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**ANALYSIS OF THE PROPOSED REGIME OF IDENTITY CONTROL
DRAFT BILL NUMBER 9985-07 OF CHILE**

**BY THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE RIGHTS TO FREEDOM OF
PEACEFUL ASSEMBLY AND OF ASSOCIATION
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1. The draft bill number 9985-07 as communicated by the lower house (Cámara de Diputados) of Chile to the upper house (Senado) of Chile on 9 September 2015, proposes changes to the current regime of identity control in the country. It does so by on the one hand modifying art 85 of the Procedural Penal Code (Código Procesal Penal) and on the other hand introducing an autonomous new provision in article 12. Given the impact of identity controls for the realization of the rights to freedom of peaceful assembly and of association, the UN Special Rapporteur wishes to share his analysis of this new regime against the framework of international law, standards and principles as committed to various actors during his country visit to Chile in September 2015.
2. International law refers to legally binding obligations. This analysis also makes reference to standards and principles emanating from legal and institutional frameworks, coming from international treaty bodies, international, regional courts (jurisprudence) or forming part of an existing or emerging practice. These standards and principles provide a clearer understanding on what precisely the international legal obligation entails. As the Republic of Chile is a full member of the United Nations and the Organization of American States through the respective treaties, the findings of bodies or of experts under the special procedures, within these systems are of utmost relevance. Further, given that the ICCPR and the European Convention on Human Rights use similar wording for many of the rights protected under the ICCPR and given the elaborate track record of the European Court on Human Rights (ECtHR) in providing interpretative guidance to human rights stipulations, the decisions of this Court are relevant and shall be referred to in the discussion below. Relevant

passages from the OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly¹ are also highlighted.

a) The proposed identity control regime

3. Current Article 85 of the Procedural Penal Code [Código Procesal Penal, hereinafter Article 85] determines that identity controls, including searching of bags, clothes and vehicles, must take place in the context of a crime - committed or suspected to be committed. Identity controls can be asked from a suspected perpetrator, any person suspected to have information about a crime or a person attempting to hide his/her identity. A person failing or refusing to identify him- or herself shall be brought to the nearest police station, where further efforts of identification may take place - possibly including taking fingerprints. An individual may be held for at most 8 hours, after which he or she must be released².
4. The proposed provision to amend article 85 would allow the control and search to take place on the spot, and confirms an identity control and search can take place if there is an outstanding arrest warrant against the person in question. Finally the amendment also makes some 'subtle' alterations, such as changing the phrase 'indications of a crime exist' to 'any indication of a crime exists', lowering the level of indications of a potential crime, which has happened.
5. Article 12 of the draft bill [hereinafter Article 12] does not modify any existing legislation, but introduces a new general power for police to stop and check the identity of all people, without any indication or context of a crime. A person failing or refusing to produce proof of identity may be brought to the nearest police station where additional identification procedures may take place. These processes may take a maximum of 4 hours, after which the person shall be released. This provision does not include search powers and explicitly prohibits 'discrimination'. Article 12 stipulates that the police has to develop a complaint procedure³ and to keep statistics on the use of the new stop-and-identify procedure on its website. This monitoring system shall indicate sex, age and nationality of the people stopped. Finally, a regular report to be communicated to the Ministry of Interior and Public Security is provided for.
6. These provisions raise two significant questions under international law. First, since identity controls affect the human rights of the people concerned, when may they be used and how will authorities guard against abuses? Second, do the detention periods of 8 (in the context of a crime) or 4 hours (without any suspicion of a crime), conform to international law, standards and principles?

¹ OSCE/ODIHR and Venice Commission, *Guidelines on Freedom of Peaceful Assembly* (2010) (available at <http://www.osce.org/odihr/73405?download=true>)

² Unless a case is presented under article 496, 5 of the penal code.

