

**Chile's Breach of its Obligations under the
International Covenant on Civil and Political Rights (ICCPR) to
Protect the Rights of Sexual Minorities, Including
Lesbian, Gay, Bisexual, and Transgender People**

Respectfully submitted to the
United Nations Human Rights Committee
on the occasion of its consideration of the
Fifth Periodic Report of Chile
pursuant to Article 40 of the
International Covenant on Civil and Political Rights (ICCPR)
Hearings of the United Nations Human Rights Committee
New York City, United States of America
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Prepared and submitted by the Program in International Human Rights Law of Indiana University School of Law at Indianapolis, Indiana and the International Human Rights Law Society of Indiana University School of Law at Indianapolis, Indiana.

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The Program in International Human Rights Law and this “Shadow Report” to the United Nations Human Rights Committee

The Program in International Human Rights Law welcomes the Chilean Government’s Fifth Periodic Report to the United Nations Human Rights Committee. In this Report, Chile asserts that it has provided adequate legislative, judicial, administrative, and other mechanisms that fulfill its obligations under the International Covenant on Civil and Political Rights (ICCPR). This shadow report reveals that Chile has not complied fully with ICCPR mandate to protect the rights of sexual minorities, including lesbian, gay, bisexual and transgender people.

The Program in International Human Rights Law, Indiana University School of Law at Indianapolis, was established in 1997 to further the teaching and study of international human rights law, to promote scholarship in international human rights law, to assist human rights governmental, inter-governmental, and non-governmental organizations on international human rights law projects, and to facilitate the placement of students as law interns at international human rights organizations domestically and overseas.

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Executive Summary

This submission provides information on Chile's obligations under the International Covenant on Civil and Political Rights (ICCPR) to provide sexual minorities, including Lesbian, Gay, Bisexual and Transgender people (LGBT) equal protection under the law, freedom from discrimination, and freedom from incursions on the right to privacy. Further, this report seeks to provide insight into how the past obligations of Chile under the ICCPR have been discharged, including examining shortcomings and providing recommendations.

A. Relevant Legal Issues – Why Sexual Minorities are Protected under the ICCPR

As a party to the ICCPR, the Chile is bound to fulfill all obligations that arise under the Covenant. Under Articles 2, 17, and 26, Chile must protect all persons from discrimination, ensuring equal protection of the law, and ensuring freedom from incursions on the right to privacy. Further, the decisions of the Human Rights Committee in the *Toonen* and *Young* cases extend protection of those articles to sexual minorities. Accordingly, Chile must ensure that LGBT people are protected from discrimination on the basis of their sexual orientation and gender identity. In violation of these obligations, Chile has failed to adequately protect LGBT people from discrimination in the following areas: employment; education; health care; marital/partnership rights, parenting, and adoption.

B. Chile has Violated Specific Rights of LGBT People on the Basis of Sexual Orientation and Gender Identity

The Committee is required to evaluate Chilean laws and practices relating to sexual minorities, specifically LGBT people. This report was prepared to inform and expose to the Committee, Chile, and other interested parties that the laws, policies and practices of Chile perpetuate discrimination and disparately impact LGBT people. The following paragraphs highlight issues that will be described further in this report.

Employment

Employment discrimination by employers makes the workplace tenuous for LGBT people. Gainful employment directly affects an individual's self worth, provides people with a sense of accomplishment, and allows them to make positive contributions to society. Although Chile's Constitution proscribes discrimination in the workplace, LGBT people suffer from *de facto* discrimination as shown in the employers' refusal to hire them due to their sexual orientation. Likewise, LGBT people get fired simply on account of their sexual orientation and gender identity. This *de facto* discrimination is traceable to the lack of appropriate legislation protecting LGBT people from any form of discrimination in the workplace grounded on sexual orientation.

