

Vaccines are Not Enough: How Failure to Protect Human Rights compromised Chile's COVID-19 response

A Briefing Paper
October 2021

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I. EXECUTIVE SUMMARY

The adverse human impacts of the COVID-19 pandemic have been felt around the globe, and the Latin America and the Caribbean region has been no exception.¹ As of 11 October 2021, the Pan American Health Organization (PAHO) had reported over 41.9 million COVID-19 cases in the region. More than 1.2 million people have died due to COVID-19.² Inequality has exacerbated the negative social and economic impact of the pandemic, particularly on persons from marginalized groups such as migrants, women, and LGBTI persons.³ The outbreak of pandemic in Latin America has also taken place in a moment of massive social mobilizations demanding profound changes in the social and economic policies.⁴

In Chile, the COVID-19 pandemic has coincided temporally with the emergence of widescale protests and social mobilization. Despite the country's relative economic⁵ and democratic stability immediately prior to the outbreak of the pandemic, Chile was in fact already facing social and political upheaval, in part as a result of deeply unequal access basic necessities. While the Government has taken important public health measures to tackle the effects of the pandemic, the pandemic has served to magnify and intensify these inequalities. This in turn, has fuelled further calls for social change.

The COVID-19 response of Chilean authorities also illustrates vividly the risks and limits of the prolonged use of states of emergency as a legal basis to enable regulatory measures of tackling the pandemic. To its credit, Chile has implemented a highly successful vaccine program and taken a number of other important public health measures to improve the well-being of its inhabitants. Nevertheless, these measures have proved insufficient to curb the spread of the virus and ensure full compliance with Chile's obligations to respect, protect and fulfil the right to health.

It is in this context that this report examines the human rights impacts of the pandemic and the responses of the Chilean authorities.

¹ Pan American Health Organization, Latin America and the Caribbean surpass 1 million COVID deaths, 21 May 2021, available at: <https://bit.ly/2USKaNC>

See also: DW, COVID-19: Latinoamérica es la región más afectada en el mundo, 27 July 2021, available at: <https://bit.ly/2UZgXdD>

² Pan American Health Organization, Geo- Hub Covid-19 – Information System for the Region of the Americas, available at: <https://bit.ly/2TtjA00>

³ See for instance: R Green, Covid-19: Latin America's deepest crisis for a century foments major change, International Bar Association, 27 July 2021, available at: <https://bit.ly/3i8eFIS>; International Commission of Jurists, Invisible, Isolated, and Ignored: Human Rights Abuses Based on Sexual Orientation and Gender Identity/Expression in Colombia, South Africa and Malaysia, 2021, available at: <https://bit.ly/3okJqOg>

⁴ See for instance: BBC News, Ola de protestas en América Latina: ¿puede la amenaza de una nueva "década perdida" explicar lo que ocurre en las calles?, 29 November 2019, available at: <https://bbc.in/3xaqxhE>; CNN en Español, ¿Primavera Latinoamericana? 2019, un año de protestas en la región, 22 November 2019, available at: <https://cnn.it/3iT5vPB>

Also see: In Bolivia: B Miranda, Protestas en Bolivia tras la cuestionada victoria de Evo Morales: cómo se radicalizaron las manifestaciones y la violencia en el país, BBC News, 7 November 2019, available at: <https://bbc.in/3rA5jZm>

In Colombia: D Pardo, Paro nacional en Colombia: 3 factores inéditos que hicieron del 21 de noviembre un día histórico, BBC News, 22 November 2019, available at: <https://bbc.in/3i4jNO4>

In Ecuador: BBC News, Crisis en Ecuador: continúan las protestas mientras el gobierno y el movimiento indígena se preparan para dialogar este domingo, 11 October 2011, available at: <https://bbc.in/3yiXSYy>

⁵ According to the 2020 Human Development Report, among the Latin America Countries, Chile is first in the Human Development Index ranking. Globally, out of 189 countries, Chile is in 48th place.

See: United Nations Development Programme, Human Development Report 2020, The next frontier, Human Development and the Anthropocene, 2020, page 343, available at: <http://hdr.undp.org/sites/default/files/hdr2020.pdf>

Section I of this report presents a brief summary of the most relevant international human rights law and standards applicable to the measures implemented by the Chilean government in response to COVID-19. It considers the rights to health, life, freedom of movement and peaceful assembly. In relation to the right to health, **States have an obligation to ensure immediate access to at very least the “minimum essential level” of health services**, facilities and goods on a non-discriminatory basis. This includes providing diagnostics, medicines, vaccines and therapeutics against infectious diseases, including COVID-19.

As far as the right to life is concerned, States are required to **take appropriate measures to ensure protection of life against the many life-changing and life-threatening risks presented by COVID-19**. To do so, States also have the duty to address “the general conditions in society that may give rise to direct threats to life”,⁶ including life-threatening diseases. Such conditions include the the pandemic itself as well as “conditions in society” such as poverty and inequality that compound the virus’s potential threat to life.

Chile’s COVID-19 response measures have included severe restrictions to the rights of freedom of movement and peaceful assembly. The rights to **freedom of movement and peaceful assembly are essential to the full development of individuals and in shaping societies**, for instance by providing scope for governments to be held to account. Any limitations on these rights must comport with the principle of legality and be, necessary, proportionate, and non-discriminatory. This is particularly important at this time when a new Constitution is being drafted. Similarly, where a state of emergency is applicable, States must ensure that derogating measures are (i) strictly necessary to meet a specific threat to the life of a nation (ii) be non-discriminatory (iii) temporary, and (iv) subject to periodic review.

Section II of the report summarizes aspects of the human rights situation in Chile before the outset of the COVID-19 pandemic. On this matter, it is noted despite its relative overall high level of wealth, when it comes to economic distribution, evidence suggests that **Chile is one of the most unequal countries in the Americas**. This inequality gap is in part, a result of the economic model adopted in Chile, which gives private businesses the primary role in the provision of social services.

One of the main consequences of this gap is that, even before the pandemic, a significant number of Chilean inhabitants, particularly persons from marginalized or disadvantaged groups, were **struggling to secure sufficient income to guarantee themselves an adequate standard of living and access adequate healthcare services**. This suggests significant shortcomings in Chile’s

⁶ UN Human Rights Committee, General Comment No. 36: Article 6: right to life, CCPR/C/GC/36, 3 September 2019, para 26.

performance in discharging its legal obligations under international human rights law, including the International Covenant in Economic, Social and Cultural Rights.

Section III addresses the COVID-19 situation in Chile. It analyses some **key aspects of the response of the Chilean Government**, including the health and social relief measures adopted by the Government. In this respect, some legal restrictions relating to the acquisition of health goods and services and the hiring of health workers and other medical personnel. Likewise, in response to COVID-19, Chile created an **integrated health network for COVID-19** (*red integrada de salud COVID-19*) **that played a key role in avoiding the collapse of the health system** by, for instance, allowing people to access either to public or private hospitals. Despite these laudable achievements of Chile's response to COVID-19, **significant disruptions in access to non-COVID-19 related health services have been reported**, including access to reproductive healthcare services.

The Chilean authorities also **adopted social relief measures from the outset of the COVID-19 pandemic**, aiming to alleviate the negative socio-economic impacts of the pandemic. These social relief measures included the provision of economic benefits and help to families in vulnerable situations. Over time, the Government expanded the scope of these measures. Unfortunately, **the measures have been insufficient to effectively respond to the adverse human rights impact wrought by the pandemic**. Overall, **the pandemic has exacerbated the already troubling levels of poverty and inequality in Chile**, particularly in regard to persons from marginalized groups of the population.

Two key elements of Chile's COVID-19 response are discussed in detail in Section IV: the **"state of exception", declared by the government** on 18 March 2020, and its COVID-19 **vaccine rollout programme**, which began on 24 December 2020.

On 18 March 2020, at the onset of the COVID-19 pandemic, Chilean President declared a "state of exception of catastrophe for public calamity" (*Estado de Excepción Constitucional de Catástrofe, por Calamidad Pública*). It lasted until 30 September 2021. Since the state of exception was in force for 18 months and 12 days, its use characterized the Government's responses to the pandemic with various **consequences that threatened human rights and the rule of law**.

For instance, military forces have had a key and outsized role in Chile's response to the COVID-19 pandemic. The state of exception allowed the President to appoint 16 "Chiefs of National Defence" (*Jefes de la Defensa Nacional*), one in each region of the country. These Chiefs, who are high-ranking military officials, **had extensive powers in their designated regions, including powers more appropriately held by public health experts** in the context of public health

emergency such as the one brought about by COVID-19. Though the Chiefs followed guidelines issued by the Ministry of Health and other health authorities, **the power by which public health measures were implemented lied inappropriately with the Chiefs of National Defence**, who enacted resolutions (*resoluciones exentas*) on COVID-19 affairs. These resolutions included severe restrictions on the right to freedom of movement, the use of public transport, the use of private vehicles, and mandated quarantines.

Another important consequence was the imposition of restrictions on freedom of movement. These restrictions include quarantines and curfew. Chile also had its borders closed for almost the entirety of 2020 and part of 2021. These measures **had a considerable impact on the daily lives and human rights of Chilean inhabitants**. For instance, human rights defenders and independent lawyers experienced difficulty in accessing permits to go to police stations and detention places in quarantine zones. In addition, the criminal code was used to police people who violated quarantines or curfew.

With regard to COVID-19 vaccines. **Chile's vaccination strategy is arguably one of the most successful in Latin America**. According to Chilean official data, as of 12 October 2021, 89,05% of Chilean population was fully vaccinated.⁷ This success has been attributed to several factors, including sufficient monetary resources to purchase vaccines; adequate planning for the acquisition of vaccines; previous experiences in vaccine campaigns; and State capacity and infrastructure to implement the vaccine plan.

Despite an effective rollout, it should be noted that the COVID-19 cases and deaths did not decline significantly during the first part of 2021 in Chile. This demonstrates that **although vaccines are essential to tackle the COVID-19 pandemic, they are not alone enough to stop COVID-19 transmission** particularly at earlier stages of rollouts. The situation of migrants and refugees in Chile during the pandemic is particularly perilous. Migrants with irregular status have been disproportionately impacted by the pandemic and have **faced challenges in accessing social relief benefits and the COVID-19 vaccines on an equal basis with Chilean citizens**.

Section V concludes by providing recommendations to the Chilean authorities to assist in ensuring increased compliance with international human rights law and standards. For instance, **sanitary measures taken to response to COVID-19 must fully respect the rights to freedom of movement and freedom of assembly**. Only restrictive measures that are non-discriminatory, necessary and proportionate to the challenges responded to will be lawful. Chilean authorities should take concrete steps to enforce existing legal human rights protections for refugees and migrants, particularly migrants with irregular status in the country.

⁷ Gobierno de Chile, Plan Nacional de Vacunación, available at: <https://bit.ly/3mxw4vj>

The Constitutional Convention (*Convención Constitucional*) should ensure that the **new constitution fully incorporates the rights guaranteed under international human rights law, including all economic and social rights.** This will assist in ensuring the government can be held to account for the elimination of poverty and the eradication of inequality. The Constitutional Convention should also ensure that **the new Constitution improves on the regulation of states of exception** (or emergency), to ensure that all emergency response measures are undertaken in accordance with international human rights law and standards.

II. INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS⁸

A number of principal international human rights law and standards are applicable to the measures implemented by the Chilean government in response to the COVID-19 outbreak and the question of equitable access to COVID-19 vaccines, diagnostics and treatments. In addressing the COVID-19 situation, Chile must discharge its obligations to respect, protect and fulfil the rights to life and health, while at the same time ensuring that its protective measures do not undermine other human rights such as the right to freedom of movement, the right to peaceful assembly and the right to an adequate standard of living. Determining the extent to which States may limit or derogate from human rights obligations to confront a public health emergency is critical to this examination.

A. The Right to Health

States have an obligation under Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Chile is a State Party,⁹ to respect, protect, and fulfil the right to the highest attainable standard of physical and mental health. Certain elements of this obligation are “immediate” obligations, and others may perform in a “progressive” manner. The immediate obligations include:¹⁰

- **Ensuring immediate access to at very least the “minimum essential level” of health services, facilities and goods.** Among others, this includes:
 - Providing “access to health facilities, goods and services on a non-discriminatory basis”¹¹.
 - Providing “access to essential drugs”¹², including medicines and other treatments.
 - Ensuring “equitable distribution of all health, goods and services”¹³.
 - Providing “immunization against the major infectious diseases occurring in the community”¹⁴, including through the administering of vaccines.
 - Taking “measures to prevent, treat and control epidemic and endemic diseases”¹⁵, which requires the ready accessibility to all of diagnostics, medicines, vaccines, treatments and all other necessary health goods and services.

⁸ This section is based on the following ICJ documents: *The Unvaccinated: Equality not Charity in Southern Africa* (2021) and *Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses* (2020). All ICJ documents are available on the ICJ website: <https://www.icj.org>

⁹ OHCHR, Status of Ratification, available at: <https://indicators.ohchr.org/>

¹⁰ See: International Commission of Jurists, *Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses*, September 2020, page 15 and ff available at: <https://bit.ly/3f4Ghf0>;

¹¹ UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, 11 August 2000, para 43(a).

¹² *ibid*, para 43 (d).

¹³ *ibid*, para 43 (e).

¹⁴ *ibid*, para 44 (b).

¹⁵ *Ibid*, para 44 (c).

- Providing “education and access to information concerning the main health problems in the community, including methods of preventing and controlling them”¹⁶, which in the context of an epidemic requires the proactive provision of information about the disease itself and effective ways to prevent, detect and treat infection.

Access to COVID-19 vaccines, as well as various other medicines, diagnostics and treatments, form a key part of the minimum essential level of healthcare States are obliged to realize immediately in the context of an epidemic such as COVID-19.¹⁷

- **Ensuring that health services, facilities and goods are available to all without discrimination.** The right to health should be guaranteed without discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence, economic and social situation, or other status.¹⁸ States must refrain from denying or limiting equal access to health goods, facilities and services. In particular, equal access should be guaranteed to the those from the most marginalized sections of the population.¹⁹ Moreover, the right to health should be accessible without discrimination “even in times of severe resource constraints”,²⁰ such as those brought on by the COVID-19 epidemic.
- **Avoiding any retrogressive steps decreasing existing access to health.** Retrogressive measures, which decrease access to existing health services, goods and facilities, are presumed to be violations of the right to health and may only be taken on “most careful consideration of all alternatives”.²¹ States have a burden to show that such measures “are duly justified”.²² In the context of COVID-19, such “retrogressive” steps importantly include diminished access to non-COVID-19 health services, goods and facilities.
- **Taking steps towards realizing the right to health in full, even if some aspects are achieved in a progressive manner.** Legislative,

¹⁶ *ibid*, para 44 (d).

¹⁷ In this regard, it should be noted that article 12 explicitly sets out that the full realization of the right to health requires that States take all necessary measures to ensure the “prevention, treatment and control of epidemic, endemic, occupational and other diseases” and create conditions “which would assure to all medical service and medical attention in the event of sickness”.

¹⁸ International Covenant of Economic, Social and Cultural Rights, Article 2; UN Committee on Economic, Social and Cultural Rights, 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), E/C.12/GC/20, 2 July 2009, paras. 15-35.

¹⁹ UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, 11 August 2000, para 19 and 34.

²⁰ *ibid*, para 18.

²¹ *ibid*, para 32.

²² *ibid*, para 32.

judicial, administrative, financial, educational, social and other measures must be adopted to pursue the full realization of the right to health.

In terms of international human rights law, all health goods, facilities and services must be available, accessible, acceptable and of adequate quality.²³ Additionally, the right to health must be realized by States individually and “through international assistance and cooperation, especially economic and technical, to the maximum of its available resources”.²⁴ Maximizing resources therefore requires States to seek and provide cooperation and assistance to each other where necessary.

Moreover, Article 15(1)(b) of the ICESCR sets forth “the right to the benefits of scientific progress and its application”. The UN Committee on Economic, Social and Cultural Rights (CESCR) has emphasized that a component of this right is a right to equitable COVID-19 vaccine access, as this is an unquestionable product of recent scientific progress.²⁵

Apart from the ICESCR, the right to health is further provided for by other international human rights treaties, including the International Convention on the Elimination of All Forms of Racial Discrimination,²⁶ the Convention on the Rights of the Child,²⁷ and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,²⁸ all to which Chile is a State Party.²⁹

At the regional level, article 26 of the American Convention on Human Rights provides that States Parties, such as Chile, have the obligation to take measures to achieve “progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States”.

Regarding the scope of this article, the Inter-American Court of Human Rights has affirmed that Article 26 establishes States’ obligations in relation to economic, social, and cultural rights (ESCR).³⁰ Therefore, ESCR are justiciable rights under the American Convention.³¹ Furthermore, the Court has stated that Article 26 established not only “progressive” obligations but also “immediate” obligations.³²

²³ *ibid*, para 12.

