



UPR Submission

**Chile**

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## **Summary**

The continuing jurisdiction of military courts over civilians violates rights to due process and to an impartial hearing by a qualified and independent court. By allowing investigations into human rights abuses committed by police to be investigated by a military prosecutor and tried in a military court, Chile is failing to fulfill its obligations to provide victims of human rights violations with an effective remedy.

The failure of Chile to lift a blanket ban on abortion, including in cases of rape and incest or when a pregnancy places the woman's life at risk, puts women's human rights in jeopardy. Policies adopted as a result of a court ruling declaring emergency contraception to be unconstitutional have severely restricted women's rights to reproductive health and personal autonomy.

## **Military Jurisdiction over Civilians**

Eighteen years since Chile returned to democratic rule, military courts continue to enjoy jurisdiction over civilians in certain cases. Since military judges are officers on active duty and subject to military chain of command these courts fail to meet internationally recognized standards of fair trial, including that the court be independent and its impartiality safeguarded. Due process and rights to a defense in cases under military jurisdiction are severely restricted when compared to those provided under the civilian procedural code now in force in Chile.

Military prosecutors, who are active duty officers of the armed forces, conduct investigations under the Code of Military Justice in secret. Serving officers of the army, navy, air-force, and the uniformed police, Carabineros (a branch of the Chilean armed forces), act as judges. These officers do not enjoy tenure in their judicial capacity. The Martial Court (Corte Marcial, the military appeals court), which reviews verdicts on appeal, is composed of two appeals court judges and three military members (the general auditors of the air-force and Carabineros, and an active duty army colonel). The military members of the court have limited (three year) tenure.

Civilians are affected by these military criminal proceedings both as defendants and as victims. As defendants, civilians can be tried by military courts for the possession or use of prohibited weapons, and certain speech offenses, such as making comments or declarations considered to affect the morale of the armed forces (an offense known as

“improper sedition” (*sedición impropia*). They can also be tried by military courts for acts of aggression against members of Carabineros.

While the last case of an improper sedition case dates from 1994, prosecutions for other offenses under the Code of Military Justice still occur with some frequency. A Mapuche indigenous rights activist is currently under investigation by a military prosecutor for illegal possession of a weapon.<sup>1</sup> The trial by military courts of civilians accused of “wounding, hitting or maltreating” members of the uniformed police, Carabineros, is a common occurrence.<sup>2</sup> Such cases make up a considerable part of the workload of military courts: 27 percent of cases that reached the Martial Court in 2007 were in this category.<sup>3</sup>

### **Military jurisdiction over police actions that violate human rights**

Military courts are also an obstacle to accountability for human rights abuses. They continue to try cases in which Carabineros are accused of use of unnecessary force, torture, or ill-treatment committed against civilians. The Military Criminal Code is applicable when military are accused of common crimes committed “in an act of military service” as well as on military or police premises.<sup>4</sup> Such crimes include the “use of unnecessary force” in carrying out orders or in exercise of military functions. In 2007, 62 cases of the “use of unnecessary force” came for review before the Martial Court.<sup>5</sup> In two recent cases, police allegedly responsible for shootings of members of indigenous Mapuche communities in disputed circumstances have been prosecuted by military courts for “use of unnecessary force resulting in death.”<sup>6</sup>

### *International Standards*

Several authoritative international human rights bodies have noted with concern Chile’s continued use of military courts to try civilians. In its concluding observations on the report Chile submitted under art. 40 of the International Covenant on Civil and Political Rights, the Human Rights Committee considered that this practice was incompatible with art. 14 of the Covenant, and recommended that Chile “should expedite the adoption of the law amending the Code of Military Justice, limiting the jurisdiction of military tribunals solely to military personnel charged exclusively with military offences, and ensuring that the new

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<sup>1</sup> F. Alvarez and S. Bustos, “CAM and Pro-Mapuche Detainees Face Key Week in Courts” (Detenidos de la CAM y pro mapuches tienen semana judicial clave), *El Mercurio* (Santiago, Chile), November 3, 2008. <http://diario.elmercurio.com/2008/11/03/nacional/nacional/noticias/108C612F-741F-4C92-A9D6-93F3C998EE26.htm?id={108C612F-741F-4C92-A9D6-93F3C998EE26}>.

<sup>2</sup> Code of Military Justice, art. 416 bis,

<sup>3</sup> Centro de Derechos Humanos, Universidad Diego Portales, “Informe Anual Sobre Derechos Humanos en Chile, 2008,” p. 403. [http://www.udp.cl/derecho/derechoshumanos/informesddhh/informe\\_08/JusticiaMilitar.pdf](http://www.udp.cl/derecho/derechoshumanos/informesddhh/informe_08/JusticiaMilitar.pdf) (accessed October 23, 2008).

<sup>4</sup> Code of Military Justice, art. 5(3).

