**Human Rights Violations**

**of Lesbian, Gay, Bisexual & Transgender (LGBT)**

**People in Chile**

Presented to the 018th Session of:

**International Covenant on Civil and Political Rights**

**Human Rights Committee of the United Nations**

**for consideration during the drafting of the List of Issues**

July 2013 • Geneva

**Organización de Transexuales por la Dignidad de la Diversidad (OTD)**

[**www.transexualesdechile.org**](http://www.transexualesdechile.org)

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**Introduction**

The arrests, harassment and discrimination faced by lesbian, gay, bisexual and transgender (LGBT) people in Chile demonstrate the need for the Government of Chile to act urgently. The International Covenant on Civil and Political Rights (ICCPR) recognizes the right to be protected from violence and discrimination for all people. Despite these guarantees, the Government of Chile refuses to repeal laws that negatively impact LGBT people or to modify cultural attitudes that lead to climates of fear, harassment, and discrimination. There is an urgent need for the Human Rights Committee (“the Committee”) to act so that all people in Chile, regardless of their sexual orientation or gender identity, can enjoy their most basic human rights.

**SUBSTANTIVE VIOLATIONS**

**Article 2(1), 3 and 26: Discriminatory Laws and Practices**

Articles 2(1), 3 and 26 of the Covenant provide for the respect, equality and nondiscrimination of all individuals on the grounds of, inter alia, race, color and sex. In the landmark decision of *Toonen v. Australia* in 1994, the Committee found that the reference to “sex” in Articles 2(1) and 26 must be taken to include sexual orientation.

***State Actor violence against Lesbian, Gay, Bisexual and Transgender (LGBT) individuals***

Lesbian, Gay, Bisexual and Transgender people (LGBT) in Chile suffer constant and arbitrary violence by State actors, particularly by those in direct contact with them. Discriminatory laws such as Article 373 of the Chilean Penal Code, “the law of morality and good customs,” continue to be used as a justification for detaining LGBT individuals. Additionally, LGBT people regularly experience violence from law enforcement officials intended to protect their rights safety, including Carabineros (police), Investigative Police (PDI) and Gendarmería (prison guards).

Police officers in Chile frequently justify apprehension of LGBT individuals using Article 373 of the Penal Code. The stated purpose of Article 373 is to punish behavior that offends “morality or good customs,”[[1]](#footnote-1) however, because the law fails to define or explain what constitutes a violation, law enforcement wrongfully use it to criminalize and harass lawful behavior of LGBT people. Police used it to forcibly remove university students occupying a public space on the Sociology University of Concepción in Chile.[[2]](#footnote-2) Many of the abuses of power exercised against LGBT people from this law go unreported. For this reason, the absence of official statistics further frustrates the visibility of this enormous phenomenon. Other courts in the region have held that public morality laws cannot be used at the expense of individual rights including rights to equality and integrity.[[3]](#footnote-3)

Regarding violence by State actors, a particularly egregious incident of abuse by multiple State actors occurred on June 28, 2012, when police detained María Ignacia, a 22-year-old transgender woman[[4]](#footnote-4) in the city of Antofagasta for reasons that remain unknown[[5]](#footnote-5). As the police held María without cause, they mocked and insulted her and later forced her to perform oral sex on several officers at the police station. When María went to the public hospital to document her injuries, the doctor on duty refused to help her.[[6]](#footnote-6) Finally, when she went to make a report to the Investigative Police (PDI), they threatened and intimidated her in an attempt to prevent her from registering her complaint. Only with the support of the Organization for Dignity and Diversity of Transexuals (OTD) and the National Human Rights Institute (NHRI) was María finally able to make her complaint to the Investigative Police. At this time, the prosecutor of Antofagasta is still investigating her case.[[7]](#footnote-7) María Ignacia represents a common example of transgender individuals struggling to receive justice at every level of the criminal justice system.

Another case of state violence involved Nayaret, a 24-year old transgender woman engaged in sex work who was brutally attacked by a client. Later, the Carabinero police of Chile minimalized her attack and left Nayaret bleeding for 30 minutes, delaying the documentation of her injuries and putting her life at serious risk.[[8]](#footnote-8) The police negligence is an insult to Nayaret’s dignity, and demonstrates the clear denigration of the value of life transgender individuals often face when engaging with state actors because of their gender identity.