²⁴ International Covenant of Economic, Social and Cultural Rights, Article 2(1).

See also: International Commission of Jurists, *Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses*, September 2020, page 27 and ff available at: <https://bit.ly/3f4GhfQ>; Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2011), available at: <https://bit.ly/3f8GuPf>; De Schutter et al “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” *Human Rights Quarterly* 34 (2012) 1084–1169, available at: <https://bit.ly/3xliZZL>

²⁵ UN Committee on Economic, Social and Cultural Rights, Statement on universal and equitable access to vaccines for the coronavirus disease (COVID-19), E/C.12/2020/2, 15 December 2020, available at: <https://bit.ly/3x8jmGJ>

²⁶ Article 5 (4)(iv).

²⁷ Article 24.

²⁸ Article 28, 43 (e) and 45 (c).

²⁹ See: OHCHR, Status of Ratification, available at: <https://indicators.ohchr.org/>

³⁰ Inter-American Court of Human Rights, *Case of Poblete Vilches et al. v. Chile*, Merits, Reparations and Costs, Judgment of March 8, 2018, Series C No. 349, para 103.

³¹ Inter-American Court of Human Rights, *Case of Cuscul Pivaral et al. v. Guatemala*, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 23, 2018, Series C No. 359, para 75 and ff.

³² Inter-American Court of Human Rights, *Case of Poblete Vilches et al. v. Chile*, Merits, Reparations and Costs, Judgment of March 8, 2018, Series C No. 349, para 104; Inter-American Court of Human Rights, *Case of Cuscul Pivaral et al. v. Guatemala*, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 23, 2018, Series C No. 359, para 98.

The latter obligations refer to the adoption of effective, adequate, deliberate and concrete measures to guarantee access and full realization of ESCR without discrimination.³³

In relation to these “progressive” obligations, the Court has determined that States should be granted flexibility in their implementation, and that the context and difficulties faced by States should be taken into account.³⁴ However, States must take measures to guarantee ESCR “to the extent permitted by the economic and financial resources available.”³⁵

Importantly, the Court has explicitly set out that the right to health is an autonomous and justiciable right guaranteed by Article 26 of the American Convention on Human rights.³⁶ The Court has also established the scope and content of the right to health along the same lines as international law standards in terms of the ICESCR and the CESCR’s jurisprudence³⁷.

The Inter-American Court of Human Rights has also highlighted that States’ duty to supervise and monitor both public and private health care institutions to ensure that their operation is consistent with the protections afforded by the right to health.³⁸

It is notable that the right to health is specifically recognized in Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador” (1999). Article 10(2) of the Protocol holds that State Parties “agree to recognize health as a public good” and must adopt measures for the “prevention and treatment of endemic, occupational and other diseases”. Regrettably, Chile is not a State Party to the Protocol, a situation it should reconsider.³⁹

³³ Inter-American Court of Human Rights, *Case of Poblete Vilches et al. v. Chile*, Merits, Reparations and Costs, Judgment of March 8, 2018, Series C No. 349, para 104.

³⁴ Inter-American Court of Human Rights, *Case of Cuscul Pivaral et al. v. Guatemala*, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 23, 2018, Series C No. 359, para 141.

³⁵ *ibid*, para 142.

³⁶ Inter-American Court of Human Rights, *Case of Poblete Vilches et al. v. Chile*, Merits, Reparations and Costs, Judgment of March 8, 2018, Series C No. 349, para 106 to 110, 174; Inter-American Court of Human Rights, *Case of Cuscul Pivaral et al. v. Guatemala*, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 23, 2018, Series C No. 359, para 98 and ff; Inter-American Court of Human Rights, *Case of Hernández v. Argentina*, Preliminary Objection, Merits, Reparations and Costs, Judgment of November 22, 2019, Series C No. 395, para 62 and ff; Inter-American Court of Human Rights, *Case of Guachalá Chimbo et al. v. Ecuador*, Merits, Reparations and Costs, Judgment of March 26, 2021, Series C No. 423, para 96 and ff.

³⁷ In this regard, the Court said that the right to health:“(…) is a fundamental human right, essential for the satisfactory exercise of the other human rights and everyone has the right to enjoy the highest attainable standard of health that allows them to live with dignity, understanding health not only as the absence of disease or infirmity, but also as a state of complete physical, mental and social well-being derived from a lifestyle that allows the individual to achieve total balance. Thus, the right to health refers to the right of everyone to enjoy the highest level of physical, mental and social well-being. The general obligation to protect health translates into the state obligation to ensure access to essential health services, ensuring effective and quality medical services, and to promote the improvement of the population’s health. This right encompasses timely and appropriate health care in keeping with the principles of availability, accessibility, acceptability and quality, the application of which will depend on the prevailing circumstances in each State. Compliance with the State obligation to respect and to ensure this right must pay special attention to vulnerable and marginalized groups, and must be realized progressively in line with available resources and the applicable domestic laws”. See: Inter-American Court of Human Rights, *Case of Guachalá Chimbo et al. v. Ecuador*, Merits, Reparations and Costs, Judgment of March 26, 2021, Series C No. 423, para 100 and 101.

³⁸ Inter-American Court of Human Rights, *Case of Poblete Vilches et al. v. Chile*, Merits, Reparations and Costs, Judgment of March 8, 2018, Series C No. 349, para 124; Inter-American Court of Human Rights, *Case of Suárez Peralta v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment of May 21, 2013, Series C No. 261, paras 132, 149 and ff; Inter-American Court of Human Rights, *Case of Ximenes Lopes v. Brazil*, Merits, Reparations and Costs, Judgment of July 4, 2006, Series C No. 149, para 141; Inter-American Court of Human Rights, *Case of Cuscul Pivaral et al. v. Guatemala*, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 23, 2018, Series C No. 359, para 106.

³⁹ In addition, Chile has not ratified other important regional treaties, such as the Inter-American Convention Against Racism, Racial Discrimination and Related Forms of Intolerance; and the Inter-American Convention Against All Forms of Discrimination and Intolerance.

Finally, regarding the access to COVID-19 vaccines in particular, the Inter-American Court of Human Rights has ruled that the rights to equality and non-discrimination impose a duty on States to provide access to COVID-19 vaccines without any distinction, including the migratory status.⁴⁰ The Inter-American Commission of Human Rights also came to the same conclusion.⁴¹

B. The Right to Life

The right to life is a fundamental, which is generally not subject to emergency derogation or other limitation,⁴² and which is essential for the exercise and enjoyment of other human rights,⁴³ including the right to health. In this regard, Article 6.1 of the International Covenant on Civil and Political Rights (ICCPR), to which Chile is a State Party,⁴⁴ provides:

“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

A similar protection is founded in regional treaties such as the American Convention of Human Rights,⁴⁵ to which Chile is also a Party.

In relation to States’ duty to respect the right to life, the UN Human Rights Committee has emphasized that it “must be respected and ensured without distinction of any kind”.⁴⁶ Similarly, the Committee has underscored that the legal protection to the right to life must be provided “equally to all individuals”.⁴⁷ This requires “effective guarantees against all forms of discrimination, including multiple and intersectional forms of discrimination”.⁴⁸

The Committee has also highlighted that States have the duty to “take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity”,⁴⁹ including “the prevalence of life-threatening diseases”.⁵⁰ States should ensure “adequate conditions for protecting the right to life”,⁵¹ including “measures

⁴⁰ Corte Interamericana de Derechos Humanos, Caso Vélez Loor Vs. Panamá, Medidas Provisionales, Resolución de 24 de junio de 2021, para 48.

⁴¹ Inter-American Commission of Human Rights, COVID-19 vaccines and inter-American human rights obligations, Resolution 1/2021, 6 April 2021, available at: <https://bit.ly/3iYnIex>

⁴² See for instance: International Covenant on Civil and Political Rights, article 4.2 and American Convention of Human Rights, article 27.2

⁴³ UN Human Rights Committee, General Comment No. 36: Article 6: right to life, CCPR/C/GC/36, 3 September 2019, para 2. See also: Inter-American Court of Human Rights, *Case of Noguera et al. v. Paraguay*, Merits, Reparations and Costs, Judgment of March 9, 2020, Series C No. 40, para 65.

⁴⁴ OHCHR, Status of Ratification, available at: <https://indicators.ohchr.org/>

⁴⁵ Article 4.1 provides: “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life”.

⁴⁶ UN Human Rights Committee, General Comment No. 36: Article 6: right to life, CCPR/C/GC/36, 3 September 2019, para 61.

⁴⁷ *ibid*, para 61.

⁴⁸ *ibid*, para 61.

⁴⁹ *ibid*, para 26.

⁵⁰ *ibid*, para 26.

⁵¹ *ibid*, para 26.

designed to ensure access without delay by individuals to essential goods and services such as food, water, shelter, health care."⁵²

Along the same lines, the Inter-American Court of Human rights has affirmed that States have the duty to generate "minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it".⁵³ Consequently, the protection of the right to life requires the protection of other human rights, such as the right to health, the right to a healthy environment, and the right to food.⁵⁴

Finally, in the direct context of COVID-19, the Human Rights Committee has stressed that States "must take effective measures to protect the right to life and health of all individuals within their territory and all those subject to their jurisdiction".⁵⁵ This would likely include measures necessary to ensure equitable vaccine access for all people, given the immediate and far-reaching threat to life brought on by COVID- 19.

C. The Rights to Freedom of Movement and Peaceful Assembly

The right to freedom of movement is "an indispensable condition for the free development of a person".⁵⁶ In relation to this right, Article 12.1 of the ICCPR provides:

"Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence".

In addition, Article 12.3 of the ICCPR established that limitations to this right must be:

"(...) provided by law, [be] necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and [be] consistent with the other rights recognized in the present Covenant".

A similar protection is founded in regional treaties such as the American Convention of Human Rights.⁵⁷

The UN Human Rights Committee has affirmed that its enjoyment "must not be made dependent on any particular purpose or reason for the person wanting to

⁵² *ibid*, para 26.

⁵³ Inter-American Court of Human Rights, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment of June 17, 2005, Series C No. 125, para 162.

⁵⁴ *ibid*, para 163.

⁵⁵ UN Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID- 19 pandemic, CCPR/C/128/2, 30 April 2020, available at: <https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf>

⁵⁶ UN Human Rights Committee, General Comment No. 27: Article 12 (Freedom of Movement), CCPR/C/21/Rev.1/Add.9, 1 November 1999, para 1.

⁵⁷ Article 22.1 provides: "Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law".

Article 22.3 provides: "The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others".

move or to stay in a place”.⁵⁸ Similarly, the Committee has stressed that States must protect this right from public and private interference.⁵⁹ In addition, the Committee has said that the permissible limitations to this right “must not nullify the principle of liberty of movement”.⁶⁰

The right of peaceful assembly is also a fundamental freedom that “enables individuals to express themselves collectively and to participate in shaping their societies”.⁶¹ This right “protects the ability of people to exercise individual autonomy in solidarity with others”.⁶² The UN Human Rights Committee has stressed that this right covers all types of peaceful assemblies “wherever they take place: outdoors, indoors and online; in public and private spaces; or a combination thereof”.⁶³

This right is protected in article 21 of the ICCPR, which also establishes the conditions for imposing limitations to this right:

“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”

In other words, any restrictions to the right to peaceful assembly must be provided by law, necessary and proportionate to one of the purposes identified in article 21, and non-discriminatory.⁶⁴ Moreover, any restriction “should be guided by the objective of facilitating the right, rather than seeking unnecessary and disproportionate limitations on it”.⁶⁵ In addition, the Committee has highlighted that States must not “prohibit, restrict, block, disperse or disrupt peaceful assemblies without compelling justification, nor to sanction participants or organizers without legitimate cause”.⁶⁶

The Inter-American Human Rights system also guarantees the right to peaceful assembly in Article 15 of the ACHR.⁶⁷

D. Limitations and Derogation to International Human Rights

In an attempt to combat the COVID-19 pandemic, States across the world, including Chile, have applied exceptional measures in their responses to the

⁵⁸ UN Human Rights Committee, General Comment No. 27: Article 12 (Freedom of Movement), CCPR/C/21/Rev.1/Add.9, 1 November 1999, para 5.

⁵⁹ *ibid*, para 6.

⁶⁰ *ibid*, para 1.

⁶¹ UN Human Rights Committee, General Comment No. 37: Article 21 (Right of peaceful assembly), CCPR/C/GC/37, 17 September 2020, para 1.

⁶² *ibid*, para 1.

⁶³ *ibid*, para 6.

⁶⁴ *ibid*, para 36 and f.f.

⁶⁵ *ibid*, para 36.

⁶⁶ *ibid*, para 23.

⁶⁷ Article 15 reads in full: “The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others.”

pandemic.⁶⁸ Many of these exceptional measures, which commonly included “lockdowns” or “quarantines”, placed restrictions or limitations on the enjoyment and access to human rights. In some instances, these measures have been taken pursuant to declared states of emergencies, or similar states.

International human rights law, including the ICCPR, allow for certain rights to be derogated from where a state of emergency that threatens the life of the nation has been declared and notified to the UN Secretary General.⁶⁹ Any measures derogating from human rights must be non-discriminatory and strictly necessary to meet a specific threat to the life of the nation. The derogations measures must strictly meet the conditions proportionality and necessity, meaning that no right can ever be suspended in its entirety.⁷⁰ The permissible scope of derogations in states of emergency is fully set out by the UN Human Rights Committee in its General Comment 29.⁷¹

The ACHR also provides for the possibility of derogation in emergency situations.⁷² Certain rights under the ICCPR⁷³ and ACHR⁷⁴ are not subject to derogation even in times of emergency, and the right to life is one of them.

Outside of states of emergency, certain rights are subject to other forms of limitation. For instance, the ICCPR allows for certain limitation to freedom of expression (Article 19), association (Article 22), assembly (Article 21), movement (Article 12.3), public trial (Article 14.1), and manifestation of religion or belief (Article 18.3). These limitations may only be for the purposes specified in their respective articles, including national security, public health, public order, public morals and protection of the rights of others. They must be non-discriminatory, provided by law and meet the conditions of necessity and proportionality. The scope of permissible limitations has been set out in various General Comments of the Human Rights Committee, including, among others, General Comment 34 on Freedom of Expression⁷⁵ and General Comment 37 on Freedom of Assembly.⁷⁶

This jurisprudence is informed and supplemented by the Siracusa Principles on the Limitations and Derogation Provisions of the International Covenant on Civil and Political Rights,⁷⁷ including the right to life and the right to freedom of peaceful assembly.⁷⁸ These Principles affirm that, to be lawful, an exceptional measure must be:

⁶⁸ In this regard, see for instance: Blavatnik School of Government, University of Oxford, Radcliffe Observatory Quarter, Our World in Data, Policy Responses to the Coronavirus Pandemic, available at: <https://ourworldindata.org/policy-responses-covid>

⁶⁹ See: ICCPR, Article 4.

⁷⁰ UN Human Rights Committee, General Comment No. 29: Article 4 (States of emergency), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 4.

⁷¹ *ibid.*

⁷² Article 27.

⁷³ Article 4.2.

⁷⁴ Article 27.2.

⁷⁵ UN Human Rights Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011.

⁷⁶ UN Human Rights Committee, General Comment No. 37: Article 21: the right of peaceful assembly, CCPR/C/GC/37, 17 September 2020.

⁷⁷ For a detailed treatment of different aspects of the application of Siracusa Principles in the context of COVID-19, see: B Sander & J Rudall (eds), COVID-19 and International Law *Opinio Juris* Symposium (March-April 2020), available at: <https://bit.ly/3j40TWO>

⁷⁸ UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights E/CN.4/1985/4, 28 September 1984.

- a. Provided for and carried out in accordance with the law;
- b. Based on scientific evidence;
- c. Directed toward a legitimate objective;
- d. Strictly necessary in a democratic society;
- e. The least intrusive and restrictive means available;
- f. Neither arbitrary nor discriminatory in application;
- g. Of limited duration; and
- h. Subject to review.⁷⁹

Importantly in the context of the right to health, the Siracusa Principles indicate that any limitations or derogations of rights in the name of a “public health” emergency must be “specifically aimed at preventing disease or injury or providing care for the sick and injured”.⁸⁰

Given the human rights obligations pertaining to the right to health outlined above, it is clear that the “public health” objectives that emergency measures and restrictions are undertaken to curb the COVID-19 pandemic must be specifically aimed at both addressing public health imperatives in general terms and realizing the right to health of all persons in a State’s jurisdiction without discrimination.⁸¹

In the narrow circumstances in which some human rights may be limited or derogated from to resolve a public health emergency such as brought on by COVID-19, the minimum core obligations in terms of the right to health are, according to the CESCR, non-derogable and generally not subject to such limitations or restrictions.⁸² Consistently with this, in relation to COVID-19, the CESCR has indicated that “minimum core obligations imposed by the [ICESCR] should be prioritized” in States responses to the epidemic.⁸³

Article 4 of ICESCR does provide for the limitation of ESCR but “only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”⁸⁴ However, in the specific context of the right to health, the CESCR has clarified that Article 4 is “primarily intended to protect the rights of individuals rather than to permit the imposition of limitations by States”.⁸⁵ To be lawful, restrictions on the right to health must therefore be consistent with a range of factors that map almost

⁷⁹ *ibid.*

⁸⁰ *Id* para 25-26 which read in full: “Public health may be invoked as a ground for limiting certain rights in order to allow a State to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured. Due regard shall be had to the International Health Regulations of the World Health Organization.”

