



Human Rights Violations of Lesbian, Gay, Bisexual and Transgender (LGBT) People in Chile

Presented to the 111th Session of the Human Rights Committee of the United Nations
International Covenant on Civil and Political Rights (ICCPR)

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Submitted by:

International Coalition of Women Living with
HIV/AIDS (ICW Latina)
Abracemos A Un Amigo
Alma Viva - Rancagua
Amisex
Acción Gay
Arco Iris
Chile Igualdad para Todos
Fundación Iguales
Fundación Margen
Fundación Savia

International Gay and Lesbian Human Rights
Commission (IGLHRC)
Juntos Por La Vida
Mesa intersuroriental prevención en VIH del
Sotero del Río- Santiago
Nefertiti
Organización de Transexuales por la Dignidad
de la Diversidad (OTD)
Pucara
Rompiendo El Silencio

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Introduction

This submission, made jointly by fourteen national, regional and international organizations outlines some of the organizations' concerns regarding the implementation of the International Covenant on Civil and Political Rights (ICCPR) for lesbian, gay, bisexual and transgender (LGBT) people in Chile. The organizations submit the document to the Human Rights Committee in advance of its review of Chile and hope it will inform the Committee's consideration of the Chilean government's compliance with the ICCPR.

This submission covers recent developments in Chile affecting the rights of lesbian, gay, bisexual and transgender persons (LGBT). Despite the protections of non-discrimination and freedom of violence enshrined in the Chilean Constitution for all people, LGBT people in Chile continue to be discriminated against and vulnerable to violence in Chilean society. Recently, Chile has adopted anti-discrimination legislation that includes sexual orientation and gender identity as protected grounds, but this legislation fails to prevent discrimination against LGBT people in their enjoyment of some of the human enshrined in the ICCPR.

This submission provides details on relevant laws and policies in Chile, and outlines some of the human rights violations affecting LGBT persons exclusively or predominantly. The report outlines why it is vital for the Chilean government to pass gender identity legislation, currently pending in the Senate, to ensure the rights to life and non-discrimination for everyone regardless of their gender identity.

II. Articles 2, 3, 26, and 7: Right to Equality, Non-Discrimination and to be Free from Torture

Articles 2(1), 3 and 26 of the Covenant protect the rights to non-discrimination, equal rights between men and women, and equal protection under the law, respectively. In the landmark decision, *Toonen v. Australia* in 1994, the Human Rights Committee found that the reference to “sex” as a prohibited ground of discrimination in Articles 2(1) and 26 must be taken to include sexual orientation. In the 2009 Concluding Observations for Chile, the Committee noted it “remain[ed] concerned about the discrimination to which some people are subject because of their sexual orientation.”¹ The Committee specifically advised the State to devote time and resources to this issue, advising Chile to “guarantee equal rights to all individuals, as established in the Covenant, regardless of their sexual orientation, including equality before the law and in access to health care.” The Committee also called for the State to “launch awareness-raising programs to combat social prejudice,” acknowledging the importance of advancing both the law and social attitudes if rights to equality and non-discrimination against LGBT people are to be achieved.

Importantly, in addition to entitling “all persons to equality before the law as well as equal protection of the law,” the Human Rights Committee has interpreted Article 26 to include “guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex... or other status.”²

A. The Anti-Discrimination Law³

The notion of non-discrimination in Article 2 is a practical one, meant to ensure to all people equal substantive enjoyment of the rights protected by the Covenant. Laws and policies that promise non-discrimination but fail to deliver enjoyment of this right in substance do not meet the Covenant’s standard. In fact, the Committee has voiced concern in previous instances when it identified non-discrimination legislation that failed to secure “practical enjoyment”⁴ of the rights of the Covenant by members of the minority group. In concluding observations, the Committee has noted that the non-discrimination legislation must ensure minorities “enjoy effective

¹ Concluding Observations, Chile, ICCPR, CCPR/C/CHL/CO/518 (May 2007) at paras 16.

² UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11.

³ Información contenida en el Informe sobre Violencia contra las Lesbianas, los Gays, y las Personas Trans, Bisexuales e Intersex en las Américas presentado por la Organización de Transexuales por la Dignidad de la Diversidad (OTD) ante la Comisión Interamericana de Derechos Humanos, con fecha 24 de febrero 2012, en la reunión de expertos “Violencia e impunidad en contra de personas lesbianas, gays, transexuales, bisexuales e intersexuales” convocado por la comisión interamericana de derechos humanos bajo el auspicio de UNAIDS (programa de Naciones Unidas por el Sida/VIH).