***Recommendations***

* The State should eliminate the “morality and good customs law” of Article 373 of the Penal Code, because the vague language of the law allows police to discriminatorily enforce it against LGBT people.

***The Anti-Discrimination Law: A badly conceived instrument for protection of human rights***

In 2011, following the brutal murder of 24-year-old Daniel Zamudio, who was beaten and stabbed to death for being gay by neo-nazis, the Chilean government hastily passed anti-discrimination legislation that had been pending since 2005. Though the legislation’s stated purpose is to provide legal protection to vulnerable minorities and it includes protected categories of sexual orientation and gender identity, the State’s haste to pass bill gave way to the inclusion of a broad exception.

The Anti-Discrimination Law includes an exception asserting, “*distinctions, exclusions and restrictions will always be considered reasonable, although based on one of the criteria mentioned in the first section…*” (the section includes sexual orientation and gender identity) “…*by the legitimate exercise of other fundamental rights*… in Article 19 of the Constitution.”[[9]](#footnote-9) In other words, one may discriminate on the basis of sexual orientation and gender identity if the person discriminating is engaged in any of the fundamental rights enumerated in Article 19 of the Constitution.[[10]](#footnote-10) This broad list includes freedom of conscience and religion, freedom of teaching and freedom to engage in economic activities.[[11]](#footnote-11) In other words, the exception permits broad justification for discrimination and offers little protection against it.

***Recommendations***

Ensure the Anti-discrimination Law may operate to provide an effective remedy for discrimination by doing the following:

* Develop and implement guidelines for judges in order to prevent and avoid abuse of discretion in judicial decisions;
* Include “gender” as a protected category of discrimination;
* Shift the burden of proof from the person who suffers the discrimination to the person or body that is accused of committing the violation;
* Ensure that the requirement to develop and implement anti-discriminatory public policies is not exclusively in the discretion of each one of the State administrative bodies.

***Discrimination regarding parental rights***

Despite the constitutional guarantees that all persons have equal rights under the law and the recently adopted antidiscrimination law, LGBT parents are regularly discriminated against. Such discrimination is shielded by and perpetuated through the legislature as well as the judiciary. As marriage between persons of the same sex is prohibited, non-biological LGBTI parents do not have any right regarding their children and are continuously under the risk of seeing their parental rights diminished. The draft law on “Agreement of Partnership Cohabitation” (Ley de Acuerdo de Vida en Pareja) itself, which is currently being debated in the Congress, does not preserve nor protect either the rights of LGBT parents nor their children’s.

In 2012, the Inter-American Court of Human Rights issued a landmark decision finding sexual orientation as a protected class in the American Convention and holding that the State of Chile wrongfully deprived Plaintiff Karen Atala of custody of her three daughters because of her sexual orientation.[[12]](#footnote-12) In the aftermath of this case, the State of Chile should be commended for fulfilling many of its obligations under the decision including financial compensation, the symbolic act of reparation and providing psychological assistance to the plaintiff and her children. Unfortunately, some obligations under the decision remain outstanding. As a way to ensure non-discrimination on the basis of sexual orientation moving forward, the Inter-American Court decision also ordered Chile to implement continuous educational programs and training courses to public officials, particularly judicial officials in (1) human rights, sexual orientation, and non-discrimination; (2) protection of the rights of LGBTI community; and (3) discrimination, overcoming gender stereotypes of LGBTI persons and homophobia at the regional and national levels.[[13]](#footnote-13) Despite this judicial order, one that is vital to preventing discriminatory treatment of LGBT people in the judicial system, the State has not yet fulfilled its obligation to institute these vital judicial trainings.

Another way LGBT parents have been denied parental rights may be seen through the recent event occurring on April of 2013 when the Civil Registry denied Alexandra Benado the opportunity to legally register as the mother of children who had grown up with her partner, Alejandra Gallo.[[14]](#footnote-14) This denial of rights led to an injunction against the Registry before the Court of Appeals of Santiago. In particular, Chilean law recognizes parentage of children without requiring the existence of a biological link, protecting families who constitute a family within the context of assisted reproduction. However, as the case of Alexandra Benado and Alejandra Gallo represents, courts continue discriminating against lesbian couples, denying them rights relating to assisted reproduction enjoyed by heterosexual couples.