⁸¹ T Hodgson and I Seiderman, COVID-19 Responses and State Obligations Concerning the Right to Health (Part 1), 1 April 2020, available at: <https://bit.ly/2WXy5rI>; and T Hodgson and I Seiderman, COVID-19 Responses and State Obligations Concerning the Right to Health (Part 2), 1 April 2020, available at: <https://bit.ly/2YuWxBo>

⁸² UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, 11 August 2000, para 47.

Also see: International Commission of Jurists, *Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses*, September 2020, page 14 to 17, available at: <https://bit.ly/3f4GhfO>

⁸³ UN Committee on Economic, Social and Cultural Rights, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, U.N. Doc. E/C.12/2020/1, 7 April 2020, para 11, available at: <https://undocs.org/E/C.12/2020/1>

⁸⁴ ICESCR, Art. 4.

⁸⁵ UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, 11 August 2000, paras 28 and 29.

exactly on the requirements for limitations of civil and political rights set out in the ICCPR and its jurisprudence, as well as the standards detailed in the Siracusa Principles.⁸⁶

Thus, for COVID-19 emergency measures to justifiably limit or restrict the rights to access to healthcare facilities, goods and services, such measures must comply with these requirements. The CESCR has made clear that as a general matter such measures must be: “necessary to combat the public health crisis posed by COVID-19”, “reasonable and proportionate”, “should not be abused”, and “should be lifted as soon as they are no longer necessary for protecting public health”.⁸⁷

⁸⁶ *ibid.*

⁸⁷ UN Committee on Economic, Social and Cultural Rights, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, U.N. Doc. E/C.12/2020/1, 7 April 2020, para 11, available at: <https://undocs.org/E/C.12/2020/1>

III. GENERAL OVERVIEW OF THE HUMAN RIGHTS SITUATION IN CHILE BEFORE THE PANDEMIC

Before the onset of the COVID-19 pandemic, despite relative economic and political stability, Chile was already facing severe social and economic strains. By 2016, the UN Special Rapporteur on Extreme Poverty and Human Rights, for example, had observed that economic model adopted in Chile, which gives private businesses the primary role in the provision of social services, had led to an unequal access to social rights,⁸⁸ such as the right to health, right to education,⁸⁹ right to social security, and right to adequate housing.⁹⁰

Chile has amongst the highest levels of inequality of countries in the Americas when it comes to economic distribution.⁹¹ A significant number of Chileans struggle to secure sufficient income to guarantee themselves an adequate standard of living,⁹² and many lack adequate health insurance coverage and social security.⁹³ In this regard, in 2015, the United Nations Committee on Economic, Social, and Cultural Rights (CESCR) expressed concern about the fact that despite continued economic growth and the adoption of some welfare protection measures which have narrowed the inequality gap, that gap has not been reduced sufficiently and “that the levels of poverty and extreme poverty continue[d] to affect the most disadvantaged and marginalized groups”.⁹⁴

More recently, in 2019, according to Chile’s National Institute on Human Rights (*Instituto Nacional de Derechos Humanos*), multidimensional poverty was 20.7% (3.530.889 people).⁹⁵ The Institute also observed that at least 50% of pensions were at level that fell below the poverty line.⁹⁶

Furthermore, persons from marginalized or disadvantaged groups have been disproportionately affected by social and economic inequality, including women,⁹⁷ indigenous peoples,⁹⁸ LGBTI persons.⁹⁹ In addition, reports by the Office of the High Commissioner of Human Rights and the InterAmerican Commission indicate

⁸⁸ See: Programa de las Naciones Unidas para el Desarrollo, *Desiguales, Orígenes, cambios y desafíos de la brecha social en Chile*, 2017; and Instituto Nacional de Derechos Humanos, *Informe anual situación de los derechos humanos en Chile 2019*, 2019, page 5 and ff, available at: <https://n9.cl/psgrv>

⁸⁹ Special Rapporteur on extreme poverty and human rights, *Mission to Chile*, A/HRC/32/31/Add.1, 8 April 2016, para 14 to 16.

⁹⁰ Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, *Mission to Chile*, A/HRC/37/53/Add.1, 17 January 2018, para 22 and ff.

⁹¹ Office of the High Commissioner for Human Rights, *Report of the Mission to Chile*, 30 October – 22 November 2019, 2019, para 9, available at: <https://n9.cl/wcrl>; Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, *Mission to Chile*, A/HRC/37/53/Add.1, 17 January 2018, para 6; Special Rapporteur on extreme poverty and human rights, *Mission to Chile*, A/HRC/32/31/Add.1, 8 April 2016, para 13.

⁹² See, for instance: Fundación Sol, *Fundación Sol publica estudio que establece el panorama sobre los salarios en Chile y el bajo valor de la fuerza de trabajo*, 10 November 2020, available at: <https://n9.cl/redk2>

⁹³ For instance, see: M C Hernández, *France 24, Reforma previsional en Chile: el gran clamor en medio del estallido social*, France 24, 20 January 2020, available at: <https://n9.cl/941wg>

⁹⁴ CESCR, *Concluding observations on the fourth periodic report of Chile*, E/C.12/CHL/CO/4, 7 July 2015, para 20, 24, 28, 30.

⁹⁵ Instituto Nacional de Derechos Humanos, *Informe anual situación de los derechos humanos en Chile 2019*, 2019, page 7, available at: <https://n9.cl/psgrv>

⁹⁶ *ibid*, page 8.

⁹⁷ For instance, see: Committee on the Elimination of Discrimination against Women, *Concluding observations on the seventh periodic report of Chile*, CEDAW/C/CHL/CO/7, 14 March 2018, para 20; Special Rapporteur on extreme poverty and human rights, *Mission to Chile*, A/HRC/32/31/Add.1, 8 April 2016, para 40 and ff.

⁹⁸ Special Rapporteur on extreme poverty and human rights, *Mission to Chile*, A/HRC/32/31/Add.1, 8 April 2016, para 53 and f.f.

⁹⁹ *ibid*, para 35 and f.f.

that many migrants and refugees have been subjected to discrimination and violence.¹⁰⁰

Social uprising (2019 Chilean protest)

These precarious conditions reached a tipping point in October 2019, when an increase in the underground train fare in Chile's capital (Santiago de Chile) triggered social protests and unrest throughout the country.¹⁰¹ Starting on 18 October 2019,¹⁰² thousands of Chileans went out to the streets in protest to demand fundamental changes to the social and economic model adopted by Chile.¹⁰³ Security forces, including the military and the National Police (carabineros), were reported to have employed excessive and unnecessary use of force.¹⁰⁴ Some protesters also committed unlawful acts of violence.¹⁰⁵

The wave of protests prompted growing pressure on the Chilean government to adopt measures to address popular demands.¹⁰⁶ In particular, on 15 November 2019, after discussions with the National Executive, the Chilean Congress approved a President's proposal to develop a new constitution. To do so, it was decided that Chileans would vote on the proposal through a national plebiscite.

The 1980 Constitution and Social, Economic, and Cultural Rights (ESCR)

Chile's 1980 Constitution was enacted during the Pinochet right-wing military dictatorship. The Constitution has been partially amended multiples times since then to attempt to align it with democratic values, but was not seen by many as not fit for contemporary purposes and falling short in its human rights related provisions, as observed by the former UN Special Rapporteur on Human Rights

¹⁰⁰ Office of the High Commissioner for Human Rights, Report of the Mission to Chile, 30 October – 22 November 2019, 2019, para 12, available at: <https://n9.cl/wcrl>; Inter-American Commission on Human Rights, IACHR Issues Preliminary Observations and Recommendations Following On-Site Visit to Chile, 31 January 2020, available at: <https://n9.cl/hoh42>

¹⁰¹ A Taub, 'Chile Woke Up': Dictatorship's Legacy of Inequality Triggers Mass Protests, The New York Times, 3 November 2019, available at: <https://n9.cl/8n444>

¹⁰² The first protests started on 14 October 2019. However, the massive protests started on 18 October 2019.

¹⁰³ D. Blandón Ramírez, Chile: ¿por qué protestan en una de las economías más prósperas de la región? France 24, 24 October 2019, available at: <https://n9.cl/5713m>

¹⁰⁴ In this regard, the Inter-American Commission on Human Rights received documented information and that "pellets and gas cylinders had been shot at demonstrators' bodies, necks, and faces". The Office of the High Commissioner for Human Rights noted that "the police and the army have not adhered to international human rights norms and standards relating to management of assemblies and to the use of force". In addition, it should be noted that in the context of 2019 protests alone 29 persons were reportedly killed and more than 13,000 more people required emergency medical attention, with 405 people suffered eye injuries from the use of pellets and other devices. There were also at least 1,172 documented cases of potential torture or ill-treatment of protestors the police and military.

See: Inter-American Commission on Human Rights, IACHR Issues Preliminary Observations and Recommendations Following On-Site Visit to Chile, 31 January 2020, available at: <https://n9.cl/hoh42>; Office of the High Commissioner for Human Rights, Report of the Mission to Chile, 30 October – 22 November 2019, 2019, para 22, available at: <https://n9.cl/wcrl>; Instituto Nacional de Derechos Humanos, Informe anual situación de los derechos humanos en Chile 2019, 2019, page 22 and ff, available at: <https://n9.cl/psgrv>; Amnesty International, Eyes on Chile: Police Violence and Command Responsibility During the Period of Social Unrest, October 2020, available at: <https://n9.cl/cy48a>; and Instituto Nacional de Derechos Humanos, Primer Informe de Seguimiento a las Recomendaciones del INDH en su Informe Anual 2019, 2 February 2021, page 11 and ff, available at: <https://n9.cl/m8xa6>

¹⁰⁵ See: Inter-American Commission on Human Rights, IACHR Issues Preliminary Observations and Recommendations Following On-Site Visit to Chile, 31 January 2020, available at: <https://n9.cl/hoh42>; Office of the High Commissioner for Human Rights, Report of the Mission to Chile, 30 October – 22 November 2019, 2019, para 96 and ff, available at: <https://n9.cl/wcrl>

¹⁰⁶ It should be noted that President Piñera suspended the increase in the underground train fare in Santiago de Chile on 19 October 2019, a day after the protests started. See: CNN Español, Sebastián Piñera suspende el alza de tarifas del metro de Santiago y se decreta toque de queda, 19 October 2019, available at: <https://cnn.it/3iRuWkq>

and Extreme Poverty.¹⁰⁷ Moreover, many Chileans reject the current Constitution “due to its authoritarian impact and its illegitimate origins”.¹⁰⁸

The 1980 Constitution has some provisions concerning protections for the rights to health, education¹⁰⁹ and social security.¹¹⁰ However, “the formulations used do not generally conform to international standards and are not firmly anchored in the language of rights and obligations”.¹¹¹ Overall, the Constitutional text “does not give a prominent role to the State to guarantee economic and social rights”.¹¹² It omits the right to housing, food, and water and sanitation which are necessarily connected to the protection of the rights health, education and social security.

Consequently, a new constitution became seen among many Chileans as an opportunity to produce profound social changes to Chilean society, including in regard to combatting poverty and eradicating inequality.¹¹³

Despite the importance of the announcement, the protests and demonstrations continued¹¹⁴ for the rest of 2019, although with less intensity.¹¹⁵ In 2020, demonstrations started again in early February,¹¹⁶ with protestors taking to the streets every Friday in Santiago de Chile.¹¹⁷ In March 2020, with the outbreak of the COVID-19 in Chile, protests halted for a couple of weeks, but resumed again in late April 2020.¹¹⁸

In relation to the process for the elaboration of a new constitution, in October 2020, through a plebiscite,¹¹⁹ Chileans approved the initiative for the constitution by a Constitutional Convention (*Convención Constituyente*) of popularly elected citizens.¹²⁰ On 4 July 2021, the Constitutional Convention, tasked with drafting a new Constitution, was inaugurated. It is expected that a new Constitution could be approved by mid-2022.¹²¹

¹⁰⁷ Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Mission to Chile, A/HRC/37/53/Add.1, 17 January 2018, para 12.

¹⁰⁸ J P McSherry, Is This the Year of Structural Change in Chile?, Jacobin Magazine, 18 June 2021, available at: <https://n9.cl/6k9gp>

¹⁰⁹ Chilean Constitution, article 19.10.

¹¹⁰ Chilean Constitution, article 19.18.

¹¹¹ Special Rapporteur on extreme poverty and human rights, Mission to Chile, A/HRC/32/31/Add.1, 8 April 2016, para 25.

¹¹² A Salinas Rivera, Chile: designing a path to solve the political and social crisis, International Commission of Jurists, 24 November 2019, available at: <https://n9.cl/h7sj>

¹¹³ *ibid.*

¹¹⁴ J Geay, Los chilenos retoman las calles tras la restitución del polémico intendente de Santiago, France 24, 8 February 2020, available at: <https://bit.ly/3zmIIP>

¹¹⁵ See: Infobae, Chile teme recrudescimiento de la violencia tras dos meses de protestas, 19 December 2019, available at: <https://n9.cl/clng>; El Universo, Un manifestante murió durante protesta en Chile; ya suman 29 muertos, 28 December 2020, available at: <https://n9.cl/tokh2>

¹¹⁶ Human Rights Watch, World Report 2021, Chile, available at: <https://n9.cl/2sed>

¹¹⁷ See: DW, Incendios marcan nueva jornada de protestas en Chile, 15 February 2020, available at: <https://n9.cl/8sku1>; R Montes, Chile pone una pausa a las protestas a la espera del plebiscito constitucional, El País, 7 February 2020, available at: <https://n9.cl/qypum>

¹¹⁸ El Mundo, Noche de protestas en Chile pese al estado de excepción por el coronavirus, 28 April 2020, available at: <https://n9.cl/r05ff>

¹¹⁹ The plebiscite was initially scheduled for April 2020, but as a result of the onset of the COVID-19 pandemic, it was delayed to October 2020.

Official information about the plebiscite can be found at: Servel, Plebiscito Nacional 2020, available at: <https://bit.ly/3xCaIRC>

¹²⁰ Two questions were asked in the plebiscite: Do you approve or reject writing a new constitution? And if you approve, who should draft it, a Constitutional Convention of popularly elected citizens, or a mixed body with half citizens and half legislators?

¹²¹ Gobierno de Chile, Proceso Constituyente, available at: <https://n9.cl/x35fd>

IV. THE GOVERNMENT'S RESPONSE TO THE COVID-19 PANDEMIC

Since January 2020, even before the first documented cases of COVID-19 in the country, the Chilean Government started adopting measures to address the incipient situation of COVID-19 and inhibit its spread.¹²² On 5 February 2020, based on different domestic regulations regarding the control of a pandemic and contagious diseases, and in particular in terms of regulations enacted pursuant to the Sanitary Code (Decree 725 of 1968),¹²³ the Ministry of Health issued a Decree declaring a "sanitary alert" (*Alerta Sanitaria*).¹²⁴

This declaration empowered the Ministry of Health and other health authorities to adopt measures to respond to COVID-19, including by lifting of some legal restrictions relating to the acquisition of health goods and services and the hiring of health workers and other medical personnel. The declaration also granted the Ministry the power to regulate prices of medicines, medical supplies, and health services. Initially, the sanitary emergency was declared for one year. At the time of writing, the sanitary alert had been prolonged until 31 December 2021.¹²⁵

On 3 March 2020, the Ministry of Health confirmed the first documented COVID-19 case in the country.¹²⁶ On the same day, President Piñera sent a message of calm to Chileans and stated that Chile was prepared to address the COVID-19 pandemic.¹²⁷ In the following days, the Government took a range of decisions that were aimed at avoiding the spread of the virus, including closing schools¹²⁸ and all of the country's borders.¹²⁹

On 18 March and in parallel to the declaration of the sanitary emergency, president Piñera issued a decree declaring a "state of exception of catastrophe for public calamity" (*Estado de Excepción Constitucional de Catástrofe, por Calamidad Pública*).¹³⁰ The state of exception was prolonged several times,¹³¹ with the latest renewal persisting until 30 September 2021.¹³²

On 22 March 2020, based on the state of exception, a national curfew was declared.¹³³ As elaborated further below, the declaration of a sanitary alert and

¹²² A summary of the Government response is available at: <https://www.gob.cl/coronavirus/gestionpandemia/>

¹²³ See articles: 3, 8, 9, 10, 20 to 41, 36, 57, 67, 94, 121 and 155.