⁴ Concluding Observations, Albania, ICCPR, A/60/40 vol. I (2004) 25 at paras. 82(22).

protection against discrimination” and that such legislation must “provide effective remedies to victims of discrimination.”⁵

The Non-discrimination Law 20.609 of 2012 had as a fundamental objective to create a judicial remedy for when a person commits an arbitrary act of discrimination. Nevertheless, the non-discrimination law is insufficient due to limitations of the law, some of which are in direct conflict with Chile’s international human rights obligations.

1. The Law Fails to Incorporate the Importance of Training Judges

The issue of training of judges needs to be considered not only in relation to the Anti-Discrimination law but regarding the interpretation of all national standards.⁶ This issue has already been the subject of the recent decision of the Inter-American Court of Human Rights (IACtHR) *Atala Riffo and Girls v. Chile*⁷. In this case, the IACtHR recognized the existence of structural and historical discrimination against people of diverse sexual orientations, specifically regarding issues related to access to justice and the application of domestic laws. As a result, the court directed the State to implement “ongoing programs and education and training courses on: i) Human rights, sexual orientation and non-discrimination; ii) protection of the rights of the LGBTI community, and iii) discrimination, overcoming gender stereotypes against LGBTI people “aimed at Public Officials, including legal officials.” The decision stated the intent behind this order was to “generate structural changes and dismantle the prejudices, stereotypes and practices that perpetuate discrimination against LGBTI people.”⁸

Despite the ruling of the IACtHR, the Chilean State has failed to implement permanent training and education for public officials. This failure was confirmed in an IACtHR resolution dated November 26, 2013 which concerned "monitoring compliance with judgment", in which the Court decided to keep open the procedure to monitor sentencing due to continued non-compliance with the order.⁹

⁵ Concluding Observations Serbia and Montenegro, ICCPR, A/59/40 vol. I (2004) 68 at paras. 75(23).

⁶ See Alberto Coddou, Judith Schonstein y Tomás Vial, *La Ley antidiscriminación: avances e Insuficiencias en la protección de la igualdad y la no discriminación en Chile*. Informe anual sobre derechos humanos en Chile / Universidad Diego Portales, Facultad de Derecho. (Santiago de Chile). (2013), páginas 285-308. See: http://www.derechoshumanos.udp.cl/wp/wp-content/uploads/2013/10/libro_DD_HH_capitulo8.pdf retrieved on May 25, 2014.; *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012), la sentencia se encuentra disponible en: http://corteidh.or.cr/docs/casos/articulos/seriec_239_esp.pdf disponible en http://www.corteidh.or.cr/docs/casos/articulos/seriec_239_esp.pdf.

⁷ *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012), available at http://corteidh.or.cr/docs/casos/articulos/seriec_239_esp.pdf disponible en http://www.corteidh.or.cr/docs/casos/articulos/seriec_239_esp.pdf.

⁸ Coddou *supra* note 6 at 267, 271 and 272.

⁹ Resolución De La Corte Interamericana De Derechos Humanos (23 Nov. 2013) Caso Atala Riffo Y Niñas vs. Chile Supervisión De Cumplimiento De Sentencia, la sentencia se encuentra disponible en: http://corteidh.or.cr/docs/casos/articulos/seriec_239_esp.pdf

As the obligations with regard to non-discrimination under the ICCPR are substantively comparable to those of the Inter-American Convention on Human Rights, this failure is equally relevant to this Committee's work.

It is a rule of international law that once a country has ratified a treaty, it must govern the way they understand and apply domestic law (Article 27 of the Vienna Convention on the Law of Treaties).¹⁰ For this reason, Chile is required to fulfill its obligations to ensure that judges understand their duty to always consider the latest status of international law when interpreting the provisions of non-discrimination.¹¹ This implies, among other things, to the notion, “any other status,” as a prohibited grounds for discrimination in the anti-discrimination law. The national law should, in this category, seek to collect existing social divisions and anticipate divisions that may occur in the future. In this regard, the training of judges is critical in order for Chile to be in compliance with international obligations.