Notably, the Human Rights Committee has recognized that the obligation to protect people from discrimination based on sexual orientation extends to ensuring that same-sex couples receive the same treatment and are entitled to the same benefits as couples opposite sex who are not married.[[15]](#footnote-15)

***Recommendations***

* The State fulfill its obligation under *Atala Riffo and Daughters v. Chile* by implementing continuous educational programs and training courses to public officials, specifically judicial officials in (1) human rights, sexual orientation, and non-discrimination; (2) protection of the rights of LGBTI community; and (3) discrimination, overcoming gender stereotypes of LGBTI persons and homophobia at the regional and national levels.

**Article 10 and 7: Right to Humane Treatment in Detention and Free From Torture**

***Violence against women in prisons***

Articles 10 and 7 of the Covenant respectively require that all individuals in detention be treated with humanity, dignity and with respect and must not be subjected to torture or cruel, inhuman or degrading treatment or punishment. By its General Comments on Article 10, the Committee has stated “treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule…[which] must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”[[16]](#footnote-16) Furthermore, the prohibition of torture relates not only to physical abuse but also to “acts that cause mental suffering to the victim,” including intimidation.[[17]](#footnote-17) In its General Comments on Article 7, the Committee has noted that States have a positive obligation to provide specific training for law enforcement officers and must hold responsible all those who violate the prohibition on torture.[[18]](#footnote-18)

Transgender women in detention are regularly incarcerated in male prisons, which exposes them to a constant threat of violence. Despite its prevalence, violence against transgender women in prison often goes unnoticed and unpunished. Prison authorities regularly determine the gravity of injury sustained is not sufficient for action and do not intervene to prevent or punish the violence. One example involves René Mora, the victim of arson when male-inmates threw burning paper into her cell, ultimately setting it on fire. She was not in her cell at the time the men threw the burning paper but the fire destroyed all of her personal belongings and damaged her cell.[[19]](#footnote-19) The prison guards did not acknowledge or address the matter, nor did they make the incident public.

Like many people in detention facilities, transgender people face unhealthy and unsanitary conditions. However, because transgender individuals have disproportionately higher rates of HIV, these unsanitary conditions often become extremely dangerous put their lives at greater risk. This is particularly true when they do not receive proper medical care.[[20]](#footnote-20)

***Recommendations***

* The State should develop and implement training programs for State agencies at every level around respecting transgender human rights. The State should require all military and police to receive this training and all other officials in constant contact with trans individuals.
* The State should respect gender identity during the execution of a prison sentence and stop placing transgender prisoners in the prison facility of their sex assigned to them at birth. The State should instead put them in prisons in accordance with the gender they express.

**Conclusion**

LGBT persons are entitled to exercise their full rights under the ICCPR. In order to protect the rights of all persons to enjoy those rights, the Government of Chile must take positive steps to repeal discriminatory laws and take an active role in combatting violence and discrimination. There is an urgent need for the Committee to take appropriate action to ensure LGBT people can enjoy their rights they are entitled to under the Convention.