¹²⁴ Ministerio de Salud, Decreto 4 de 2020, available at: <https://n9.cl/1let>

¹²⁵ Ministerio de Salud, Decreto 1 de 2021, article 10, available at: <https://bit.ly/2YISeZx>

¹²⁶ Ministerio de Salud, Ministerio de Salud confirma primer caso de coronavirus en Chile, 3 March 2020, available at: <https://n9.cl/xcv7>

¹²⁷ Diario Concepción, Coronavirus en Chile: Piñera asegura que "estamos preparados para enfrentar adecuadamente esta epidemia", 3 March 2020, available at: <https://n9.cl/80n3o>

¹²⁸ Ministerio de Educación, Se extiende período de suspensión de clases, 25 March 2020, available at: <https://n9.cl/14eb>

¹²⁹ Gobierno de Chile, Chile ingresa a fase 4 por Coronavirus y Presidente anuncia cierre de fronteras y asegura cadena de abastecimiento, 16 March 2020, available at: <https://n9.cl/0zsmv>

¹³⁰ Ministerio del Interior y Seguridad Pública, Decreto Supremo 104 de 2020, available at: <https://n9.cl/x8igg>

¹³¹ Ministerio del Interior y Seguridad Pública: Decreto Supremo 269 de 2020, Decreto Supremo 400 de 2020, Decreto Supremo 646 de 2020, Decreto Supremo 72 de 2021, and Decreto Supremo 153 de 2021.

¹³² Ministerio del Interior y Seguridad Pública, Decreto Supremo 72 de 2021, available at: <https://n9.cl/wntmp>

¹³³ Ministerio de Salud, Ministro de Salud anuncia nuevas medidas para enfrentar el brote de COVID-19 en el país, 22 March 2020, available at: <https://n9.cl/uzin9>

the parallel state of exception were used by the National Government to establish curfews and quarantines throughout the course of the pandemic.¹³⁴

During March and April 2020, despite the increase of COVID-19 cases, President Piñera continued to assert that the situation was under control.¹³⁵ Indeed, in late April 2020, the Government started designing a plan for "return to normality", which included reopening schools and shopping centres. It also contemplated returning to in-person work for public servants.¹³⁶ This plan was ultimately not implemented because the rate of COVID-19 transmissions worsened.¹³⁷

It was only in mid-May 2020, when Chile had reported over 40,000 COVID-19 cases,¹³⁸ that President Piñera finally admitted that Chile, particularly its health system, was not adequately prepared for the COVID-19 pandemic.¹³⁹ During May and June 2020, reported COVID-19 cases and COVID-19 related deaths increased dramatically and reached their highest level of the entire pandemic.¹⁴⁰ In a single day on 12 June 2020, Chile reported 6,754 new COVID-19 cases.

These high transmission levels persisted with the occupancy of ICU beds increased steadily from late August 2020. This trend continued until mid-2021 when the average occupancy of ICU beds was over 95%.¹⁴¹ Since mid-2021, Chile has experienced a sustained decrease in the number of COVID-19 cases.¹⁴²

As of 11 October 2021, the National Government had documented 1,663,383 COVID-19 cases. At least 37,571 people have died due to COVID-19.¹⁴³ As with most countries, this is most likely a significant underestimate as a result of undetected "excess mortality".¹⁴⁴

COVID-19 measures

In relation to health measures, while taking significant strain as a result of COVID-19, the Chilean health system did not collapse. An integrated health network for COVID-19 (*red integrada de salud COVID-19*) was implemented in order to respond to COVID-19 effectively.¹⁴⁵ This allowed people to access either to public

¹³⁴ For instance, see: Ministerio de Salud, Resolución exenta 591 de 2020, Resolución exenta 1.057 de 2020, Resolución exenta 1106 de 2020, Resolución exenta 43 de 2021, and Resolución exenta 590 de 2021.

¹³⁵ El Mostrador, Del "estamos preparados" al "tenemos que ser realistas": el giro de Piñera desde el inicio de la pandemia, 18 May 2020, available at: <https://n9.cl/nccf>

¹³⁶ F Paúl, Coronavirus en Chile | "Nueva normalidad": la "arriesgada" y polémica apuesta del país para retomar la actividad económica y escolar en medio de la pandemia, BBC News, 23 April 2020, available at: <https://n9.cl/luzm5>

¹³⁷ Observatorio Ciudadano, Informe sobre situación de los derechos humanos en Chile en el contexto de pandemia COVID-19, November 2020, Page 7, available at: <https://n9.cl/j4irt>

¹³⁸ As Chile, Curva del coronavirus en Chile hoy, 17 de mayo: ¿cuántos casos, contagios y muertes hay?, 17 May 2020, available at: <https://n9.cl/fkqz>

¹³⁹ Ministerio de Salud, Presidente Piñera anuncia paquete de ayuda para enfrentar la pandemia del Coronavirus y la crisis económica, 17 May 2020, available at: <https://n9.cl/2f0t9>

¹⁴⁰ See: WHO Coronavirus (COVID-19) Dashboard, Chile, available at: <https://n9.cl/juxo5>

¹⁴¹ Presidente de la República, Oficio del Gabinete Presidencial No. 749 de 2021, resumen ejecutivo, 23 June 2021, page 2, available at: <https://n9.cl/s57wl>

¹⁴² Gobierno de Chile, Cifras Oficiales Covid-19, available at: <https://www.gob.cl/coronavirus/cifrasoficiales/>

See also: P Luna, Chile respira y vive uno de los momentos más estables de la pandemia, France 24, 4 August 2021, available at: <https://bit.ly/3gZq2Za>

¹⁴³ Gobierno de Chile, Cifras Oficiales Covid-19, available at: <https://n9.cl/ex1a7>

¹⁴⁴ World Health Organization, The true death toll of COVID-19 - Estimating global excess mortality, available at: <https://www.who.int/data/stories/the-true-death-toll-of-covid-19-estimating-global-excess-mortality>; IHME Healthdata, Estimation of excess mortality due to COVID-19, 13 May 2021, available at: <http://www.healthdata.org/special-analysis/estimation-excess-mortality-due-covid-19-and-scalars-reported-covid-19-deaths>.

¹⁴⁵ Ministerio de Salud, Resolución Exenta 156 del 1 de abril de 2020.

or private hospitals according to the capacity of the hospitals. In addition, during the pandemic, the number of ICU beds available in the country has been increased to meet the demand for such services and facilities.¹⁴⁶

Despite the above, there has been a serious disruption in non-COVID-19 related health services. This has had a particularly negative effect on people with serious diseases.¹⁴⁷ Access to reproductive health services, for example, has also reportedly been negatively affected during the pandemic. While it is unclear just how widespread these issues have been, the organization *Miles Chile*, has documented the significant challenges for women in accessing contraception and accessing to safe abortion.¹⁴⁸

Concerning social and economic measures, since mid-March 2020, the National Government has adopted multiple and varying measures to tackle the effect of the pandemic and attempted to curb its spread.¹⁴⁹ For example, it established measures to provide economic benefits and help to families in a vulnerable situations,¹⁵⁰ employees who temporarily lost work opportunities due to the pandemic,¹⁵¹ and small and medium-sized businesses.¹⁵²

Some specific aspects of these measures have been problematic from a human rights and rule of law perspective. For instance, employment protection measures focus on formal workers (*employees*), and exclude informal workers who may be in even more desperate need for support as a result of the impact of the pandemic and pandemic response measures such as lockdowns on their income.¹⁵³

¹⁴⁶ See: Ministerio de Salud, Fortalecimiento Red Asistencial frente al COVID-19 Subsecretaría de Redes Asistenciales, September 2020, available at: <https://bit.ly/2YwtQOx>; Ministerio de Salud, Resolución Exenta 156 del 1 de abril de 2020; and Ministerio de Salud, Resolución Exenta N° 356 del 18 de mayo del 2020

See also: JJ Faundes Peñafiel, A Lucas Garín and G Lillo Ortega, Covid-19 vaccination in Chile, Heinrich-Böll-Stiftung, 14 June 2021, available at: <https://eu.boell.org/en/2021/06/14/covid-19-vaccination-chile>

Also see: Hospital Regional de Talca, Hospital Regional de Talca aumenta a 76 camas UCI para enfrentar demanda Covid-19, 26 April 2021, available at: <https://bit.ly/3DNUfqu>; El Mostrador, Luis Castillo deja coordinación de camas críticas de la red integrada de salud Covid-19: "Hemos cumplido cada una de las metas que nos hemos propuesto", 1 September 2021, available at: <https://bit.ly/3h3zPqE>; Hospital Clínico Magallanes, Unidad de Cuidados Intensivos de Red Integrada COVID-19 ha aumentado 160% en solo un año para hacer frente a la pandemia, 8 May 2021, available at: <https://bit.ly/3mXZ9C9>

¹⁴⁷ See, for instance: Monitoreo Nacional de Síntomas y Prácticas COVID-19 en Chile (MOVID-19), ¿Cuál ha sido el impacto de la pandemia en el acceso a atenciones de salud?, 5 October 2020, available at: <https://bit.ly/3n8XPNO>; Colegio Médico de Chile, El impacto de covid19 en el sistema de salud y propuestas para la reactivación, 19 August 2020, available at: <https://bit.ly/38NOKCC>

¹⁴⁸ Observatorio Ciudadano, Informe sobre situación de los derechos humanos en Chile en el contexto de pandemia COVID-19, November 2020, Page 44 and 45, available at: <https://n9.cl/j4irt>; Corporación Miles, Acceso a la salud sexual y reproductiva durante la pandemia, 2020, available at: <https://bit.ly/38GZ8Ky>; Corporación Miles, Monitoreo latinoamericano a las medidas de salud sexual y reproductiva durante la pandemia del Covid-19, Minuta Temática sobre la situación en Chile, available at: <https://bit.ly/3zPKnku>; Corporación Miles, Tercer Informe sobre Derechos, Salud Sexual y Reproductiva y Violencia de Género en Chile, 9 April 2021, available: <https://bit.ly/3yOfrrOj>

See also: C Santiago and F Solar, Brecha de género en tiempos de pandemia: cómo el COVID impacta en la detección de cánceres que afectan a las mujeres, 1 May 2021, available at: <https://bit.ly/3yOic4Z>; Universidad de Valparaíso, Estudio evidencia dificultades para acceder a salud sexual y aborto legal durante la pandemia, 11 May 2021, available at: <https://bit.ly/3BKjFdA>; P Morales and S Valenzuela, 22% disminuyó el acceso a la Ley de Interrupción Voluntaria del Embarazo en pandemia, 27 May 2021, available at: <https://bit.ly/3tkexK3>; Centro de Derechos Reproductivos and Humanas, Información independiente sobre Chile para el grupo de trabajo anterior al 80o período de sesiones del Comité para la Eliminación de la Discriminación contra la Mujer, 1 February 2021, available at: <https://bit.ly/3l0SdBG>

¹⁴⁹ A summary of the measures is available at: Ministerio de Economía, Formento y Turismo, La Guía MIPYME, Medidas de apoyo en el contexto del plan de emergencia y de reactivación económica del gobierno de Chile - 2020/2021, July 2021, available at: <https://bit.ly/3j1xyvB>

Regarding employment protection measures, see also: Organización Internacional del Trabajo, Chile > Impacto de la COVID-19 sobre los mercados de trabajo y la generación de ingresos, Noviembre 2020, available at: <https://bit.ly/3BNqZoU>

¹⁵⁰ For instance, see: Ley 21.230 de 2020.

¹⁵¹ For instance, see: Ley 21.227 de 2020. See also: Decreto 930 de 2021.

¹⁵² For instance, see: Ley 21.354 de 2021 and Ley 21.353 de 2021.

¹⁵³ Ciper, Para que nunca más en Chile: hacia una salud y vida digna para todos y todas, 15 April 2020, available at: <https://n9.cl/25twz>

Furthermore, although some modifications have been adopted to expand the scope of these relief measures, these efforts have been insufficient to effectively respond to the adverse human rights and rule of law impact wrought by the pandemic, particularly in regard to persons from marginalized groups of the population. Overall, therefore, the pandemic has exacerbated the already troubling situation of poverty and inequality in Chile.¹⁵⁴ While such pressures may be an inevitable consequence of the pandemic, as evidenced elsewhere, the steps taken to mitigate them have been inadequate.

According to the Ministry of Social Development and Family (*Encuesta Casen*), in 2020, 10.8% of Chilean inhabitants (2.112.185 people) were living in poverty, and 4,3% of Chilean inhabitants (831.232 people) were living in conditions of extreme poverty, and increase In 2017, these figures were 8,6% and 2,3%, respectively.¹⁵⁵ Similarly, the Ministry has indicated that in 2020, the income of 20% the wealthiest families in Chile was 11.7 times higher than the income of 20% the poorest families. Such a vast chasm had not been recorded in Chile since the mid-90s.¹⁵⁶

In addition, it should be noted that to tackle the economic crisis, Congress has, on three occasions, approved withdrawals from retirement funds. As of August 2021, 90% of the Chilean workers have taken out money from their funds with almost US\$ 50,000 million withdrawn.¹⁵⁷ In the future, this situation risks jeopardizing access to an adequate pension for a potentially large number of workers and their families with potential consequences for the realization of right to social security¹⁵⁸.

A. THE USE OF THE STATE OF EXCEPTION

On 18 March 2020, at the onset of the COVID-19 pandemic, President Piñera declared a "state of exception of catastrophe for public calamity" (*Estado de Excepción Constitucional de Catástrofe, por Calamidad Pública*). At the beginning of the pandemic, states of exception, emergency or similar measures were adopted by a number of executive authorities worldwide to tackle the unexpected effects of COVID-19.¹⁵⁹

In Chile, the state of exception lasted until 30 September 2021. This means that the measure was in force for one year and a half. Consequently, its use has characterized the Government's responses to the pandemic.

¹⁵⁴ Ministerio de Desarrollo Social y Familia, Ministerio de Desarrollo Social y Familia entrega resultados de la Encuesta Casen en Pandemia 2020, 5 July 2021, available at: <https://n9.cl/2xj6l>

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

¹⁵⁷ F Zamarín, Chile: Lo que hay en juego detrás de un nuevo retiro de fondos de pensiones, Forbes, 19 August 2021, available at: <https://bit.ly/3l2pDQ8>

¹⁵⁸ See: International Covenant on Economic, Social and Cultural Rights, article 9; UN Committee on Economic, Social and Cultural Rights, General Comment No. 19: The right to social security (Article 9), 4 February 2008, E/C.12/GC/19.

¹⁵⁹ According to the International Center for Not-for-Profit Law, 108 countries enacted "emergency declarations". See: <https://www.icnl.org/covid19tracker/>

A.1. Chile's legislation on the state of exception of catastrophe and international human rights law

According to Article 43 of the Chilean Constitution,¹⁶⁰ during a state of exception in the form of a "state of catastrophe in case of public calamity", the president is empowered to impose certain restrictions on the rights to freedom of movement and freedom of assembly, and may also adopt extraordinary administrative measures to restore the normality in the emergency area(s) so designated.

The Chilean Constitution also grants broad powers to military forces during a state of exception – a decision which, as mentioned above, is not itself subject to judicial review. According to Article 41, a consequence of the declaration is that the president can appoint one or more "Chiefs of National Defence" (*Jefes de la Defensa Nacional*), who are high ranking military officials, to be placed in charge of one or more emergency areas.

In these areas so designated, the Chiefs of National Defence have extensive powers, including to: (1) maintain public order; (2) dictate guidelines about the use of force; (3) control the access and exit of people (curfews); (4) order the storage of essential goods; and (5) establish conditions for public meetings or events.¹⁶¹ Chilean law also allows the president to delegate all or part of their presidential functions to the Chiefs of National Defence.¹⁶²

States of exception in the Chilean Constitution

The Chilean Constitution provides for various different forms of states of exception (*Estados de excepción constitucional*):¹⁶³ state of assembly in case of international war (*estado de asamblea, en caso de guerra exterior*); state of siege in case of non-international war or grave internal commotion, (*estado de sitio, en caso de guerra interna o grave conmoción interior*); and state of catastrophe in case of public calamity (*estado de catastrofe, en caso de calamidad pública*).

The Chilean Constitution gives extraordinary powers to the president and the military forces during all of these states of exception.

Significantly, the Chilean Constitution and law do not comply with prevailing international standards in international law on emergency-motivated restrictions of human rights. In particular, it should be highlighted the regulation established

¹⁶⁰ Article 43 reads in full:

"By declaring a state of assembly, the President of the Republic is empowered to suspend or restrict personal freedom, freedom of assembly and freedom to work. He will also be able to restrict the exercise of the right of association, intercept, open or register documents and all class of communications, provide for the confiscation of assets and establish limitations to the exercise of the right of property.