³ No specifics on the complaint procedure are given in the draft bill.

b) Identity control with or without a reasonable suspicion

7. Article 85 of the Procedural Penal Code (and the proposed amendments to it) provides for stop and search powers, while the new stipulation as defined by article 12 of that same draft bill, introduces general stop and identify powers. These powers affect the right to free movement and the right to private life. Thus, they must be authorized by law, not be arbitrary⁴ and be necessary and proportional.
8. In the case of reasonable suspicion, stop and search powers may be justifiable under international law and standards when meeting these requirements⁵. Recent cases in the context of countering terrorism are instructive on the limitations, as the principles they establish would *per se* also apply to any other, lesser crime. In a terrorism-related case, the European Court of Human Rights expressed deep concern with the breadth of discretion conferred upon individual police officers: 'he is not required even subjectively to suspect anything about the person stopped and searched'⁶. The Court found that an absence of any obligation on the part of the law enforcement officer to show a reasonable suspicion [*in casu of holding articles which could be used in connection with terrorism*] renders it difficult for victims, if not impossible, to prove that the power [*of stop and search*] was improperly exercised⁷.
9. While the stop and search powers of article 85 must indeed take place in a context of crime, the provision does not necessarily require a clear suspicion in terms of presence of a strong amount of evidence. The proposed changes further lower the standards instead of confining the powers of police officers by requiring even less evidence as 'any indication' of a potential crime shall suffice. Under article 85, even witnesses to misdemeanors may be stopped and searched. Following the reasoning of the European Court, allowing search powers upon these individuals, together with the breadth of discretion conferred upon police officers, does not comply with international law, standards and principles.

⁴ 'The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.' UN Human Rights Committee, *General Comment No. 16 Article 17 right to privacy*, September 1988, [hereinafter *General Comment No. 16*], para 4. Article 12 of the ICCPR protect the right to free movement, conditions for restrictions are stipulation in 12 (3) and (4): (3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. (4) No one shall be arbitrarily deprived of the right to enter his own country. European Court of Human Rights, *Gillian and Quinton v. United Kingdom*, Application no. 4158/05, para 63: 'Court considers that the use of the coercive powers conferred by the legislation to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life.'

⁵ See article 11,3 ICCPR on restrictions on the right to freedom of movement; previous footnote.

⁶ European Court of Human Rights, *Gillian and Quinton v. United Kingdom*, Application no. 4158/05, para. 83.

⁷ European Court of Human Rights, *Gillian and Quinton v. United Kingdom*, Application no. 4158/05, para. 83-86.

10. With regard to the search powers in public, the European Court of Human Rights found that: 'the public nature of the search may, in certain cases, compound the seriousness of the interference because of an element of humiliation and embarrassment. Items such as bags, wallets, notebooks and diaries may, moreover, contain personal information which the owner may feel uncomfortable about having exposed to the view of his companions or the wider public.'⁸ This aspect of stop and search powers should also be taken into account when revising article 85 of the procedural penal code, allowing for searches on the spot.
11. The guidelines of the Working Group on protecting human rights while countering terrorism of the UN Counter-Terrorism Implementation Task Force (CTITF), state that only stops that are 'necessary to achieve their protective function are legitimate'⁹. The guidelines also state that there must be specific reasons to conduct the stop, e.g., because the person fits a given description or the person attempts to enter a building that requires special protection. Citing legislation or broad reasons, such as national security alone, is insufficient.¹⁰ The provisions under article 12 of the draft bill, allowing for general stop and identify powers, fail to comply with this guideline¹¹.
12. In addition, broad or blanket discretion to stop and identify or stop and search creates virtually insurmountable risks of discrimination. Ex-post reporting mechanisms cannot prevent or undo that; all they can do is monitor it.
13. In August this year, at the occasion of the Universal Periodic Review of the United Kingdom, the UN Human Rights Committee expressed serious concerns over too little protection against arbitrary and disproportionate use of stop and search powers without reasonable suspicion, against individuals of a particular ethnicity - especially by the Police of Scotland¹². It recommended stepping up efforts to ensure conformity with the Covenant, including engaging in better training, improving the transparency of the stop and search practices, undertaking comprehensive data-gathering about the application and ensuring

⁸ European Court of Human Rights, *Gillian and Quinton v. United Kingdom*, Application no. 4158/05, para. 63

⁹ UN Counter-Terrorism Implementation Task Force (CTITF) - Working Group on protecting human rights while countering terrorism, *Basic human rights reference guide. Stopping and searching of persons*, March 2014, para 52.