1. Código Penal [Penal Code] Art. 373 (Chile). [↑](#footnote-ref-1)
2. This case was reported to OTD in June of 2007. Valentina Matus, a student at the Sociology University of Concepción reported private security guards at the university repeatedly harassing her and her girlfriend while occupying a public area. The guards insulted the couple and demanded they leave the public space citing the “morality and good customs” law. [↑](#footnote-ref-2)
3. Corte Constitutional [C.C.] [Constitutional Court], March 25, 2004, Sentencia T-301/04 (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2004/t-301-04.htm> [↑](#footnote-ref-3)
4. *Brutal actuar de carabineros en contra de mujer transexual y posteriormente del subcomisario de investigaciones en Antofagasta* (Brutal acts by soldiers against transexual women and following of the subcommision of investigations in Antofagasta), Organización de Transexuales por la Dignidad de la Diversidad, (June 29, 2012), <http://transexualesdechile.org/?p=6559>; Francisco Alemán C., *Transexual denuncia haber sido abusada sexualmente por Policía de Carabineros de Antofagasta*, Magazin (July 3, 2012), [http://www.radiomitos.cl/magazin/?p=9442](http://www.radiomitos.cl/magazin/?p=9442" \t "_blank). [↑](#footnote-ref-4)
5. Although in general, Carabineros use *Article 373 of the Penal Code* as an argument to detain LGBT persons. [↑](#footnote-ref-5)
6. A different healthcare professional without experience in evidence preservation agreed to assist her. Due to the lack of experience in evidence collection, the medical professional did not preserve any of the fluids in the victim’s mouth, which was an essential piece of evidence to prove the sexual abuse of the Carabinero police. [↑](#footnote-ref-6)
7. Prosecutor’s office of Antofagasta case number RUC 1200651304-0. [↑](#footnote-ref-7)
8. *Ataque transfobico a mujer travesti en Rancagua* (Transphobic assault against travesty woman in Rancagua), Organización de Transexuales por la Dignidad de la Diversidad (July 22, 2012) <http://transexualesdechile.org/?p=6759>, *Organización denuncio brutal ataque a travesti en Rancagua,* Cooperativa (23 Julio 2012),[http://prontus.cooperativa.cl/organizacion-denuncio-brutal-ataque-a-travesti-en-rancagua/prontus\_nots/2012-07-23/173014.html](http://prontus.cooperativa.cl/organizacion-denuncio-brutal-ataque-a-travesti-en-rancagua/prontus_nots/2012-07-23/173014.html" \t "_blank); Loreta Morales, *Dos hechos de violencia contra personas de minorias sexuales marcan a Rancagua*, El Ranchahuaso (July 25, 2012, 00:07) [http://www.elrancahuaso.cl/node/36977](http://www.elrancahuaso.cl/node/36977" \t "_blank). [↑](#footnote-ref-8)
9. See also: *Chile: Amend and Pass Anti-discrimination Bill*, Human Rights Watch (April 9, 2012), <http://www.hrw.org/news/2012/04/09/chile-amend-and-pass-anti-discrimination-bill>. [↑](#footnote-ref-9)
10. The provisions protected under Article 19 include respect for and protection of private and public life and the honor of the individual and his or her family, freedom of conscience, religion, teaching, education, expression. [↑](#footnote-ref-10)
11. Law Num. 20.609, July 12 2012, Diario Oficial [D.O.], <http://www.senado.cl/appsenado/templates/tramitacion/index.php?boletin_ini=3815-07> (last visited July 30, 2012) [↑](#footnote-ref-11)
12. *Atala Riffo and Daughters v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), ¶252-272 (February 24, 2011) *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec\_239\_ing.pdf. [↑](#footnote-ref-12)
13. *Id.* at ¶271. [↑](#footnote-ref-13)
14. “Humanas presenta recurso de protección para reconocimiento del rol de madres de dos mujeres respecto de sus hijos,” Humanas: Centro Regional Derechos Humanos y Justicia de Género [Humanas: Human Rights and Judicial Regional Center) (16 April 2013) *available at* http://www.humanas.cl/?p=11826. [↑](#footnote-ref-14)
15. *Young v. Australia* (CCPR/C/78/D/941/2000), para. 10.4. See Report of the United Nations High Commissionner for Human Rights, “Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity” (2011) [↑](#footnote-ref-15)
16. General Comment No. 21: Replaces General Comment 9 concerning humane treatment of persons deprived of liberty (Art. 10): 10/04/1992 at para 4. [↑](#footnote-ref-16)
17. Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, ¶ 3, U.N. Doc. No. A/56/156, (July 3, 2001). [↑](#footnote-ref-17)
18. General Comment No. 20: Replaces general comment 7concerning prohibition of torture and cruel treatment or punishment (Art. 7): 10/03/1992. [↑](#footnote-ref-18)
19. *Intentan Quemar a Travesti en Carcel [Attempt to burn transvestite in Prison],* Chile.com, <http://www.chile.com/secciones/ver_seccion.php?id=29595>. [↑](#footnote-ref-19)
20. Héctor Vergara Comte et al., Homosexuales y Travestis Encarcelados Denuncian Tratos Vejatorios en Ex Penitenciaria de Santiago (Incarcerated homosexuals and travesties denounce degrading treatments in ex-prison facilities in Santiago), Concepto VIH-SIDA E ITs A.C. (May 12, 2012), http://conceptovihsida.blogspot.com/2012/05/homosexuales-y-travestis-encarcelados.html. [↑](#footnote-ref-20)