<sup>5</sup> Centro de Derechos Humanos, Universidad Diego Portales, op cit.

<sup>6</sup> The case of Alez Lemún, which ended in the acquittal of the police officer responsible for his death, is described in “Undue Process: Terrorism Trials, Military Courts and the Mapuche in Southern Chile,” Human Rights Watch report, October 2004, p. 56.

law does not contain any provisions that could allow rights established in the Covenant to be violated.”<sup>7</sup>

The Inter-American Court of Human Rights ruled in 2005 in the Palamara case that Chile’s military tribunals had excessively wide jurisdiction, including over civilians, and failed to comply with international standards of competence, independence, and impartiality. The court ordered Chile to reform its military courts, to ensure that they meet these standards, and to end their jurisdiction over civilians.<sup>8</sup>

By allowing police officers to be tried by military courts for acts which constitute human rights violations, Chile is failing to fulfil its obligations to provide victims of human rights violations with an effective remedy. Authoritative international human rights bodies have repeatedly found that military tribunals cannot be relied upon to provide such remedies. For that reason, they have called on states to transfer jurisdiction over these cases from military to civilian authorities. In 2007, the Inter American Court on Human Rights has held that “the military criminal jurisdiction is not the competent jurisdiction to investigate and, if applicable, prosecute and punish the perpetrators of human rights violations.”<sup>9</sup> This view has been affirmed and upheld in subsequent decisions.<sup>10</sup>

#### *Steps taken by the Chilean Government*

Although Chile has announced its intention to reform its military justice system, progress has been disappointingly slow. In June 2007 the government presented a reform bill to Congress which expressly excluded any change to the jurisdictions described above. If approved as written, military courts would continue to deal with assaults by civilians against police as well as abuses committed by the police against civilians. During 2008 this bill remained frozen in the Senate due in part to objections by legislators to these omissions. A civil-military commission established by the Minister of Defense in 2007 is currently working on proposals for a new Code of Military Justice. In August 2008 it published a list of 27 guiding principles for the new code, which included the principle that no civilians should be tried by military courts. However, although three years have passed since the Palamara judgment, as of November 2008 there was still no bill in Congress which addresses this fundamental issue.

### **Reproductive rights**

#### *Abortion*

Chile is one of only four countries in the world that prohibits abortion in any circumstance. Abortion is not permitted to save the life of the pregnant woman, nor to preserve her health, nor in cases of rape or incest. Authoritative interpretations of international law

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<sup>7</sup> Human Rights Committee, Concluding Observations on Report submitted by States Parties under Article 40 of the Covenant , Chile, CCPR/C/CHL/CO/5 May 18, 2007, para 12.

<sup>8</sup> Inter-American Court, Palamara Iribarne v. Chile, Judgment of November 22, 2005, (Series C), No. 35 (2005).

<sup>9</sup> Inter-American Court, Rochela Massacre v. Colombia, Judgment of May 11, 2007, Inter-Am. Ct. H.R. (Series C) No. 163, para. 200 (emphasis added).

<sup>10</sup> See, e.g., Inter-American Court, Escue-Zapata v. Colombia, Judgment of July 4, 2007, Inter-Am. Ct. H. R. (Series C) No. 165, para. 105 and Inter-American Court, Zambrano Velez v. Ecuador, Judgment of July 4, 2007, Inter-Am. Ct. H.R. (Series C) No. 166, para. 66.

recognize that abortion is vitally important to women's exercise of their human rights.<sup>11</sup> Indeed, the global tendency is to liberalize abortion laws and reduce barriers to respect women's right to access necessary health services and mitigate the ill effects of clandestine abortion on public health.<sup>12</sup> UN treaty bodies have argued that women's human rights are jeopardized by restrictive and punitive laws and practices.<sup>13</sup> In Chile, women's rights to decide independently with respect to her life, health and autonomy are violated. As a result, tens of thousands of clandestine abortions are performed each year, many of those to women with scarce economic resources who seek services in unsafe, unsanitary and potentially life-threatening situations.<sup>14</sup>

Human Rights Watch has documented the harmful effects of abortion restrictions in countries with similarly restrictive legislation and/or access.<sup>15</sup> These include violations to women's rights to health and health care, to life, to non-discrimination and equal treatment in the law, to security of person, to liberty, to privacy, to information, to be free from cruel, inhuman or degrading treatment, to decide the number and spacing of children, to enjoy the benefits of scientific progress, and to freedom of conscience and religion. It is clear that international human rights law supports women's rights to decide independently in matters of abortion, without interference from the state or third parties. Chile is in violation of these fundamental rights.

### *Emergency Contraception*

Emergency contraception is a pregnancy prevention method used after unprotected sexual intercourse, whether rape or voluntary. It is a unique method that can prevent crisis pregnancies—and by extension, some abortions—when other methods no longer work. It is safe, effective and easy to use by any woman who needs it. In 1997, the World Health Organization added emergency contraceptive pills (ECPs) to its Model List of Essential Drugs.