¹⁰ UN Counter-Terrorism Implementation Task Force (CTITF) - Working Group on protecting human rights while countering terrorism, *op.cit.*, para 51-53. See also UN Human Rights Committee, *General Comment No. 27*, UN Doc. CCPR/C/21/Rev.1/Add.9 (1999), para. 15 about the reasons to be given for restrictive measures.

¹¹ These general powers cannot be compared to situations involving prior consent, such as driving or traveling by air. Driving requires an authorization, obtaining and using it implies consent to verification as much as buying an air-ticket includes acceptance of the security checks when traveling. And even these circumstances can raise serious issues in terms of discrimination. See next paragraph.

¹² UN Human Rights Committee, *Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland*, UN Doc. CCPR/C/HBR/CO/7, August 2015, para 11.

independent scrutiny and oversight to ensure that such powers are not exercised in an arbitrary or discriminatory manner¹³.

14. The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, in his 2015 report to the Human Rights Council, presents the contexts that have led to the use of racial and ethnic profiling and provides an overview of the different manifestations by law enforcement agencies of the phenomenon. In his report, he found that:

“[p]olice, immigration and detention officials frequently employ racial and ethnic profiling, in many different and pernicious ways. Government policies may also facilitate discretionary practices that allow law enforcement authorities to target groups or individuals on the basis of their skin colour, dress or facial hair or the languages they speak. Implicit biases also sometimes motivate profiling. Although some studies have demonstrated how ineffective racial and ethnic profiling is, officials continue to use the practice.¹⁴ One manifestation is the use of stop and frisk or stop and check mechanisms to target minorities. This practice results in the disproportionate targeting of these often vulnerable populations.¹⁵ For example, in one South Pacific State, black males were subject to field contact by police officers at a rate 2.4 times higher than their representation in the general population.¹⁶ In Europe, Roma communities are subjected to unequal levels of identity checks, and in some cases, the police stop Roma pedestrians three times more often than non-Roma pedestrians.¹⁷ In one North American state, despite accounting for only 24 per cent of the population, persons of African descent were the subject of 63.3 per cent of stops of civilians by the police^{18, 19} .

¹³ UN Human Rights Committee, *Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland*, UN Doc. CCPR/C/HBR/CO/7, August 2015, para 11.

¹⁴ Open Society Institute, *Ethnic Profiling in the Moscow Metro* (New York, 2006), available from http://www.lamberthconsulting.com/uploads/Ethnic_Profiling.pdf; and American Civil Liberties Union Foundation of Massachusetts, *Black, Brown and Targeted: A Report on Boston Police Department Street Encounters from 2007–2010* (ACLU Racial Justice Program, 2014).

¹⁵ Rachel Neild and others, *Ethnic Profiling in the European Union: Pervasive, Ineffective, and Discriminatory* (New York, Open Society Institute, 2009), available from http://www.opensocietyfoundations.org/sites/default/files/profiling_20090526.pdf.

¹⁶ Flemington and Kensington Community Legal Centre, summary of Gordon and Henstridge first reports.

¹⁷ Open Society Institute, *“I Can Stop and Search Whoever I Want”: Police Stops of Ethnic Minorities in Bulgaria, Hungary, and Spain* (New York, 2007), available from http://www.opensocietyfoundations.org/sites/default/files/profiling_20070419.pdf.