2. The Law Creates a Priori a Hierarchy of Rights

The final paragraph of Article 2 of the LAD (“distinctions, exclusions or restrictions, however, based on any of the criteria mentioned in the first paragraph, which are justified in the legitimate exercise of other fundamental rights are considered reasonable, especially those reported in numbers 4, 6, 11, 12, 15, 16, and 21 of Article 19 of the Constitution of the Republic, or other constitutionally legitimate cause”) is problematic since it introduces the possibility of *a priori* a hierarchy of rights. It does not require consideration of the facts of the distinction, exclusion or restriction but allows for a blanket exception for non-discrimination in the interest of exercising the named fundamental rights. The result being not only a failure to combat discrimination but a situation that enables and promote discrimination through a hierarchy of rights. This rule has no counterpart in the ICCPR and other human rights treaties and the relevant case law and has been widely criticized by legal scholars.¹²

3. The Law Fails to Provide Practical Enjoyment of the Right

The anti-discrimination law describing the duty of the State to eliminate arbitrary discrimination is insufficient. The law does not determine which body of the government is responsible for defining, implementing and monitoring obligations dedicated to ensuring non-discrimination. The absence of this information generates a vacuum in the efficacy of the standard, resulting in symbolic non-discrimination rather than practical enjoyment of non-discrimination, as is the standard required by the Committee.¹³

¹⁰ Ibid.

¹¹ Coddou *supra* note 6 at 299.

¹² Ibid. at 306

¹³ Ibid. at 307

Recommendations

- Develop and implement guidelines for judges to prevent and avoid abuse of discretion in judicial decisions and ensure all judges receive adequate training to ensure adherence to those guidelines.
- Delete the paragraph of Article 2, “distinctions, exclusions or restrictions” which creates an unnecessary and dangerous hierarchy of rights.
- Ensure that the requirement to develop and implement anti-discrimination public policy does not depend exclusively on the discretion of each State administrative bodies.

B. The Gender Identity Law¹⁴

The Human Rights Committee has held repeatedly that an individual’s gender identity cannot be a ground for discrimination.¹⁵ The success of the Gender Identity Law (Bulletin No 8924-07) currently in Congress is a positive step for the government protecting against discrimination the basis of gender identity.

The law articulates the right to change the gender and name of a person in the Public Identification Record, when it does not correspond or is not congruent with the true gender identity of the applicant. The objective of the law is to establish adequate regulation, in accordance with constitutional and international laws, with regards to equality, non-discrimination, the right to identity, and the general protection of human dignity, rights, and fundamental liberties. Identification documents are essential to access education, employment, healthcare benefits, and numerous other critical resources. Refusing to conform to social norms and gender stereotypes results in transgender people regularly encountering violence and discrimination¹⁶ and as a result, possessing a gender identity document that contains a gender different from the one an individual presents with can oscillate from uncomfortable to life-threatening. Discrimination, violence, and vulnerability exist even more for transgender people in

¹⁴ Información contenida en el Informe sobre Violencia “Violencia e impunidad en contra de personas lesbianas, gays, transexuales, bisexuales e intersexuales” convocado por la comisión interamericana de derechos humanos bajo el auspicio de UNAIDS (programa de Naciones Unidas por el Sida/VIH).

¹⁵ Concluding Observations, ICCPR Finland, UN Doc. CCPR/C/FIN/CO/6 (2013), para. 8; Ukraine, UN Doc. CCPR/C/UKR/CO/7 (2013), paras. 8,10; Belize, UN Doc. CCPR/C/BLZ/CO/1 (2013), para. 13; China (Hong Kong), UN Doc. CCPR/C/CHN-HKG/CO/3 (2013), para. 23; Paraguay, UN Doc. CCPR/C/PRY/CO/3 (2013), para. 9; Peru, UN Doc. CCPR/C/PER/CO/5 (2013), para. 8; Philippines, UN Doc. CCPR/C/PHL/CO/4 (2012), para. 10; Turkey, UN Doc. CCPR/C/TUR/CO/1 (2012), paras. 8 and 10; Armenia, UN Doc. CCPR/C/ARM/CO/2 (2012), para. 10; Kenya, UN Doc. CCPR/C/KEN/CO/3 (2012), para. 8; Lithuania, UN Doc. CCPR/C/LTU/CO/3 (2012), para. 8; Dominican Republic, UN Doc. CCPR/C/DOM/CO/5 (2012), para. 16; Guatemala, UN Doc. CCPR/C/GTM/CO/3 (2012), para. 11; Turkmenistan, UN Doc. CCPR/C/TKM/CO/1 (2012), para. 21; Iran, UN Doc. CCPR/C/IRN/CO/3 (2011), para. 10; UN Doc. CCPR/C/JAM/CO/3 (2011), para. 8; Kuwait, UN Doc. CCPR/C/KWT/CO/2 (2011), para. 30; Mongolia, UN Doc. CCPR/C/MNG/CO/5 (2011), para. 9; Poland, UN Doc. CCPR/C/POL/CO/6 (2010), para. 8.