By declaring a state of siege, the President of the Republic may restrict freedom of movement and arrest people in their own dwellings or places determined by law and which are not prisons nor are they destined to the detention or imprisonment of common prisoners. He may also suspend or restrict the exercise of the right of assembly.

By declaring a state of catastrophe, the President of the Republic may restrict the freedoms of movement and assembly. He may, likewise, provide for confiscation of assets, establish limitations on the exercise of the right of property and adopt extraordinary measures of administrative character that are necessary for the speedy restoration of normalcy in the affected zone.

By declaring a state of emergency, the President of the Republic may restrict the liberties of movement and assembly."

¹⁶¹ See: Ley 18.415 de 1985, and Ministerio de Defensa Nacional, Decreto 8 de 2020.

¹⁶² Ley 18.415 de 1985, artículo 6.

¹⁶³ Chilean Constitution, articles 39 to 45. An English version of the Constitution is available at: <https://bit.ly/2UXhLXk>

in Article 4 the International Covenant on Civil and Political Rights (ICCPR), to which Chile is a State Party.

According to Article 4, in case of a public emergency “which threatens the life of the nation and the existence of which is officially proclaimed”, States are permitted to derogate parts of obligations in regard to some but not all rights, of the ICCPR temporarily. These measures of derogation are only valid if a set of strict conditions are met:

- a. There is a formal declaration of a state of emergency by the State.¹⁶⁴
- b. The measures are strictly necessary¹⁶⁵ and limited “to the extent strictly required by the exigencies of the situation”.¹⁶⁶
- c. The measures are “of an exceptional and temporary nature”.¹⁶⁷
- d. The measures are non-discriminatory.¹⁶⁸
- e. The measures are not “inconsistent with their other obligations under international law”.¹⁶⁹
- f. The State immediately informs other States Parties of the ICCPR, through the intermediary of the Secretary-General of the United Nations, of the measures adopted (regime of international notification).¹⁷⁰

A similar provision for what is termed the “suspension” of guarantees is also found in Article 27 of the American Convention on Human Rights (ACHR), to which Chile is a State Party. In cases of “war, public danger, or other emergency that threatens the independence or security of a State Party”, the Article allows States to take actions to derogate part of its obligations of the Convention temporarily. In addition, the Article establishes that States have the obligation to immediately inform other States Parties of the measures adopted through the Secretary General of the Organization of American States.

As they must be of a temporary nature, the legislative authorities should conduct “prompt and periodic independent review by... of the necessity for derogation measures.”¹⁷¹

The present Chilean Constitution fails to comply with these international standards. Rather, it allows the the president, acting alone, to prolong the state of exception for up to one year without the Congress’s approval. Indeed, no indication is given that the president is required to consult with anyone, including their Ministers, other executive officials or experts when determining or extending

¹⁶⁴ UN Human Rights Committee, General Comment No. 29: Article 4 (States of emergency), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 2.

¹⁶⁵ *ibid*, para 3 and 5.

¹⁶⁶ ICCPR, article 4

See also: UN Human Rights Committee, General Comment No. 29: Article 4 (States of emergency), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 4 and f.f.

¹⁶⁷ UN Human Rights Committee, General Comment No. 29: Article 4 (States of emergency), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 8.

¹⁶⁸ ICCPR, article 4

See also: UN Human Rights Committee, General Comment No. 29: Article 4 (States of emergency), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 8.

¹⁶⁹ ICCPR, article 4

¹⁷⁰ See: UN Human Rights Committee, General Comment No. 29: Article 4 (States of emergency), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 17.

¹⁷¹ The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights E/CN.4/1985/4, 28 September 1984, para 55.

a state of exception. The president is merely required to inform Congress about the measures that have been adopted in response to the declaration of a state of exception. It is only after the declaration has subsisted for 180 days that Congress might end the state of exception if it decides that the reasons for the declaration have completely ceased.¹⁷²

In addition, the Constitution does not contemplate any automatic judicial review for the regulations issued during this state. Article 45 of the Constitution allows for limited judicial review of measures undertaken that impact on constitutional rights during states of exception. However, it does not allow the courts to question “the bases or the factual circumstances invoked by the authority to decree the states of exception”.

A.2. State of exception during the COVID-19 pandemic

By issuing Decree 104 of 2020, the Chilean president declared a “state of exception of catastrophe for public calamity” to address the COVID-19 pandemic. Although the Decree mentioned the need to adopt exceptional measures to protect the life and health of Chilean inhabitants,¹⁷³ it focused exclusively on the designation and functions of Chiefs of National Defence in line with Article 41 of the Constitution. In this respect, 16 Chiefs of National Defence were appointed by the president, one for each region of the country.

Importantly, the Decree determined that the Chiefs were allowed to instruct local government authorities about the best way to implement sanitary measures.¹⁷⁴ Furthermore, the Chiefs had authority to decide the manner on how sanitary measures to halt the spread of COVID-19 are applied in the regions. To do so, the Decree set out that the Chief should follow the measures and guidance issued by the Ministry of Health.¹⁷⁵

In addition, it is worth mentioning that Chile has not fully complied with its obligation to notify the measures adopted due to the state of exception to other States Parties of the ICCPR and of the ACHR. In this regard, in 2020, Chile did file

¹⁷² Constitución Política, artículo 41, which reads in full: “Article 41 The state of catastrophe, in case of public calamity, will be declared by the President of the Republic, determining the affected zone. The President of the Republic will be obliged to inform the National Congress of the measures adopted in virtue of the state of catastrophe. The National Congress may waive the declaration when one hundred and eighty days have elapsed, if the reasons for it have ceased absolutely. However, the President of the Republic may declare the state of Catastrophe for a period superior to one year with the consent of the National Congress. The said agreement shall be processed in the manner established in the second paragraph of article 40. Once the state of catastrophe has been declared, the respective zones will be under the immediate control of the Chief of National Defense appointed by the President of the Republic. He will assume the direction and supervision of his jurisdiction with the powers and duties established by law.”

¹⁷³ See also: Gobierno de Chile, Presidente declara Estado de Excepción Constitucional de Catástrofe en todo el territorio nacional, 18 March 2020, available at: <https://n9.cl/5ata>

¹⁷⁴ Ministerio del Interior y Seguridad Pública, Decreto Supremo 104 de 2020, artículo 3.7.

¹⁷⁵ Ministerio del Interior y Seguridad Pública, Decreto Supremo 104 de 2020, artículo 4.

notifications under the ICCPR¹⁷⁶ and ACHR,¹⁷⁷ but has, however, failed to do so for measures adopted during 2021.¹⁷⁸

A.3. The consequences of the state of exception

Restrictions on Freedom of Movement

An important consequence of the state of exception was the widespread interferences with the right freedom of movement of Chilean inhabitants.¹⁷⁹ In this respect, in late June 2021 President Piñera indicated that some 11,3 million people were living in zones subject to quarantine, that up to 95% of the Chilean population were subject to measures that restrict the freedom of movement, and that the entire Chilean population was under a curfew.¹⁸⁰

The impact of these measures was considerable. For instance, the sanitary regulations established that, as a general rule, people living in quarantine zones could only leave their homes for up to two hours, twice weekly.¹⁸¹

Use of Article 318 of Chilean Criminal Code during the pandemic

Article 318 of Chilean Criminal Code, which establishes fines and prison time against individuals who put at risk public health due to infractions of official sanitary measures during a catastrophe or pandemic, have been during the COVID-19 pandemic. Specifically, pursuant to Article 318 people have been fined, detained and criminal charged for breaking quarantine and lockdown rules. In June 2020, Article 318 was amended to allow for an increase the fines that can be levied for violation of lockdown rules. The prison terms for violations of sanitary measures were also increased dramatically from 61 days to up to three years.

The use of criminal sanctions used to police sanitary measures are generally both disproportionate and unnecessary, in contravention of international law. Less restrictive means such as administrative sanctions or fines, such the ones established in the Sanitary Code, not only possibly but most likely more effective coercive measures in the context of the COVID-19 pandemic. The use of Article 318 to police sanitary measures has been challenged on multiple occasions before national tribunals in Chile. Notably, in relation to specific criminal process, the Chilean Constitutional Tribunal has ruled that Article 318 cannot be used because it is unconstitutional (*inaplicabilidad por inconstitucionalidad*).

¹⁷⁶ United Nations, Treaty Collection, Depository Notifications (CNs) by the Secretary-General, available at: <https://bit.ly/2ZrADPX>

¹⁷⁷ Organization of American States, Recent Suspensions of Guarantees regarding Multilateral Treaties, 2020, available at: <https://bit.ly/2XIwnuF>

¹⁷⁸ Organization of American States, Recent Suspensions of Guarantees regarding Multilateral Treaties, 2021, available at: <https://bit.ly/3k1AkbH>; United Nations, Treaty Collection, Depository Notifications (CNs) by the Secretary-General, available at: <https://bit.ly/2ZrADPX>

¹⁷⁹ The right to freedom of movement is protected under Article 12 of the ICCPR and Article 22 of the ACHR. Both of these provisions allow for restrictions to the right for a specified legitimate purpose, one of which the protection of public health. However, any such restrictions must be necessary and proportionate to that end. In the Chilean constitution, this right is protected under Article 7 (a).

¹⁸⁰ Presidente de la República, Oficio del Gabinete Presidencial No. 749 de 2021, 23 June 2021, para 7, available at: <https://n9.cl/s57wl>

¹⁸¹ Gobierno de Chile, Instructivo para permisos de desplazamiento, 1 July 2021, page 5, available at: <https://bit.ly/3xoeKwZ>

In this regard, for instance, in a ruling handed down in July 2021, the Constitutional Tribunal affirmed that Article 318 did not sufficiently clearly define the criminal conduct it seeks to sanction. In other words, the Tribunal found it overly vague in contravention of the principle of legality, established in Article 19.3 of the Constitution. In particular, the Tribunal underscored that there were no clear guidelines provided for the criminal prosecution for violations of sanitary measures established during the COVID-19 Pandemic. In this regard, the Tribunal noted that the Prosecutors could select any of the multiple, and continuously changeable, sanitary measures adopted by the Ministry of Health to prosecute an individual. As a consequence, the Article was prone to be arbitrary application.

Chile also had its borders closed for almost the entirety of 2020,¹⁸² a measure that was implemented again in April 2021.¹⁸³ This measure restricted travelers from entering the country, but also meant that Chilean residents could only travel abroad in exceptional circumstances.¹⁸⁴ In general terms, people were permitted to leave the country for humanitarian reasons or when they were carrying out fundamental activities for the country. As of 26 July 2021, people who are fully vaccinated were also allowed to leave the country for any reason including for leisure travel.

More recently, on 1 October 2021, Chile opened its borders to people who do not have permanent residency in Chile and have been fully vaccinated. To enter the country, such persons are required to, for instance, produce negative PCR tests and may be subjected to quarantine periods (from 5 to 7 days).¹⁸⁵

Role of Military Forces and Police during the state of exception

Along with the central role that the Ministry of Health and scientific advisory bodies¹⁸⁶ have had during the pandemic, the prolongation of the state of exception gave the military forces a central role in Chile's response to the pandemic, as recognized by President Piñera.¹⁸⁷ In this respect, for instance, Decree 104 of 2020 allowed the deployment of more than 20,000 members of military units in all the country.¹⁸⁸

¹⁸² C Menéndez, Chile reabre su frontera tras ocho meses de cierre por la COVID, Euro News, 23 November 2020, available at: <https://n9.cl/ukciw>

¹⁸³ BBC News, Coronavirus en Chile: el país cierra sus fronteras ante el aumento de los casos de covid-19, 1 April 2021, available at: <https://n9.cl/v4ini>

¹⁸⁴ A Jara, Se solicita en Comisaría Virtual y requiere evaluación: los detalles del permiso para viajar al extranjero durante abril, La Tercera, 5 April 2021, available at: <https://n9.cl/93axu>

¹⁸⁵ Chile Atiende, Coronavirus (COVID-19) / Viajes y estado de fronteras, available at: <https://n9.cl/p7ud>

¹⁸⁶ Regarding advisory bodies, it has been noted that: "(...) a COVID-19 Scientific Advisory Council was created, headed by the Ministry of Science, Technology, Knowledge and Innovation, bringing together researchers, consultants and industry representatives. The COVID-19 Social Committee was also created, comprised of health specialists, the municipalities and scholars, and in which the Medical College played a key role. Both bodies have followed the Ministry of Health's management of the process, with different levels of involvement and decision-making. For example, the Ministry of Science and the Scientific Advisory Council have been of the utmost importance for the vaccination strategy and information management, while the Social Committee has been highly relevant in strengthening communication of risk, despite also having been critical of certain government decisions and declarations (...)". See: JJ Faundes Peñafiel, A Lucas Garín and G Lillo Ortega, Covid-19 vaccination in Chile, Heinrich-Böll-Stiftung, 14 June 2021, available at: <https://eu.boell.org/en/2021/06/14/covid-19-vaccination-chile>

¹⁸⁷ Presidente de la República, Oficio del Gabinete Presidencial No. 749 de 2021, resumen ejecutivo, 23 June 2021, page 3, available at: <https://n9.cl/s57wl>

¹⁸⁸ O Aránguiz, Chile despliega 20.422 militares y decreta el toque de queda, Info Defensa, 24 March 2020.

See also: J M Ojeda, Las primeras horas del despliegue de las FF.AA. en estado de catástrofe por Covid-19, La Tercera, 19 March 2020, available at: <https://bit.ly/3odlr3k>

Similarly, throughout the country, the Chiefs of National Defence issued resolutions on the management of the pandemic. On this matter, following guidelines issued by Ministry of Health and other health authorities, the Chiefs enacted numerous resolutions (*resoluciones exentas*) on restrictions in the right to freedom of movement,¹⁸⁹ the use of public transport,¹⁹⁰ the use of private vehicles,¹⁹¹ the use of facemasks,¹⁹² and quarantines.¹⁹³

It is concerning that the power to enforce sanitary measures was placed in the purview of the Chiefs of National Defence, not public health authorities. Certainly, the need for the Chief's themselves to replicate the guidelines issued by the Ministry of Health was a clear indication of the inappropriate role played by the military forces in the regulation of Chile's COVID-19 responses.

In the same vein, the Police were in charge of controlling the observance of the quarantine and other measures of freedom of movement. By way of example of the severity and restrictiveness of this approach, to go outdoors people living in quarantine zones had to apply for a "displacement permit" (*permiso de desplazamiento*) through the Police's website.¹⁹⁴ The permit had to be requested on each separate occasion that a person was planning to go outdoors. Similarly, if someone required going outdoors during the curfew hours, they had to request a safe-conduct permit on the Police's website.¹⁹⁵ A special permit was also needed to travel abroad.¹⁹⁶

Apart from the continuous control of the movement of people by the Police, the online system in place to request permits did not cater for situations in which people who did not have access to the internet or the digital illiteracy to navigate online applications. While Chile is country with relatively high level of internet access and digital literacy, this is not the case across the board. People in more vulnerable situations might be required to repeatedly go to a police station to ask for a permit, sometimes to exercise or go shopping for basic necessities.¹⁹⁷ This might pose an additional burden for persons from some marginalized sectors of the population, such as older persons. It is also questionable whether leaving a mere two hours for such purposes in quarantine zones was a proportionate restriction.