¹⁸ Rachel Neild and others, *Ethnic Profiling in the European Union: Pervasive, Ineffective, and Discriminatory*; and American Civil Liberties Union Foundation of Massachusetts, *Black, Brown and Targeted: A Report on Boston Police Department Street Encounters from 2007–2010*.

¹⁹ Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, A/HRC/29/46, para. 16.

15. The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance concluded that:

“[r]acial and ethnic profiling in law enforcement constitutes a violation of human rights for the individuals and groups targeted by these practices, because of its fundamentally discriminatory nature and because it exacerbates discrimination already suffered as a result of ethnic origin or minority status. Furthermore, racial and ethnic profiling harms already tenuous relationships between law enforcement agencies and minority communities, at a time when members of minority communities need to be reassured about their inclusion and participation in society”.²⁰

16. The European Court of Human Rights, in its important decision (cited above) in the context of countering terrorism, underscored the great risk of discrimination in the application of such powers with wide discretion. It did so even though the facts of the case did not involve any discriminatory, e.g. ethnic aspects:

‘In the Court's view, there is a clear risk of arbitrariness in the grant of such a broad discretion to the police officer. While the present cases do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration, There is, furthermore, a risk that such a widely framed power could be misused against demonstrators and protestors in breach of Article 10 and/or 11 of the Convention.’²¹

17. Against this background of existing research and experiences, the fear that the provision providing for general stop and identify powers will disproportionately affect the most marginalized and weak, such as youth (students), poor and indigenous people, is considered well-founded.

²⁰ Ibid., para. 63. A wealth of research shows that these types of identity controls do more damage than good to society; and ex-post facto monitoring or reporting has done little to address this. Research in the United States of America has demonstrated racial bias when controlling vehicles or performing stop and frisk actions. In New York, in the context of stop and frisk, blacks were stopped six times more often and Latinos four times more often than whites. Similar research in the late nineties in England and Wales demonstrated that blacks were 7.5 times more likely to be stopped and searched. (see US Ministry of Justice, *A resource guide on racial profiling data collection systems*, November 2000, NCJ 184768, p. 5-8). Clear non-discrimination laws exist in Europe and the USA. Nonetheless, a 2011 report of Amnesty International unveiled that in Spain, people not ‘looking Spanish’ can be stopped as often as four times a day for identity checks (Amnesty International, *Stop racism, not people: Racial profiling and immigration control in Spain*, December 2011); a Human Rights Watch report documents abusive identity checks on minority youth in France, damaging community relations (Human Rights Watch, *The root of humiliation: abusive identity checks in France*, January 2012); and in the Netherlands pro-active police activities are similarly threatening human rights protection because of *de facto* ethnic profiling (Amnesty International, *Stop and search powers pose a threat to human rights. Acknowledging and tackling ethnic profiling in the Netherlands*, Original full report in Dutch (October 2013), English Summary (April 2014)).

²¹ European Court of Human Rights, *Gillian and Quinton v. United Kingdom*, Application no. 4158/05, para. 85.

18. The concerns expressed by the European Court²² coincides with those of the UN Special Rapporteur on first, the discriminatory use of stop, identify and search powers – especially without suspicion of a crime - and second, the potential for abuse of such powers to limit the rights guaranteed under article 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Chile on 10 February 1972. The Special Rapporteur previously warned ‘against any use of such wide stop-and-search powers, which should never be used against peaceful protestors’²³. In the same regard, the OSCE Guidelines on peaceful assemblies hold that ‘Unless a clear and present danger of imminent violence actually exists, law-enforcement officials should not intervene to stop, search or detain protesters en route to an assembly’²⁴. Also, a court in the UK (Kent) stated that the stop and search policy whereby all individuals were stopped and searched in the context of peaceful protests during the 2008 climate camp at a power station was unlawful²⁵.

c) Identity control and detention

19. Article 9 of the International Covenant on Civil and Political Rights, concerning the right to liberty and security of person, recognizes that sometimes the deprivation of this right is justified, for example in the enforcement of criminal law. However, no one shall be subjected to arbitrary arrest or detention. The UN Human Rights Committee clarifies in its General Comment nr. 35 on liberty and security of person that the term arrest refers to any apprehension of a person that commences a deprivation of liberty and is not limited to formal arrest under domestic law. ‘The notion of ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.’²⁶ This means that detention can still be arbitrary even if it is prescribed in Chilean law. Where the room for discretion by executing officers is too wide, the principle of legality is not observed²⁷.