¹⁶ Special Rapporteur on Torture, A/56/156, para. 19. See also E/CN.4/2001/66/Add.2, para. 199, E/CN.4/2002/76, annex III, p. 11, and E/CN.4/2005/62/Add.1, paras. 1019 and 1161.

cases in which the gender assigned in the record does not correspond with the name, appearance, and lived experience of that person's body.

The proposed law provides that “all people, without the necessity of judicial or administrative authorization, and without having a detrimental effect in what is established in this law the right to amend his or her birth certificate and change of gender and name when it doesn't correspond with his or her Gender Identity.”¹⁷ And the law, “especially leaves established that to certify gender identity and to ask that the name or gender of person be changed that the Court will not require pharmaceutical, psychological, psychiatric, nor surgery treatments for the person.”¹⁸ The bill is now pending final debate in the Senate. The Committee should strongly encourage the government to pass this legislation to ensure transgender individuals can enjoy their rights under the Covenant.

Recommendation

- Pass the current Gender Identity Bill (Proyecto de ley de Identidad de Género, Boletín N° 8924-07) to ensure transgender people will have access to critical gender identity documents.

¹⁷ Género Boletín N°8.924-07 art. 11(1).

¹⁸ Género Boletín N°8.924-07 Art. 4(3).

III. Articles 2, 9, and 26: Right to Equality, Non-discrimination, Liberty and Personal Security

A. Discriminatory Provisions in the Penal Code (Article 373)

Articles 2 and 26 of the Covenant protect against discriminatory implementation of laws and article 9 provides that States have an obligation to protect against arbitrary detention. So-called “public scandal” or morality laws, which prohibit impersonation, target vulnerable or marginalized populations including in particular transgender persons for arrest. Authorities frequently use such laws to punish individuals who do not conform to social norms, and because many of them contain vague or overbroad provisions, they are often implemented in a discriminatory or arbitrary fashion, targeting the most marginalized. Such persecution constitutes a violation of various human rights and the Human Rights Committee has expressed concern regarding arbitrary detention by police of persons because of their actual or perceived sexual orientation, or because they are gender non-conforming.¹⁹ In 2010, the Working Group on Arbitrary Detention voiced concern for such laws, in particular, the wide discretion given to “morality police” or other enforcement entities charged with oversight ‘moral’ or ‘immoral’ behavior and to determine what constitutes immoral actions.²⁰

In Chile, article 373 of the Criminal Code is an example of this type of law. The article indicates that “those who in whatever way violated ‘good customs’ or ‘morality’” can be fined.²¹ The law violates fundamental human rights including rights to freedom of expression and freedom of association. The article makes the penalty for the violation of this law as “imprisonment ranging from a short or medium-term sentence.” For the LGBT community the defense of the “good customs and morality” has been used as a justification to incarcerate and harass sex workers, same-sex couples who kiss in public or simply an effeminate man.

¹⁹ Concluding Observations of the Human Rights Committee, Ecuador, ¶ 12, U.N. Doc. CCPR/C/ECU/CO/5 (November 4, 2009). Concluding Observations of the Human Rights Committee, Kyrgyzstan, ¶ 19, U.N. Doc. CAT/C/KGZ/CO/2 (December 20, 2013); Concluding Observations of the Human Rights Committee, Peru, U.N. Doc. CAT/C/PER/CO/6 (December, 2012).