Regrettably, emergency contraception has been widely confused with the abortion pill (RU-486 or mifepristone), and national level decisions have often been based on this erroneous equation. In Chile this mistaken thinking has led to a ban on the distribution of ECPs by the public health authorities. The ban is particularly grave in that, as noted above,

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<sup>11</sup> For a full discussion on international law and abortion, please see the Human Rights Watch background paper, *International Human Rights Law and Abortion in Latin America*, at <http://hrw.org/backgrounder/wrd/wrd0106/>

<sup>12</sup> Reed Bolan and Laura Katzive, "Developments in Laws on Induced Abortion: 1998–2007," *International Family Planning Perspectives*, vol. 34, no. 3, Sept 2008, pp. 110-120.

<sup>13</sup> Center for Reproductive Rights, *Bringing Rights to Bear: Abortion and Human Rights* (New York: Center for Reproductive Rights) (publication pending), pp. 1-28 of draft manuscript.

<sup>14</sup> Guttmacher Institute, *An Overview of Clandestine Abortion in Latin America*, December 1996, <http://www.guttmacher.org/pubs/ib12.html>, accessed November 3, 2008.

<sup>15</sup> Human Rights Watch, *Decisions Denied: Women's Access to Contraceptives and Abortions in Argentina*, vol. 17, no. 1(B), June 2005, <http://hrw.org/reports/2005/argentina0605/>. Human Rights Watch, *The Second Assault: Obstructing Access to Legal Abortion after Rape in Mexico*, vol. 18, no. 1(B), March 2006, <http://hrw.org/reports/2006/mexico0306/>. Human Rights Watch, *Over Their Dead Bodies: Denial of Access to Emergency Obstetric Care and Therapeutic Abortion in Nicaragua*, vol. 19, no. 2(B), Oct 2007, <http://hrw.org/reports/2007/nicaragua1007/>. Human Rights Watch, *My Rights, and My Right to Know: Lack of Access to Therapeutic Abortion in Peru*, July 2008, <http://hrw.org/reports/2008/peru0708/>.

Chile provides no solution within the law for an unwanted pregnancy, not even in the case of rape.

In April 2008 the Chilean Constitutional Court prohibited the distribution of ECPs to the public health sector.<sup>16</sup> In an effort to mitigate the effects of the ban, President Michelle Bachelet stated in her annual address to the national congress on May 21, 2008 that each mayor could decide whether or not to distribute this contraceptive method to municipal health centers. The Minister of Health clarified that while the court decision did not permit ECP delivery as official policy, municipalities could still acquire the pills from pharmacies or from the government stock as the drug is legal and municipalities, as autonomous bodies, were not affected by the Constitutional Court decision.<sup>17</sup> Despite this attempt by the government to ensure availability of the pills while respecting the court decision, according to information received by Human Rights Watch ECPs are only being distributed sporadically in centers for rape victims, and are not being distributed adequately in the municipalities. Thus, free and regular access to this essential pregnancy prevention method continues to be denied to many Chilean women, particularly poor women and adolescents.

### Recommendations

1. Chile should end the use of military courts in all cases in which the defendants are civilians.
2. To seek accountability for abuses by the police, the Chilean government should ensure that civilian authorities investigate, prosecute, and try human rights abuses committed by members of Carabineros.
3. The President of Chile should publicly support women's right to immediate unhindered access to safe abortion where the intervention is needed to protect the pregnant woman's life or health, and support legislative reform to facilitate women's access to voluntary and safe abortion services. She should also raise public awareness of the availability of emergency obstetric services at public hospitals and clinics.
4. The Chilean Congress should enact laws that allow women to have access to voluntary and safe abortions. These measures should include the repeal of penal code provisions that criminalize abortion, especially those that punish women who have had an induced abortion and those that punish doctors for providing abortion services.
5. Chile should recognize explicitly that emergency contraception is a safe and effective means to prevent pregnancy and to protect women's right to health. Therefore, the State should take all necessary measures to increase access to this method for all women, with a special emphasis on rape survivors and adolescents. Services should be youth-friendly, accessible, and available to all, regardless of ability to pay. Chile should enact laws to ensure timely access to rape survivors, and

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<sup>16</sup> Chilean Constitutional Court (*Tribunal Constitucional Chile*), Sentence (*Sentencia Rol*) 740-07-CDS.

<sup>17</sup> F. Valenzuela and R. Silva, "Health: The morning after pill still legal" (*Salud: La Píldora del día después sigue siendo legal*), *El Mercurio* (Santiago, Chile), September 9, 2008.

ensure safe pregnancy termination services for women who become pregnant as a result of rape and opt for abortion.