²² Article 10 and article 11 of the European Convention of Human Rights guarantee the right to freedom of expression and the right to freedom of peaceful assembly and of association respectively.

²³ UN Human Rights Council, *Report of the Special Rapporteur on the rights to peaceful assembly and of association*, UN Doc. A/HRC/23/39/Add.1, para. 44.

²⁴ OSCE/ODIHR and Venice Commission, *Guidelines on Freedom of Peaceful Assembly* (2010), § 154; (available at <http://www.osce.org/odihr/73405?download=true>)

²⁵ UN Human Rights Council, *Report of the Special Rapporteur on the rights to peaceful assembly and of association*, UN Doc. A/HRC/23/39/Add.1, para. 43.

²⁶ UN Human Rights Committee, *General Comment No. 35. Article 9. Liberty and security of person*, December 2014, [hereinafter *General Comment No. 35*], UN Doc. CCPR/C/GC/35, para 12.

²⁷ A law cannot allow for unfettered discretion upon those charged with its execution. UN Human Rights Committee, *General Comment No. 34. Article 19: Freedom of opinion and expression*, September 2011, [hereinafter *General Comment No. 34*], UN Doc. CCPR/C/GC/34, para 25.

20. Furthermore, the Committee considers that detentions, which are known as administrative detention without contemplation of criminal charges, present severe risks of arbitrary deprivation of liberty. The burden lays upon the State to demonstrate that no alternative measures, including the criminal justice system, were appropriate or available²⁸. The burden of proof increases with the length of the detention. The detentions in Chile's proposed identity control regime, starting with the transfer to the nearest police station up to the release after maximum eight or four hours, constitute detentions in this sense.
21. The Inter-American Court of Human Rights takes the same restrictive approach to detentions as it confirmed recently in the case of *Wong ho Wing v. Peru*, June 2015: 'La Corte Interamericana ha señalado que sin perjuicio de la legalidad de una detención, es necesario en cada caso hacer un análisis de la compatibilidad de la legislación con la Convención en el entendido que esa ley y su aplicación deben respetar los requisitos que a continuación se detallan, a efectos de que la medida privativa de libertad no sea arbitraria: i) que la finalidad de las medidas que priven o restrinjan la libertad sea compatible con la Convención; ii) que las medidas adoptadas sean las idóneas para cumplir con el fin perseguido; iii) que sean necesarias, en el sentido de que sean absolutamente indispensables para conseguir el fin deseado y que no exista una medida menos gravosa respecto al derecho intervenido entre todas aquellas que cuentan con la misma idoneidad para alcanzar el objetivo propuesto'²⁹.
22. The situations in which identity control, searches and detentions are allowed under article 85, including the suggested modifications, are vast. A person (suspected) of witnessing the commission of the smallest misdemeanor, for example, may face not only searches (*see above*), but also eight hours of detention. As for article 12, any person may face possibly up to four hours of detention at any time – for example a jogger not in possession of his her or his ID card. Neither article 85, nor article 12 provide further restrictions or indications as to justify the duration of the detention apart from 'trying to establish a person's identify'. Importantly, no judicial oversight is provided. In the assessment of the UN Special Rapporteur, the provisions on detention are contrary to the principle of legality, because of the wide discretion afforded to police officers and the fact that they apply in situations where there is no suspicion of crime (i.e. Article 12). Further, the UN Special Rapporteur finds there are very high risks of disproportionate application of the law – again, all the more so in a context without crime suspicion - given the possible length of

²⁸ 'Such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available. If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention.', UN Human Rights Committee, *General Comment No. 35*, UN Doc. CCPR/C/GC/35, para 15.