²⁰ A 2008 case reviewed by the Working Group on Arbitrary Detention revealed four men in Egypt were imprisoned for homosexual conduct, their convictions “not based on any evidence except for coerced and repudiated statements...taken from them at the Ministry of Interior’s Morality Police Department.” The Working Group reported the actions of morality police “[do] not bode well for basic human rights such as right to privacy, right to own liberty, freedom of opinion and freedom of expression.” “Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development Opinions adopted by the Working Group on Arbitrary Detention,” Human Rights Council 13th Sess. ¶18 U.N. Doc. A/HRC/13/30/Add.1 (Mar. 2, 2010) *available at* <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-30-Add1.pdf>.

²¹ Translated from the original code written in Spanish: “los que de cualquier modo ofendieren el pudor o las buenas costumbres,” CÓDIGO CIVIL [CÓD. CIV.], 12 noviembre 1874, art. 373.

Following its 2009 review by the Universal Periodic Review (UPR), Chile accepted the recommendation to “review its Penal Code, namely article 373, and other laws in order to prevent discrimination against LGBTI²² persons.”²³ In accounting for the State’s compliance with UPR recommendations, specifically the commitment to modify the article 373 to ensure it does not discriminate against LGBTI persons, the Chilean governmental delegation at the 2014 review indicated, “a new draft of the Criminal Code will be presented soon to Parliament,” going on to explain that the draft “involves the derogation of article 373.”²⁴ Despite this statement in January of 2014, the discriminatory provision remains.

Recommendation

- The Government should comply with its obligation of non-discrimination as well as its 2009 commitment under the Universal Period Review to review Article 373 of the Penal Code and repeal the law in order to prevent discrimination against LGBTI persons.

²² The letter “I” included in the acronym LGBTI refers to “intersex” individuals. The World Health organization defines intersex as “a congenital anomaly of the reproductive and sexual system.” Intersex individuals are often stigmatized for not conforming to gender stereotypes. For this reason, it is sometimes useful to align intersex advocacy with advocacy for sexual minorities and add “I” to the acronym, creating LGBTI. This shadow report uses the acronym LGBT because the report does not expressly discuss the unique issues and experiences of intersex individuals.

²³ G.A. Res. U.N. Doc. A/HRC/WG.6/18/L., ¶121.71 (13 January 2014), *available at* http://www.upr-info.org/sites/default/files/document/chile/session_18_-_january_2014/a_hrc_wg.6_18_1.3_chile_e.pdf

²⁴ G.A. Res. U.N. Doc. A/HRC/WG.6/18/L.3 para. 105 (30 January 2014), http://www.upr-info.org/sites/default/files/document/chile/session_18_-_january_2014/a_hrc_wg.6_18_1.3_chile_e.pdf

IV. Articles 26, 6, and 7: The Right to Equality, Life, the Prohibition of Torture and Other Cruel, Inhumane, or Degrading Treatment and the Struggle against Impunity

Article 26 provides that “all persons are equal before the law and are entitled to equal protection of the law without discrimination,” a right the Committee has expressly indicated covers all forms of discrimination and is not limited to the explicitly enumerated grounds in the Covenant. The guarantee of equality before the law “prohibits discrimination in law or in fact in any field regulated and protected by public authorities.”²⁵ Read in conjunction with article 7, which provides freedom from torture and guarantees “complaints about ill-treatment must be investigated effectively by competent authorities” and article 6, which provides the right to life, the Covenant provides protection from violence and guarantees the rights of individuals to seek redress from authorities following violation of such rights from violence and discrimination.

LGBT individuals endure greater amounts of violence because sexual orientation and gender identity. The Special Rapporteur on Torture has noted, “members of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment because they fail to conform to socially constructed gender expectations.”²⁶ This violence can be brought about by family members, strangers, or also for the very people that are supposed to protect them like the *Carabineros* (the police), The Investigative Police (PDI), and the Gendarmerie (the police that work in prisons).²⁷

A. Police Violence

Research by OTD published in 2012, illustrates the common occurrence of police using excessive force to abuse and humiliate transgender persons and the failure to provide effective remedies.²⁸ Below are a few examples of this violence.

One example of this is the following case. On June 28, 2012, Maria Ignacia, a young 22-year-old transgender person from Antofagasta, was detained by Chilean Police (*Carabineros*) without

²⁵ General Comment 18 ¶12, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I).

²⁶ A/56/156, para. 19. See also E/CN.4/2001/66/Add.2, para. 199, E/CN.4/2002/76, annex III, p. 11, and E/CN.4/2005/62/Add.1, paras. 1019 and 1161.