Furthermore, some persons alleging human rights violations were compelled to request the alleged perpetrators of human rights violations against them, the

¹⁸⁹ For instance, see: Resolución Exenta del Jefe de Defensa Nacional N° 3550-1863, Región de Aysén, 22 de marzo de 2020, available at: <https://n9.cl/uwlcu>; Resolución Exenta del Jefe de Defensa Nacional N° 79, Región de Tarapacá, 19 de mayo de 2021, available at: <https://n9.cl/wqiy>

¹⁹⁰ For instance, see: Resolución Exenta del Jefe de Defensa Nacional N° 3550-1545, Región de Aysén, 21 de marzo de 2020, available at: <https://n9.cl/j80f9>

¹⁹¹ For instance, see: Resolución Exenta del Jefe de Defensa Nacional N° 6800-1181, Región de Ñuble, 1 de febrero de 2021, available at: <https://n9.cl/s4m09>

¹⁹² For instance, see: Resolución Exenta del Jefe de Defensa Nacional N° 3500-234, Región de Aysén, 18 de abril de 2020, available at: <https://n9.cl/8k7b>

¹⁹³ For instance, see: Resolución Exenta del Jefe de Defensa Nacional N° 2366, Región Metropolitana, 11 de septiembre de 2020, available at: <https://n9.cl/8qcv4>

¹⁹⁴ <https://comisariavirtual.cl>

¹⁹⁵ Comisaría Virtual, Salvoconductos Individuales, available at: https://comisariavirtual.cl/salvoconductos_individuales.html

¹⁹⁶ Ministerio del Interior y Seguridad Pública, Subsecretaría de Prevención del Delito, Permiso para viajes extraordinarios al extranjero, available at: <https://n9.cl/zve61>

¹⁹⁷ Personal interview to Karinna Fernández, 3 July 2021.

police, permission to go outside. This was the case, for example, of people who suffered sustained eye injuries by the police officials during the 2019 protests and lived in quarantine areas. In order to attend medical appointments or receive medical attention resulting from police abuses, they were compelled to request additional displacement permits from police, who were in fact responsible for their injuries in the first place.¹⁹⁸

In the same vein, these restrictions seriously inhibited the work of human rights defenders (HRDs). For instance, some HRDs experienced significant difficulty in accessing permits to go to police stations and detention places in quarantine zones, in order to verify the situation of detainees. While lawyers were said generally to have maintained access to detainees, non-lawyer human rights defenders often could not gain such access, due to the fact that the rules required a person to be an *employee* (to have a labour contract with an organization) to obtain additional displacement permits to go outside to assist detained persons. Since some of HRDs work independently or as volunteers, they could not meet this requirement and could not therefore obtain permission to visit detained persons they sought to assist.¹⁹⁹ Independent journalists faced similar difficulties in conducting their own investigations for reporting.²⁰⁰

Some independent lawyers also faced barriers to visiting detainees who were their clients and in attending court hearings. This was because the rules did not contemplate operating as “legal counsel and defense” as a ground for the granting of a permit, as lawyers in these positions were also not considered to comply with the requirements to be defined as an “employee” in terms of labour law.²⁰¹ Therefore, unless lawyers were part of a law firm or organization and thereby rendered employees, they could not obtain the permit to engage their clients.

While humanitarian work was established as an exception to the rule preventing entry and exit to and from the country,²⁰² human rights defenders often faced difficulties in getting permissions to attend to humanitarian missions abroad. In this regard, for example, two Chilean members of an international mission to Colombia²⁰³ were repeatedly denied the authorization to go abroad before ultimately having such permission granted.²⁰⁴

It is also important to consider that some COVID-19 social benefits, such as paid leave for parents with young children,²⁰⁵ were only in force during the state of exception. This is because they were issued as special legislation of the state of

¹⁹⁸ *ibid.*

See also: K Fernández *in*: Londres 38, Karinna Fernández en CIDH sobre situación de fiscalías en protección de DDHH, 14 December 2020, minute 5:23, available at: <https://bit.ly/3jPxcuI>

¹⁹⁹ Londres 38, Londres 38, espacio de memorias, denuncia a CIDH los obstáculos del gobierno a la labor de personas defensoras de derechos humanos, 5 April 2021, available at: <http://www.londres38.cl/1937/w3-article-105988.html>

²⁰⁰ Observatorio Ciudadano, Informe sobre situación de los derechos humanos en Chile en el contexto de pandemia COVID-19, November 2020, Page 31 and 32, available at: <https://n9.cl/j4irt>

²⁰¹ Londres 38, Londres 38, espacio de memorias, denuncia a CIDH los obstáculos del gobierno a la labor de personas defensoras de derechos humanos, 5 April 2021, available at: <http://www.londres38.cl/1937/w3-article-105988.html>

²⁰² Ministerio del Interior y Seguridad Pública, Subsecretaría de Prevención del Delito, Permiso para viajes extraordinarios al extranjero, ¿Cuáles son los motivos por los que puedo viajar?, available at: <https://n9.cl/zve61>

²⁰³ The objective of the mission was to verify the respect of the right to peaceful protest in Colombia. More information about the mission is available at: <https://n9.cl/v6k0o>

²⁰⁴ Personal interviews to members of the mission, 3 July 2021.

²⁰⁵ See: Ley 21.247 de 2020, article 1.

exception. Public authorities therefore used the need for the continued application of these relief measures as one justification to maintain the state of exception on a continuous basis. However, this was not a reasonable basis to maintain a state of exception given that these measures could be developed through ordinary legislation.

In addition, it appears that it was developed a “normalization” of the situation of exception in Chile. Many Chilean inhabitants seemed to become increasingly accustomed in certain quarantine zones to the presence of military personnel on the streets and, in some areas, to the severe limitations to the freedom of movement.²⁰⁶ Furthermore, there was a lack of adequate control and oversight over the state of exception by the other government branches including the legislature and the courts. After the state of exception had persisted for a year, Congress approved its prolongation on two further occasions.²⁰⁷

A.4. End of the state of exception

On 27 September 2021, President Piñera announced that the state of exception would end on 30 September 2021. During the announcement, the President stressed that the state of emergency had empowered the executive to establish quarantines and curfews, which had been necessary to respond to the pandemic. He also highlighted that the state of emergency allowed the Military Forces to collaborate to control and oversee the measures imposed by the executive during the state of exception.²⁰⁸

Due to the significant reduction of COVID-19 cases and deaths in Chile, as well as the advances in the Chile’s vaccination rollout, the President indicated that it was appropriate to increase levels of freedom and mobility and fortify the economic and employment recovery, by ending the state of exception.²⁰⁹

The end of the state of exception has almost immediately had multiple consequences. First, from 1 October 2021, the special powers granted to the president and the Chiefs of National Defence were no longer in force.

Second, remaining COVID-19 response measures have been significantly altered. Although sanitary measures, such as mandatory mask-wearing and social distancing remain in force, measures such as curfews and quarantines have been ended. The general regulations on the sanitary measures (*Plan paso a paso*) have accordingly been modified to eliminate restrictions on freedom of movement. In

²⁰⁶ Personal interviews with human rights defenders, 3 July 2021.

See also: A Bustos, Más de 200 días en toque de queda: la naturalización de una medida más represiva que sanitaria, Diario U Chile, 18 October 2020, available at: <https://n9.cl/0owzy>

²⁰⁷ See: República de Chile, Senado, Estado de excepción hasta el 30 de junio: por mayoría Senado ratifica oficio presidencial, 10 March 2021, available at: <https://n9.cl/u47ww>; República de Chile, Senado, Hasta el 30 de septiembre regirá nuevo estado de excepción constitucional, 24 June 2021, available at: <https://n9.cl/45dks>

²⁰⁸ Ministerio de Salud, COVID-19: Gobierno anuncia fin del Estado de Excepción, 27 September 2021, available at: <https://bit.ly/3uBr4cM>

The president’s speech is available at: <https://bit.ly/3ovUxUI>

²⁰⁹ *ibid.*

terms of the current regulations, there does however remain an emphasis on restrictions on indoor and outdoor gatherings.²¹⁰

B. ACCESS TO COVID-19 VACCINES

Chile's vaccination rollout has been arguably one of the most successful in Latin America.²¹¹ As of 12 October 2021, some 89,05% of Chilean inhabitants have been fully vaccinated.²¹² This high rate stands in contrast to some to other Latin American countries, such as Brazil (46,54%), Argentina (52,47%), Perú (38,15%), Ecuador (55,78%), Guatemala (15,59%), and Nicaragua (4,9%).²¹³

This success has been attributed to a range of factors, including: sufficient monetary resources to purchase vaccines; adequate planning for the acquisition of vaccines; previous experiences in vaccine campaigns; and State capacity and infrastructure to implement the vaccine plan.²¹⁴

B.1. Design of the national vaccination plan and strategy

The Chilean Government's COVID-19 vaccine acquisition strategy began even before the availability of COVID-19 vaccines for purchase. Two elements of Chile's approach are noteworthy.

First, the Government sought to acquire vaccines from different companies in anticipation of their availability. This led to early negotiations with several pharmaceutical companies.²¹⁵ Chile also negotiated access to 7.6 million vaccine doses through the international COVAX mechanism.²¹⁶ Moreover, agreements on scientific collaboration with pharmaceutical companies, such as Sinovac and Janssen (Johnson & Johnson), allowed Chile to have early and preferential access to COVID-19 vaccines unlike many other countries in Latin America.²¹⁷ As a result, by December 2020, President Piñera was in a position to announce that Chile had

²¹⁰ See: Actualización del plan paso a paso, 1 October 2021, available at: <https://bit.ly/3Fh0fzu>

²¹¹ M Pichel, Coronavirus en Chile: las claves que explican la exitosa campaña de vacunación contra la covid-19 en el país sudamericano, BBC News, 11 February 2021, available at: <https://n9.cl/nbzfi>

²¹² Gobierno de Chile, Plan Nacional de Vacunación Covid-19, available at: <https://www.gob.cl/yomevacuno/#vacunados>

²¹³ See: <https://ourworldindata.org/covid-vaccinations>

Accessed 13 October 2021.

²¹⁴ M Pichel, Coronavirus en Chile: las claves que explican la exitosa campaña de vacunación contra la covid-19 en el país sudamericano, BBC News, 11 February 2021, available at: <https://n9.cl/nbzfi>

See also: JJ Faundes Peñafiel, A Lucas Garín and G Lillo Ortega, Covid-19 vaccination in Chile, Heinrich-Böll-Stiftung, 14 June 2021, available at: <https://eu.boell.org/en/2021/06/14/covid-19-vaccination-chile>

²¹⁵ See: Gobierno de Chile, Presidente Piñera presenta detalles del plan de inoculación contra el COVID-19: "Los contratos suscritos nos permitirían distribuir durante el primer semestre del próximo año 20 millones de dosis de vacunas", 17 December 2020, available at: <https://n9.cl/wrz25>

²¹⁶ Gobierno de Chile, Presidente Piñera anuncia avances para la obtención de potenciales vacunas contra el Covid-19, 22 September 2020, available at: <https://n9.cl/twdp>; Gobierno de Chile, Presidente Piñera destaca esfuerzos de estudios clínicos en el país para el desarrollo de vacunas contra el Covid-19: "Llevamos meses trabajando para asegurar la disponibilidad oportuna de una vacuna segura y eficaz", 4 November 2020, available at: <https://n9.cl/pj03a>

²¹⁷ Gobierno de Chile, Gobierno se reúne con Sinovac por primer ensayo clínico en Chile de una vacuna Covid-19, 13 October 2020, available at: <https://n9.cl/a7nth>; Gobierno de Chile, Presidente Piñera destaca esfuerzos de estudios clínicos en el país para el desarrollo de vacunas contra el Covid-19: "Llevamos meses trabajando para asegurar la disponibilidad oportuna de una vacuna segura y eficaz", 4 November 2020, available at: <https://n9.cl/pj03a>

See also: M Pichel, Coronavirus en Chile: las claves que explican la exitosa campaña de vacunación contra la covid-19 en el país sudamericano, BBC News, 11 February 2021, available at: <https://n9.cl/nbzfi>

already secured 30 million doses of a combination of different COVID-19 vaccines: Pfizer, Sinovac, AstraZeneca and Jensen.²¹⁸

What is COVAX (COVID-19 Vaccines Global Access)?²¹⁹

The COVAX Facility is co-led by the Coalition for Epidemic Preparedness Innovations, Gavi, the Vaccine Alliance, and the World Health Organization, and was “created to maximise (...) chances of successfully developing COVID-19 vaccines and manufacture them in the quantities needed (...)”.²²⁰ Through pooled funding, the Facility was able to invest in and gain access to multiple COVID-19 vaccine candidates. COVAX aims to provide 20 percent of participating countries’ populations with vaccine doses, and thereby increase equitable and timely access to vaccines globally.²²¹

Participating countries either receive vaccines through “self-financing” mechanisms, if they are upper-income and upper-middle-income economies, or as donations through the Advanced Market Commitment (AMC) plan²²² if they are lower-middle and low-income economies.²²³ In total, 92 low- and middle-income economies are eligible for these donations, and COVAX “expects” to provide these economies with approximately 1,7 billion, 26 percent of their populations, vaccine doses in 2021.²²⁴

Second, and in a parallel development, in late 2020 the Government issued Decree 1138 of 2020, containing the first guidelines to establish a vaccination plan (2020 guidelines).²²⁵ The guidelines set out the prioritized groups for the first stage of the vaccination rollout, and also detailed other key elements of the vaccination plan. As examples, basic information on vaccine storage and handling, vaccine application, training of health personnel, vaccine campaigns, and access to information regarding the implementation of the plan were provided.

While this early planning was an important element in Chile’s effective vaccination program, it should be underscored that the 2020 guidelines did not provide a vaccination schedule or timeline, except for the indication that COVID-19 vaccination would commence in January 2021.²²⁶ In 2021, additional guidelines and information were published to complement the Chile’s vaccination plan and detailing the order of vaccination for non-prioritized groups.²²⁷

²¹⁸ Ministerio de Salud, Presidente Piñera recibe primer cargamento de vacunas contra el COVID-19: “Son una luz de esperanza”, 24 December 2020, available at: <https://n9.cl/gqwbz>

²¹⁹ Information taken from: International Commission of Jurists, The Unvaccinated: Equality not Charity in Southern Africa, May 2021, Page 19, available at: <https://bit.ly/3x5WFCV>

²²⁰ S Berkley CEO of Gavi, the Vaccine Alliance, COVAX explained, 3 September 2020, available at: <https://bit.ly/2Vb4euP>

²²¹ Gavi Webpage, “COVAX”, available at: <https://www.gavi.org/covax-facility#what>

²²² World Health Organization, Fair allocation mechanism for COVID-19 vaccines through the COVAX Facility, 9 September 2021, available at: <https://bit.ly/3eQcveZ>

²²³ Gavi Webpage, “COVAX”, available at: <https://www.gavi.org/covax-facility#what>

²²⁴ COVAX Global Supply Forecast, 7 April 2021, available at: <https://bit.ly/3hZL3NG>

²²⁵ Ministerio de Salud, Exenta 1138 del 24 de diciembre de 2020, Lineamientos Técnicos Operativos Vacunación Sars-COV-2, available at: <https://n9.cl/p2kd>

²²⁶ *ibid* page 8.

²²⁷ In this regard see: Ministerio de Salud, Información Técnica Vacunas Covid-19, available at: <https://n9.cl/xvqlv>

Finally, it worth noting that the Government created a special fund to finance the purchase COVID-19 vaccines,²²⁸ allocating 200 million dollars (around 153.140 million Chilean pesos) the fund. As of the first quarter of 2021, 77,3% of the money was already spent.²²⁹

B.1.1. Vaccination scheme

The 2020 guidelines established that COVID-19 vaccines would first be given to people who were: (1) at higher risk of COVID-19 infection due to their work; and (2) more likely to develop a serious illness or critical symptoms if they contracted COVID-19.²³⁰ The result was that health personnel, essential workers, older persons and persons with comorbidities were prioritized for vaccination in the first phase of the rollout.²³¹

Importantly, the 2020 guidelines did not provide criteria to determine which subgroup of individuals would constitute part of the prioritized groups. The above criteria were established in late January 2021, when the Ministry of Health issued a document specifying which people fall into each group.²³² In general terms, each group was broadly defined. For instance, health personnel included not only medical staff but also administrative staff who work in health centres, such as cleaning and security personnel.

The category of older persons covered people over 60 years old. Essential workers included different groups of people, such as pharmacy store staff and public servants who oversee critical functions of the State. The category also included members of the security and military forces who have duties related to Chile's COVID-19 action plan.

With respect to the remainder of the population, the 2020 guidelines did not establish any subgroups or the order of vaccination. The guidelines merely said that the vaccination scheme included the "population who live in Chile".²³³ During 2021, further information and guidelines documents about the vaccination timetable have been published on a continuous basis for the rest of the population.²³⁴

Because of the ambiguity in the phrase "population who live in Chile" used in the early guidelines, the government in February 2021 issued Decree 136 of 2021 to

²²⁸ Gobierno de Chile, Gobierno presenta presupuesto de salud por más de 9 mil millones de pesos, 30 September 2020, available at: <https://n9.cl/2zia3>

²²⁹ Asesoría Técnica Parlamentaria, Ejecución Presupuestaria al primer trimestre de 2021: Fondo para vacunas Covid-19, May 2021, available at: <https://n9.cl/gohv5>

²³⁰ Ministerio de Salud, Exenta 1138 del 24 de diciembre de 2020, Lineamientos Técnicos Operativos Vacunación Sars-COV-2, page 8, available at: <https://n9.cl/p2kd>

²³¹ *ibid.*

²³² Ministerio de Salud, Grupos objetivos para vacunación contra sars-cov-2 según el suministro de vacunas, available at: <https://n9.cl/5oi8h>

See also: Ministerio de Salud, Presidente Piñera da a conocer calendario de vacunación masiva contra el COVID-19, 28 January 2021, available at: <https://n9.cl/c3kvm>

²³³ Ministerio de Salud, Exenta 1138 del 24 de diciembre de 2020, Lineamientos Técnicos Operativos Vacunación Sars-COV-2, page 8, available at: <https://n9.cl/p2kd>

²³⁴ See: Ministerio de Salud, Calendario de vacunación masiva contra COVID-19, available at: <https://n9.cl/itcvm>

clarify the term.²³⁵ The Decree established that the term referred to people who are Chilean nationals, have permanent residency in Chile, or have a valid student, residence, or work visa. The term also included people who have applied for one of these visas or other documents. The Decree therefore confirmed that the vaccination plan explicitly excluded people with a tourist visa, and importantly made no mention at all about the access to the COVID-19 vaccine for migrants, refugees and other non-citizens with irregular status.