²⁹ Inter-American Court of Human Rights, *Wong ho Wing v. Peru*, 30 June 2015, para. 248.

detention and the fact that other less intrusive measures are usually available, and can be just as effective in achieving the State's goal of security³⁰.

23. During his country visit to Chile in September 2015, the UN Special Rapporteur received information that police allegedly used pre-emptive detention and identity controls prior to the holding of assemblies under the existing article 85, thus chilling, possibly violating, the exercise of the right to freedom peaceful assembly, among other rights. The new provision under article 12 exacerbates this risk, as no justification whatsoever is needed to halt people and ask for their identity. This increases the chilling effect identity controls may have on the exercise of the rights to freedom of peaceful assembly and of association, in particular for groups most at risk such as students, indigenous peoples, trade unionists and migrants. Failure to prove identity immediately may give rise to a detention, practically overlapping the duration of the assembly (four hours). The Human Rights Committee underscores that arrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant – including freedom of opinion and expression (art. 19), freedom of assembly (art. 21), freedom of association (art. 22), freedom of religion (art. 18) and the right to privacy (art. 17)³¹ – is arbitrary; so is of course detention aimed at preventing the exercise of any of these rights.

d) Conclusion

24. The UN Special Rapporteur recommends that the Executive, Legislative and Judicial branches of the Republic of Chile review article 85 to ensure full compliance with international human rights law, standards and norms. Such a review should focus on ensuring limitation and clarification of the situations in which identification – and especially search powers – can be exercised and in which people can be kept in detention. Further, he recommends that the legislative branch does not enact general stop and identify powers, but rather incorporates the monitoring and reporting provisions stipulated under article 12 of the draft bill in an improved version of article 85 of the Procedural Penal Code.
25. The UN Special Rapporteur sincerely hopes that this analysis is useful to the different actors involved in the legislative process and wishes to encourage the Republic of Chile to fully embrace human rights, and in particular the rights to freedom of peaceful assembly and of association to further strengthen the democracy and the rule of law in the country.

This analysis is being brought to the attention of the following representatives:

³⁰ UN Human Rights Committee, *General Comment No. 35*, UN Doc. CCPR/C/GC/35, para. 15.

³¹ UN Human Rights Committee, *General Comment No. 35*, UN Doc. CCPR/C/GC/35, para. 17.

- President of the Republic of Chile
- Chamber of Deputies:
 - President of the Chamber of Deputies
 - Vice-Presidents the Chamber of Deputies
 - President of the Commission for Constitution, Legislation and Justice
 - President of the Commission for Human Rights and Indigenous peoples
- Senate:
 - President of the Senate
 - Vice-Presidents of the Senate
 - President of the Commission for Constitution, Legislation and Justice
 - President of the Commission for Human Rights and Indigenous peoples
- Ministries:
 - Minister of Foreign Affairs
 - Minister of the Interior and Public Security
 - Minister of Defence
 - Minister of Justice
 - Minister of Education
 - Minister of Labour and Social Affairs
- Security authorities:
 - Director-General of the Carabineros
 - Director-General of the Investigation Police of Chile
- Public Prosecutor
- Supreme Court:
 - President of the Supreme Court
 - Vice-President of the Supreme Court
- Director of the National Institute for Human Rights

Mr. Maina Kiai (Kenya) was designated by the UN Human Rights Council as the first Special Rapporteur on the rights to freedom of peaceful assembly and of association in May 2011. Mr. Kiai has been Executive Director of the International Council on Human Rights Policy, Chair of the Kenya National Human Rights Commission, Africa Director of the International Human Rights Law Group, and Africa Director of Amnesty International.

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