²⁷ Information contained in the “Report on Violence against Lesbian, Gay, and Transgender, Bisexual and Intersex in the Americas” presented by the Organization for Dignity Transsexual Diversity (OTD) at the Inter-American Commission on Human Rights, dated February 24, 2012, at the meeting of experts “Violence and impunity against lesbian, gay, transgender, bisexual and intersex” organized by the Inter-American Human Rights Commission under the auspices of UNAIDS (United Nations Programme on AIDS / HIV). See Organización de Transexuales por la dignidad de la diversidad (OTD) <http://transexualesdechile.org/>.

²⁸ Ibid.

justification.²⁹ The *Carabineros* laughed and insulted her, and obligated her to have oral sex with a number of officers at the police station where she was illegally detained. Afterward, when she wanted to get verification of her physical injuries in the public hospital, the doctor on shift did not do it, forcing her to be seen by a health professional who had no experience in proof of physical injury, which was the reason why samples of bodily fluids were not taken. The collection is critical evidence in order to be able to demonstrate sexual abuse by the *Carabineros*. Finally when she went to file a complaint before the Investigative Police (PDI), the number two police force in the country, Maria Ignacia was threatened and intimidated to stop her from issuing the complaint against the *Carabineros*. Supported and advised by the Organization of Transexuals for the Dignity of Diversity (OTD) and by the National Institute of Human rights (INDH), Maria Ignacia filed the complaint at the PDI and the case is under investigation by the Attorney General of Antofagasta Number RUC 1200651304-0.

Another example is that of Nayaret, a young 24-year-old transgender woman who is a sex worker and who was brutally assaulted by a client. Afterward the *Carabineros* of Chile minimizing the incident, left Nayaret bleeding for 30 minutes which delayed the verification of the physical injuries and wounds. This negligence by the *Carabineros* put the Nayaret's life at risk, suggesting that the States institutions of the State, there exist lives which are worthy of life and others no.³⁰

Recommendation

- Ensure full and independent investigations into allegations, acts and threats of violence against members of the LGBT community and LGBT human rights defenders and to hold accountable those responsible for such actions

²⁹ *Brutal actuar de carabineros en contra de mujer transexual y posteriormente del subcomisario de investigaciones en Antofagasta*, Organización de Transexuales por la Dignidad de la Diversidad, (29 Junio 2012), <http://transexualesdechile.org/?p=6559>; Francisco Alemán C., *Transexual denuncia haber sido abusada sexualmente por Policía de Carabineros de Antofagasta*, Magazin (3 Julio, 2012), <http://www.radiomitos.cl/magazin/?p=9442>.

³⁰ *Ataque transfobico a mujer travesti en rancagua*, Organización de Transexuales por la Dignidad de la Diversidad (22 Julio, 2012) <http://transexualesdechile.org/?p=6759>, *Organización denuncia brutal ataque a travesti en Rancagua*, COOPERATIVA (23 Julio 2012), http://prontus.cooperativa.cl/organizacion-denuncio-brutalataque-a-travesti-en-rancagua/prontus_notas/2012-07-23/173014.html

Loreta Morales, *Dos hechos de violencia contra personas de minorias sexuales marcan a Rancagua*, EL RANCAHUASO (25 Julio 2012, 00:07) <http://www.elrancahuaso.cl/node/36977>.

V. Article 10: Rights of Persons Deprived of their Liberty and the Right to be Free from Torture

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.”³¹ Furthermore, the prohibition of torture relates not only to physical abuse but also to “acts that cause mental suffering to the victim,” including intimidation.³² 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.³³

Chile’s prison system gained notoriety when a 2010 fire that broke out in the San Miguel Prison in Santiago, Chile after a riot, leaving 81 prisoners dead.³⁴ According to an investigation conducted in 2012 and 2013 by the National Human Rights Institute of Chile, the most common problem with prisons is overcrowding.³⁵ Several facilities studied were found to exceed capacity by over three-hundred percent.³⁶ As a result of such overcrowding, prison conditions are poor for all prisoners. Within a system where resources are strained for everyone, already vulnerable populations such as LGBT people suffer often from intersecting and multiple forms of discrimination. In a report documenting treatment of transgender people in prison, OTD reveals the unmitigated violence and overt discrimination that many LGBT prisoners face.³⁷

³¹ General Comment No. 21: Replaces General Comment 9 concerning humane treatment of persons deprived of liberty (Art. 10): 10/04/1992 at para 4.