While not mentioned in the 2020 guidelines, current official government policy statements indicate that COVID-19 vaccines should be available free of charge, and that COVID-19 vaccination would not be made compulsory.²³⁶ In addition, it was established that the target was to have vaccinated 80% of the population.²³⁷

Finally, to date Chile has not supported the proposed waiver of intellectual property rights on COVID-19 vaccines and therapeutics, proposed by India and South Africa. The proposal has been supported by some special procedure mandate holders of the Human Rights Council, the World Health Organization, and the UN Committee on Economic, Social and Cultural Rights.²³⁸ Likewise, the so-called TRIPS waiver has received almost unanimous support from countries in the Global South, making Chile's seemingly regressive approach stand out even more. In the Americas Chile, along with Colombia and El Salvador are amongst the very few countries that does not support the waiver formally.²³⁹

B.2. Implementation of the COVID-19 vaccine plan

Along with Argentina, Mexico, and Costa Rica, Chile was one of the few Latin American countries that had received any COVID-19 vaccine doses in 2020,²⁴⁰ receiving 10,000 doses of the Pfizer vaccine as early as 24 December 2020. The COVID-19 vaccine rollout officially started on the same day with the vaccination of hospital staff (nurses, doctors, and cleaning workers) in the Santiago Metropolitan Region.²⁴¹ These first doses were also used to vaccinate health personnel in other regions such as Araucanía, Biobío y Magallanes,²⁴² some of the regions most greatly affected by the COVID-19 pandemic.

On 31 December 2020, Chile received a second shipment of 11,700 doses Pfizer vaccines. These new doses were used to vaccinate more health personnel in the regions previously mentioned and in other regions (Tarapacá, Valparaíso, Maule,

²³⁵ Ministerio de Salud, Exenta 136 del 10 de febrero de 2021, Complementa Resolución Exenta N° 1138 de 2020, del Ministerio de Salud, que Aprueba Lineamientos Técnicos Operativos Vacunación Sars-COV-2, available at: <https://n9.cl/y90d>

²³⁶ Ministerio de Salud, Información Técnica Vacunas Covid-19, available at: <https://n9.cl/xvqlv>

²³⁷ Ministerio de Salud, Planificación: vacunación contra SARS-COV-2, 2021, Page 6, available at: <https://bit.ly/3e0bTTk>

²³⁸ See: UN Committee on Economic, Social and Cultural rights, Statement on universal affordable vaccination against coronavirus disease (COVID-19), international cooperation and intellectual property, E/C.12/2021/1, 23 April 2021, párr. 12 a

²³⁹ See: Rodrigo Uprimny, Presidente y minsalud: ¿apoyan el "waiver" en vacunas?, 27 September 2021, available at: <https://bit.ly/3ovvXTC>; Corporación Innovarte, Carta sociedad civil apoyo a la propuesta de moratoria ADPIC para medicamentos Covid, 14 October 2020, available at: <https://bit.ly/3ld9Pvz>

²⁴⁰ L Méndez Urich, México, Chile y Costa Rica en el podio de la carrera por la vacuna en América Latina, France 24, 24 December 2020, available at: <https://n9.cl/2rb0s>

²⁴¹ Ministerio de Salud, TENS Zulema Riquelme, la primera vacunada contra COVID-19, 24 December 2020, available at: <https://n9.cl/lqa6>

²⁴² *ibid.*

Los Ríos and Los Lagos).²⁴³ By 12 January 2021, Chile had already vaccinated some 10,699 medical personnel.²⁴⁴

During January 2021, Chile continued receiving COVID-19 vaccine doses (Pfizer and Sinovac). Four million doses of the Sinovac vaccines²⁴⁵ alone were delivered,²⁴⁶ and health personnel from different regions continued to be vaccinated.²⁴⁷ During January, the rollout of vaccines to older persons living in care facilities also commenced.²⁴⁸ By 18 January 2021, Chile was already vaccinating people in all 16 regions of the country.²⁴⁹

The large amount of Sinovac doses delivered allowed Chile to start the mass vaccination rollout.²⁵⁰ Following the 2020 guidelines, President Piñera announced that the mass vaccination would begin with the two prioritized groups, on 3 February 2021.²⁵¹ Notably, by 9 February 2021, Chile reached had vaccinated some one million people with at least one dose.²⁵²

Since mid-February 2021, Chile has started vaccinating other sectors of the population.²⁵³ As presented in the next graph, the vaccination timetable has proceeded as follows:

²⁴³ Gobierno de Chile, Presidente Piñera recibe más de 11 mil nuevas vacunas contra el Covid-19: "Van a permitir dar tranquilidad y proteger la salud y la vida de chilenos que están hoy día muy esperanzados", 31 December 2020, available at: <https://n9.cl/2x147>

²⁴⁴ Ministerio de Salud, Subsecretaria Paula Daza recibe tercer y más grande cargamento de vacunas contra el COVID-19, 13 January 2021, available at: <https://n9.cl/pk4leg>

²⁴⁵ On 20 January 2021, the Chilean sanitarian authority approved the emergency use of Sinovac. See: Instituto de Salud Pública, ISP autorizó la vacuna CoronaVac del laboratorio Sinovac Life Sciences CO. LTD para uso de emergencia en el país, 20 January 2021, available at: <https://bit.ly/3ITGKWp>

Sinovac was approved the World Health Organization (WHO) in June 2021. See: WHO, WHO validates Sinovac COVID-19 vaccine for emergency use and issues interim policy recommendations, 1 June 2021, available at: <https://bit.ly/3sanRj2>

²⁴⁶ Ministerio de Salud, Llega a Chile segundo cargamento de Sinovac con casi 2 millones de vacunas, 31 January 2021, available at: <https://n9.cl/pakd>

²⁴⁷ In this regard see: Ministerio de Salud, Subsecretaria Paula Daza recibe tercer y más grande cargamento de vacunas contra el COVID-19, 13 January 2021, available at: <https://n9.cl/pk4leg>; Ministerio de Salud, Llega a Chile segundo cargamento de Sinovac con casi 2 millones de vacunas, 31 January 2021, available at: <https://n9.cl/pakd>

²⁴⁸ Ministerio de Desarrollo Social y de Familia, La próxima semana se dará inicio a la vacunación contra el covid-19 en los ELEM del país, 14 January 2021, available at: <https://n9.cl/spqhc>

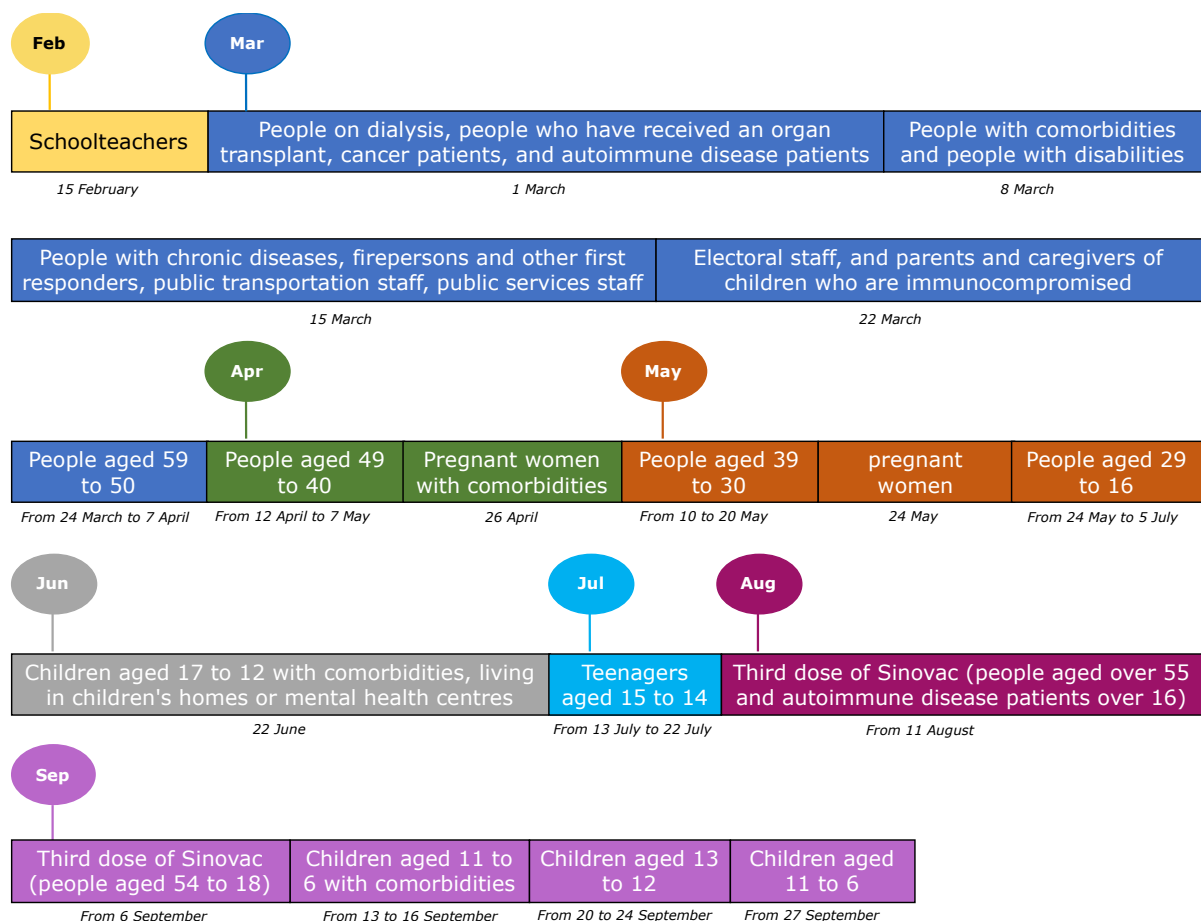
²⁴⁹ Ministerio de Salud, Planificación: vacunación contra SARS-COV-2, 2021, Page 3, available at: <https://bit.ly/3e0bTTk>

²⁵⁰ Ministerio de Salud, Llega a Chile segundo cargamento de Sinovac con casi 2 millones de vacunas, 31 January 2021, available at: <https://n9.cl/pakd>

²⁵¹ Ministerio de Salud, Presidente Piñera da a conocer calendario de vacunación masiva contra el COVID-19, 28 January 2021, available at: <https://n9.cl/c3kvm>

²⁵² Ministerio de Salud, Chile supera el millón de personas vacunadas durante la primera semana de inmunización masiva contra COVID-19, 9 February 2021, available at: <https://n9.cl/3kh5vn>

²⁵³ See: Ministerio de Salud, Calendario de vacunación masiva contra COVID-19, available at: <https://n9.cl/itcvm>



Graph 1. Source: own elaboration

It should be highlighted that, as shown in Graph 1, Chile has started to apply a third dose of Sinovac. As of yet, the third dose is only authorized for people aged over 18 years and people with an immune disease aged over 16 years. By late August, Chile had already applied more than one million third doses of Sinovac.²⁵⁴

In this regard, it should be highlighted that the World Health Organization's has called for a moratorium on booster shots in order to prioritize the large percentage of unvaccinated persons across the world but particularly in the Global South first.²⁵⁵ Wide use of the booster shots at current supply levels risks compromising access to vaccines in other countries and the right to health.

In late May, Chile created a "mobility pass" (*pase de movilidad*) for fully vaccinated people.²⁵⁶ The pass allows "greater mobility for people living in areas placed under full or partial quarantines",²⁵⁷ but it does not exempt vaccinated people from nightly curfews or restrictions for international travel.²⁵⁸ In addition, Chile enacted Law 21347 of 2021 to facilitate the vaccination of employees. The Law establishes

²⁵⁴ Ministerio de Salud, Chile superó el millón de dosis de refuerzo aplicadas de la vacuna contra SARS-CoV-2, 25 August 2021, available at: <https://bit.ly/3hcBLqT>

²⁵⁵ UN News, WHO calls for moratorium on COVID-19 booster jabs, 4 August 2021, available at: <https://bit.ly/39Ywg8C>

²⁵⁶ Chile Atiende, Pase de movilidad, 4 junio 2021, available at: <https://n9.cl/ta7jl>; Ministerio de Salud, Gobierno explica alcance del Pase de Movilidad, 24 May 2021, available at: <https://bit.ly/3lt7pJN>

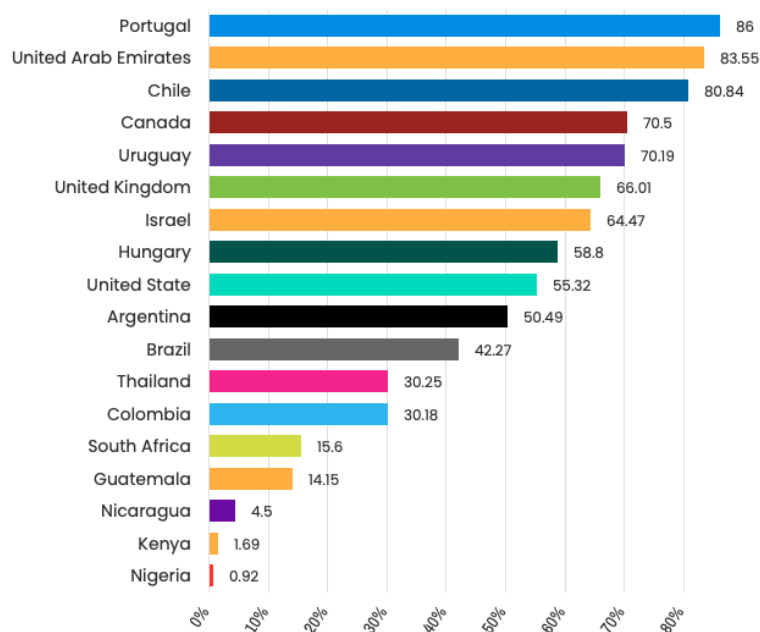
²⁵⁷ V Fuentes and M Malinowski, Fully Vaccinated Chileans Get 'Mobility Pass' as Rules Eased, 24 May 2021, available at: <https://n9.cl/0ypsh>

²⁵⁸ Ministerio de Salud, Preguntas Frecuentes Pase de Movilidad, 7 June 2021, available at: <https://n9.cl/kuwke>

that employees have the right to a half a day of paid leave to get vaccinated against COVID-19.

As of 7 October 2021, some 26,892,858 million doses had been administered. According to Chilean official data, some 88,95% people were fully vaccinated.²⁵⁹ It should be highlighted that Chile has already received Pfizer and AstraZeneca vaccines from the COVAX mechanism. As of May 2021, Chile has received 762,210 doses through this mechanism.²⁶⁰ So far, Chilean inhabitants have been vaccinated with Sinovac, Pfizer, CanSino, and AstraZeneca vaccines.²⁶¹

As seen in Graph 2, relating to the percentage of population fully vaccinated, Chile has one of the most successful COVID-19 vaccine rollouts worldwide and the best in Latin America.



Source: Nature Human Behaviour, Global database of COVID-19 vaccinations²⁶²

Despite enjoying a comparatively effective COVID-19 vaccine rollout, the COVID-19 cases and deaths did not decline significantly during the first part of 2021. Even though by in mid-June, Chile had vaccinated around 57% of the population fully vaccinated, 95% of ICU beds were still occupied,²⁶³ with up to 85% of ICU patients being people who had not yet completed their two-dose vaccination scheme.²⁶⁴ Likewise, in the metropolitan region, where more than 7 million people live, a quarantine was initiated to decrease the soaring transmission of COVID-19.²⁶⁵

²⁵⁹ Gobierno de Chile, Yo me vacuno, available at: <https://n9.cl/789jj>

²⁶⁰ Agencia EFE, Chile recibe el primer lote de vacunas de Covax con 158.000 dosis de AstraZeneca, 23 April 2021, available at: <https://n9.cl/2dr5pi>; Naciones Unidas Chile, Chile recibió segundo cargamento de vacunas contra la COVID-19 del mecanismo COVAX, 21 May 2021, available at: <https://n9.cl/2rwpz>

²⁶¹ Ministerio de Salud, Calendario de vacunación masiva contra COVID-19, available at: <https://bit.ly/3DdAJt2>

²⁶² See: <https://ourworldindata.org/covid-vaccinations>

The latest data available on 6 October 2021 was used.

