 women that were hospitalized in 2001 from abortion complications, which only represents the reported figures.

³⁸ ESCR COMMITTEE, *supra* note 16. ¶ 12.

³⁹ *Id.* ¶ 14 n. 12, 11.

⁴⁰ COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW COMMITTEE), *supra* note 21. ¶ 1.

⁴¹ COMMITTEE ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, GENERAL RECOMMENDATION N° 19: VIOLENCE AGAINST WOMEN (1992). ¶. 11.

⁴² *Id.* ¶ 24(m).

⁴³ COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW COMMITTEE), *supra* note 21. ¶ 14.

⁴⁴ *Id.*