³² 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).

³³ General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7): 10/03/1992.

³⁴ Chile: Overhaul Prison System, Death of 81 Inmates Demonstrates Disastrous Consequences of Overcrowding, HUMAN RIGHTS WATCH, (DECEMBER 9, 2010)

³⁵ “INDH publica estudio sobre situación carcelaria en Chile revelando alto hacinamiento y vulneraciones de derechos a internos en recintos penales,” National Human Rights Institute of Chile, (21 marzo 2014) *available at* <http://www.indh.cl/indh-publica-estudio-sobre-situacion-carcelaria-en-chile-revelando-alto-hacinamiento-y-vulneraciones-de-derechos-a-internos-en-recintos-penales#sthash.OZK7WVIF.dpuf>.

³⁶ *Ibid.*

³⁷ This information is taken from a forthcoming report documenting the experiences of Transgender women within five prisons in Chile. Though not an exhaustive study of all prisons in Chile, the interviews seek to represent a experiences and human rights

A. Discrimination in State Responses to Violence

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 is that of Rene Mora, who was a victim of a fire when several other male prisoners threw burning paper into her cell, which subsequently blazed up. She was not in the cell at the moment when the men threw in the fiery paper, but the fire destroyed all of her personal belongings and damaged her cell.³⁸ Mora conveyed the incident's impact to the President of the Transvestite Union "Afrodita."³⁹ According to the victim, the prison guards did not acknowledge nor address the issue, nor did they make the incident public.

B. Discrimination in Cells

Discrimination by the prisons is blatant and for everyone to see. With great frequency, trans women live crammed together, under a pavilion labeled for "homosexuals." This pavilion has its own particular rule of law in the jail and cells are closed at 5:00 pm. After that time, a person can no longer go to a public bathroom and there are no bathrooms in the cells. For this reason, people deprived of their liberty are forced to perform their most basic of necessities in a bucket or jar.⁴⁰

C. Discrimination Regarding Adequate Healthcare

OTD documented the case of a trans woman in jail who had been denied the opportunity to access a bathroom, soap or shower for an extended period of time failing to meet various international standards.⁴¹ By her own account she has gone months without being given information about her case or contact with her family or legal council. She does not have free access to the toilet or shower and water is restricted. Access to these fundamental necessities is subject to the goodwill of the guard who happens to be working. At the time of the visit of representatives of OTD to her cell, her cell had a grocery store plastic bag of feces of seven days and disposable bottles filled with urine of at least five days.⁴² The prisoner reported, "When there are other people with me, and they receive parcels, then they [the fellow prisoners] give me

violations common among many transgender women and transgender sex workers in Chile with OTD. Information on file at OTD May 2014.

³⁸ *Intentan Quemar a Travesti en Carcel*, CHILE.COM, http://www.chile.com/secciones/ver_seccion.php?id=29595.

³⁹ *Ibid.*

⁴⁰ OTD *supra* note 37.

⁴¹ United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955, available at: <http://www.refworld.org/docid/3ae6b36e8.html> [accessed 5 June 2014].

⁴² OTD *supra* note 37.

shampoo and soap [...] those of other cells, they do treat me badly, they brought me shampoo, soap and detergent, but now that I have Omo (detergent) to wash my clothes, I can not wash, because I have no water.” I have not been able to go to the bathroom in seven days. They do not let me shower.”

A disproportionate number of transgender prisoners are HIV positive and regularly denied adequate health care.⁴³ Many transgender people with HIV are undernourished and have limited access to their retroviral treatment, a fact that threatens their health and therefore their lives. Not enough with that, the moisture in the cells, is increased in people with HIV colds, which for lack of specific treatment often lead to bronchopneumonia or even cases of tuberculosis.⁴⁴

Finally, transgender women in jail do not have adequate access to condoms, denied the rights to conjugal visits. Furthermore, trans women are forbidden to wear clothes affirming their gender identity. or access gender-affirming medical care such as hormones, circumstances often experienced much suffering as they are denied the right to simply be who they are

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.

⁴³ Estudio sobre condiciones carcelarias sobre la base de plan de visitas a cárceles, National Human Rights Institute of Chile (April 2013), 59; OTD *supra* note 28.

⁴⁴ OTD *supra* note 37.