²⁶³ El Espectador, ¿Por qué Chile volvió a cuarentena si la vacunación es un éxito?, 12 June 2021, available at: <https://n9.cl/my5kk>

²⁶⁴ Forbes, Chile confina nuevamente a la capital por peligro de colapso sanitario, 10 June 2021, available at: <https://n9.cl/xctj0>

²⁶⁵ El Espectador, ¿Por qué Chile volvió a cuarentena si la vacunación es un éxito?, 12 June 2021, available at: <https://n9.cl/my5kk>

The Chilean situation illustrates the difficulties in curbing COVID-19 transmission, even when sanitary measures are adopted and implemented and vaccination against COVID-19 is speedily implemented and widely accepted. Sanitary measures implemented by Chile included as examples, mandatory use of face masks,²⁶⁶ and a programme to test, track, and trace COVID-19 cases.²⁶⁷

The Chile case-study therefore shows that although vaccines are essential to tackle the COVID-19 pandemic, they are insufficient to stop the COVID-19 transmission.²⁶⁸ All in all, Chile experience exemplifies the importance of evaluating the impact and the effectiveness of COVID-19 related measures, including curfews and strict quarantines as well as the adequate implementation of essential sanitary measures, such as mask-wearing in high-risk settings and COVID-19 cases tracing.

C. THE SITUATION OF REFUGEES AND MIGRANTS DURING THE PANDEMIC

In Chile, as seen throughout the world,²⁶⁹ the COVID-19 pandemic has exacerbated previous barriers and problems that migrants face in accessing basic services despite the guarantee of non-discriminatory access to such services in international human rights law. For instance, migrants with irregular status often are not able to access to COVID-19 the full range of social benefits available since they do not have an identification number. Migrants and refugees, however, are able to access some educational and health services. For the same reason, migrants living in quarantine zones during the pandemic have faced problems accessing permits to go outdoors without risking criminal sanction. Similarly, some migrants with regular status, who have lost their jobs, have faced difficulties in renewing their visas.²⁷⁰

Migrants and refugees' right to health

The core of the domestic legal framework on migration²⁷¹ is made up of administrative measures aiming to guarantee non-citizens access to some rights, including the right to health.²⁷²

See also: V Dannemann, La contradicción chilena: ¿Por qué el éxito de la vacunación no frena la pandemia?, DW, 22 March 2021, available at: <https://bit.ly/3e0VwG9>

²⁶⁶ Ministerio de Salud, Comienza uso obligatorio de mascarilla en lugares públicos cerrados, 17 April 2020, available at: <https://bit.ly/3kK1G1o>; Ministerio de Salud, Ministro de Salud reafirma que uso de mascarillas y medidas de prevención están vigentes en todo el país, 5 November 2020, available at: <https://bit.ly/2XOhreH>

²⁶⁷ Ministerio de Salud, Protocolo de coordinación para acciones de vigilancia epidemiológica durante la pandemia Covid-19 en Chile: estrategia nacional de testeo, trazabilidad y aislamiento, available at: <https://bit.ly/3AKVjAr>

²⁶⁸ See for instance: M Roberts et al, Vaccines alone will not stop Covid spreading - here's why, BBC News, 8 July 2021, available at: <https://n9.cl/y18zi>; S Moore et al, Vaccination and non-pharmaceutical interventions for COVID-19: a mathematical modelling study, Lancet Infectious Diseases, 18 March 2021, available at: <https://bit.ly/3xMUXHQ>

²⁶⁹ See: International Commission of Jurists, Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses, 2020, page 40 and ff, available at: <https://n9.cl/9tojp>

²⁷⁰ Observatorio Ciudadano, Informe sobre situación de los derechos humanos en Chile en el contexto de pandemia COVID-19, November 2020, Page 86, available at: <https://n9.cl/j4irt>

²⁷¹ Part of this legal framework is available at: <https://n9.cl/2i9wp>

²⁷² A Cortez Salas, M Guerra Zúñiga, and V Stuardo Ávila, Salud Sexual y Reproductiva de Mujeres Migrantes, Informe DDSRR 2018, Estado de la situación en Chile, Miles Chile, page 110, available at: <https://n9.cl/rta93>

In 2008, the Chilean Government issued guidelines on migration.²⁷³ In relation to the right to health, the guidelines set out that migrants should have access to health services. In practice, only migrants with a residency permit accessed health services on an equal basis with citizens. Migrants with irregular status only had access to few services, such as vital emergency services, prenatal care for pregnant women, and medical care for kids and teenagers.²⁷⁴

In 2015, the Ministry of Health issued Decree 67 that allowed migrants with irregular status who lacked economic resources to access the Fonasa system (the public health system)²⁷⁵ on an equal basis with citizens. In 2016, the Decree was supplemented by the *Circular* N° A15/04. The *Circular* sets out that health services are universal. Among other services that should be provided to migrants, the *Circular* includes vaccines and services related to transmissible diseases.

A year later, in 2017, the Ministry of Health, and other national authorities, issued a policy document on the right to health of international migrants. The document acknowledges that the Chilean Constitution protects and guarantees the right to health to all people living in Chile (nationals or foreigners) without any distinction.²⁷⁶

However, in reality, the document recognises that migrants do not have equal access to health services as citizens despite the adoption of some measures in their favour.²⁷⁷ Therefore, the document proposes some “strategic guidelines” to change this situation and ensure the equal provision of health services to migrants.

In 2007 refugees and asylum seekers were permitted to access the Fonasa system.²⁷⁸ Subsequently, in 2010, Law 20.430 on the protection of refugees was issued, which explicitly guarantees the right to health of refugees in article 13.

In April 2021, Chilean Congress enacted Law 21.325, a comprehensive migration law that also covers refugees.²⁷⁹ The Law establishes explicitly that migrants with irregular status have the right to access health services and benefits in the same conditions as nationals.²⁸⁰

Most elements of Law 21.325, including the article on the right to health, have, however, not yet entered into force.²⁸¹

Chile is also party to the Convention relating to the Status of Refugees and the International Convention on Migrant Workers.

²⁷³ Presidencia de la República, Instrucción Presidencial 009 de 2008. See also: Presidencia de la República, Instrucción Presidencial 005 de 2015.

²⁷⁴ Gobierno de Chile, Política de Salud de migrantes internacionales, 2017, Page 25 and ff, available at: <https://n9.cl/l1caj>

²⁷⁵ *ibid*, Page 20.

²⁷⁶ *ibid*, Page 25 and ff.

²⁷⁷ *ibid*, Page 14 and ff.

²⁷⁸ Gobierno de Chile, Política de Salud de migrantes internacionales, 2017, Page 20, available at: <https://n9.cl/l1caj>

²⁷⁹ Ley 21.325 de 2021, Article 2.

²⁸⁰ Ley 21.325 de 2021, Article 15.

²⁸¹ As of this writing, only the eighth transitory provision (artículo octavo transitorio) is in force. This provision allows some migrants with irregular status to regularize their migration status. The benefit applies only to migrants who (1) entered Chile using regular border checkpoints before 18 March 2020 and (2) do not have a criminal record. Considering that it is usual that migrants use irregular crossing points to enter Chile, the scope of benefit from this law is limited.

C.1. Non-citizens access to COVID-19 vaccines

The original 2020 guidelines on the COVID-19 vaccination plan failed to address access to vaccines for migrants and refugees. On 10 February 2021, Decree 136 of 2021 clarified that vaccine access would be granted to migrants with regular status, while also confirming that people in Chile on tourist visas would be excluded. However, the decree remained silent on whether migrants and refugees with irregular status would be able to access COVID-19 vaccines.²⁸²

The Decree itself appears to have been issued as a response to a false media report, broadcast by a Peruvian channel, suggesting that Chile would vaccinate all people, including tourists.²⁸³ These reports detailed means to access the vaccines in Chile through short "lightning trips"²⁸⁴. Commenting on the Decree, the Ministry of Foreign Affairs said that Chile would not vaccinate foreign nationals who do not live in the country as a measure to avoid "vaccine tourism". The Ministry also finally clarified that Chile would not vaccinate migrants with irregular status.²⁸⁵

The Decree and the Minister's statement were criticized by a number of civil society organizations. For instance, the president of the Chilean Medical Association (*Colegio Médico de Chile*), Izkia Siches, denounced the Decree as contrary to Chile's stated policy to guarantee the right to health to all migrants without considering their legal or documentary status. Siches also pointed out that migrants with irregular status are a sector of the population generally living in a situation of significant vulnerability to COVID-19 infection. She asserted that the Decree would also likely harm the right to health of the general population because unvaccinated migrants are obviously more likely to transmit COVID-19 to the population at large.²⁸⁶ Along the same lines, Amnesty International concluded that, with the issuing of the Decree, the Chilean Government had chosen "the path of discrimination, denial of rights to at-risk groups and ignoring best health practices in its efforts to contain COVID-19".²⁸⁷

Following this backlash, on 11 February 2021 the Director of the Migration Authority clarified that migrants with irregular status living in the country would be vaccinated. He said that since the public health regime covers this sector of the population, they should be included in the rollout of COVID-19 vaccination. The Director said that Minister had been misunderstood on the previous day because he had meant to highlight the negative effect of vaccine tourism, not vaccination

²⁸² Ministerio de Salud, Exenta 136 del 10 de febrero de 2021, Complementa Resolución Exenta N° 1138 de 2020, del Ministerio de Salud, que Aprueba Lineamientos Técnicos Operativos Vacunación Sars-COV-2, available at: <https://n9.cl/y90d>

²⁸³ C Soto, Ministro Paris despeja dudas y aclara que migrantes en situación irregular sí podrán vacunarse aunque no hayan iniciado su tramitación de visa, La Tercera, 11 February 2021, available at: <https://bit.ly/3z6zVEB>

²⁸⁴ El Comercio, ¿Turismo de vacuna en Chile? Desinformación, inmigración y la necesidad de combatir el COVID-19, 11 February 2021, available at: <https://n9.cl/t596>

²⁸⁵ DW, Chile no vacunará a los extranjeros no residentes para evitar el "turismo COVID", 10 February 2021, available at: <https://n9.cl/yt4ya>

²⁸⁶ Colegio Médico de Chile, Postura del Colegio Médico frente a vacunación a extranjeros, 10 February 2021, available at: <https://n9.cl/3ndxp>

²⁸⁷ Amnesty International, Chile: National plan must include COVID-19 vaccine for everyone living in the country, 10 February 2021, available at: <https://bit.ly/3i91FBz>

of migrants living in the country. The Ministry of Health also stated that migrants with irregular status had always been included in the vaccination plan, despite the plans silence in this regard.²⁸⁸

Along the same lines, the Ministry of Health has established that migrants must not be questioned about their migration status when they present themselves for COVID-19 vaccination. Furthermore, the Ministry of Health has indicated that migrants can present any identification document, even a document issued in their home countries, to get vaccinated. The document is required only to keep a record of the vaccination rollout and guarantee that the person in question can receive the second dose of the COVID-19 vaccine at the appropriate later stage. In this respect, the Ministry has also highlighted the importance of guaranteeing the confidentiality of health information more generally.²⁸⁹

While these policy measures to include in the COVID-19 vaccination programme are welcome, in practice migrants and refugees with irregular status have continued to face barriers to getting vaccinated. In late May, the *Coordinadora Nacional de Inmigrantes*, a local civil organization, denounced the fact that migrants continued to be required to prove their migration status in order to get vaccinated, despite the government indicating explicitly that this would not happen. The organization affirmed that this situation is commonplace in some regions of the country, particularly in the Metropolitan, Antofagasta and Tarapacá regions.²⁹⁰

Moreover, owing to the mass deportations conducted during 2021, the *Coordinadora Nacional de Inmigrantes* has argued that asking for the migration status as a condition for vaccination significantly decreases the willingness of some migrants to present themselves for vaccination, because of fears of being arrested and expelled. The *Coordinadora* insisted that the Ministry of Health's guidelines must therefore be followed,²⁹¹ meaning that all health personnel who participate in the COVID-19 vaccination strategy must be fully informed of the right of migrants with irregular status to get vaccinated without being questioned, and irrespective of their documentary status.

²⁸⁸ Cooperativa, Jefe de Extranjería aclara: Migrantes irregulares sí tendrán acceso a vacunación, 11 February 2021, available at: <https://bit.ly/36zkadQ>; El Mercurio, Tras críticas, Gobierno retrocede y permitirá vacunar a inmigrantes en situación irregular, 12 February 2021, available at: <https://bit.ly/3rcRkbl>; C Soto, Ministro Paris despeja dudas y aclara que migrantes en situación irregular sí podrán vacunarse aunque no hayan iniciado su tramitación de visa, La Tercera, 11 February 2021, available at: <https://bit.ly/3z6zVEB>

²⁸⁹ A Bustos C, Minsal aclara universalidad de la vacuna ante denuncias de discriminación a migrantes, Dario U Chile, 31 May 2021, available at: <https://bit.ly/3rfOPpk>

²⁹⁰ *ibid.*

²⁹¹ *ibid.*

V. RECOMMENDATIONS

In light of the concerns identified above, the Chilean authorities should adopt the following measures in order to ensure full compliance with its obligations in terms of international law and standards:

- **Least restrictive measures:** when establishing sanitary measures to curb COVID-19 such as quarantines, curfews and movement restrictions, Chile should fully respect the rights to freedom of movement and freedom of assembly, imposing only such restrictive measures that are non-discriminatory and necessary and proportionate to address the exigencies of the COVID situation. To do so, authorities should conduct an in-deep evaluation of the effectiveness of the current sanitary measures to be implemented in realizing the right to health and weigh this against the harms to other rights including the rights to freedom of movement, freedom of assembly and an adequate standard of living.
- **Role of police and military:** the implementation and enforcement of public health measures should be the responsibility of competent civilian authorities and public health experts, and the Police and military should not play any role beyond their ordinary security functions.
- **Human Rights Defenders:** authorities also should not apply any measures restricting movement and assembly in a manner that unduly impedes the work of human rights defenders, including journalists and others exercising these rights.
- **States of Exception:** the state of exception should not be invoked to address the COVID-19 pandemic, in the absence genuine threats to the life of the nation and public health.
- **Non-discriminatory access to healthcare:** ensure that proactive and continuous measures are taken to effectively ensure the realization of guarantees of equal and non-discriminatory access to health facilities, goods and services, particular to non-citizens, women, and LGBTI persons.
- **COVID-19 vaccines, diagnostics and treatment:** take steps to ensure that all persons, including migrants and refugees, have access to COVID-19 vaccines as well as adequate access to all necessary COVID-19 prevention, treatment and diagnostic/screening measures on an equal basis and without prohibitive documentary requirements and/or the direct or indirect threat or fear of being arrested or subjected to immigration control procedures.

- **International and regional cooperation:** continue and fortify its engagement in international and regional cooperation and assistance to ensure equitable global access to medical advances regarding COVID-19 prevention and treatment, including in respect of the COVAX program as well as bilateral arrangements to improve COVID-19 vaccine access.

Chile should publicly and openly support South Africa and India's proposed waiver of intellectual property protections on COVID-19 vaccines and therapeutics at the World Trade Organization (WTO).

- **Refugees, Asylum Seekers and other Non-Citizens:** take concrete steps to enforce existing legal human rights protections for refugees, asylum seekers and other non-citizens, particularly those with irregular status in the country. In this regard, it is essential that the regulatory document of Law 21.325 is issued promptly to allow the Law to enter into force. The regulatory document should contemplate monitoring mechanisms to evaluate the effectiveness of the law and its measures in the fulfilment of non-citizens' rights.
- **Social Security:** analyse and review the state of social security in the country, to ensure that withdrawals from pension funds permitted during the COVID-19 pandemic do not have the effect of comprising the right to adequate social security.
- **Ratify Protocol of San Salvador:** ratify the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador).

In addition, members of the Constitutional Convention are advised to:

- Ensure that the new Constitution fully incorporates the rights guaranteed under international human rights law and standards, including all economic and social rights including social rights guaranteed by the International Covenant on Economic, Social and Cultural Rights and the jurisprudence of the UN Committee on Economic, Social and Cultural Rights. The new Constitution should set eradicating poverty and eliminating inequality as amongst its core aims and values.
- Ensure that the new constitution establishes regulation of states of exception, including in the context of public health emergencies, in accordance with international human rights law and standards, including those set out in International Covenant on Civil and Political Rights and the American Convention on Human Rights. Central to this endeavour is:

- the entrenchment the principles of necessity, proportionality, and non-discrimination;
- the provision for significant legislative and judicial checks on executive power in the declaration and implementation of states of exception; and
- the provision for comprehensive powers allowing and requiring restrictive measures to be accompanied by social relief measures that ensure that all economic, social and cultural rights are respected, protected, promoted and fulfilled despite the declaration and continuation of states of exception.

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