Education

Schools, for many LGBT youth or even those students perceived to be LGBT, are another place where discrimination and harassment exist. These institutions should be a safe haven, where students can learn, grow, and succeed, but LGBT students are often targeted for harassment by their classmates, or even school administrators and teachers. This report cites instances where students were expelled for acts such as kissing and holding hands with same sex partners. When school policies and officials offer little protection from harassment, education often becomes secondary to survival. Until the government implements laws and policies that explicitly protect LGBT students from harassment and discrimination, many LGBT youth in Chile will continue to be vulnerable to discrimination based solely on sexual orientation or gender identity. In addition, the state should also ensure that religious instruction does not interfere with the students' freedom of sexual orientation.

Health Care

LGBT people often encounter health care workers who exhibit blatantly discriminatory attitudes towards the LGBT population and who are uninformed regarding the needs of sexual minorities. In times of sickness, both patients and families are often vulnerable and need support. In addition, LGBT people often go uninsured or underinsured due to discrimination in regards to health care coverage policies. Because Chile does not explicitly prevent discrimination in health care based on sexual orientation or gender identity, LGBT individuals frequently suffer discrimination in regards to available health services at clinics, doctors' offices, hospitals, and other health care service providers.

Marital/Partnership Rights, Parenting, Adoption, and Foster Care

Chile's support for a legislative bill allowing for same sex marriages constitutes a step towards the right direction; however, discrimination as far as adoption and parental custody over children remain matters of grave concern. Until Chile enacts into law civil unions for the benefit of LGBT people, children will continue to suffer from disparate inequality in the enjoyment of domestic rights, such as health insurance benefits, property relationship, and jail or hospital visitation privileges. Chile should remove the inequalities between heterosexual and homosexual unions by enacting a comprehensive law giving equal parental and adoption rights to LGBT people. Present initiatives deserve Chile's official endorsement, including Judge Karen Atala's case before the Inter-American Court of Human Rights. She seeks to overturn the Chilean Supreme Court's decision to deny her custody over her own child due to her gender identity and sexual orientation.

Hate Crime Violence

LGBT people in Chile often feel vulnerable in public for fear that they might be harassed or violently assaulted. There is no statistical tracking of hate crimes in Chile; this is a direct result of the lack of recognition by the legislature of the criminality of hate crimes themselves. There is no current legislation to provide LGBT victims or their kin with a cause of action when they are violently attacked. Further, violence and hate crimes based on sexual orientation are often underreported, in part because LGBT people are often victims of abuse by police officers themselves.

Proposed Recommendations to the United Nations Human Rights Committee Regarding Chile's Obligations under the International Covenant Civil and Political Rights to Protect Lesbian, Gay, Bisexual, and Transgender People from Discrimination

We respectfully request the United Nations Human Rights Committee adopt the following recommendations and urge Chile to comply fully with the ICCPR and to afford fully all rights hereunder to lesbian, gay, bisexual, and transgender people.

Employment

***Recommendation #1:** The Human Rights Committee urges the Chilean government to enact comprehensive legislation to protect all employees from discrimination on the basis of sexual orientation.*

Education

***Recommendation # 2:** The Human Rights Committee urges the Chilean government to enact comprehensive legislation that protects all students from discrimination on the basis of sexual orientation.*

***Recommendation # 3:** The Human Rights Committee urges the Chilean government to grant LGBT students equal access to education. Specifically, the government should provide LGBT students with procedures and policies that would prevent schools from dismissing LGBT students based on their sexual orientation.*

***Recommendation # 4:** The Human Rights Committee urges the Chilean government to implement an education policy on school curriculums, to prohibit discrimination based on sexual orientation, and to ensure that religious teaching does not interfere with the freedom of sexual orientation.*

***Recommendation # 5:** The Human Rights Committee urges Chile to establish a mechanism to train teachers and school officials on matters of sexual orientation.*

Health Care

***Recommendation # 6** The Human Rights Committee urges the Chilean government to create health care plans that cover medical treatment necessary for the transgender community such as sexual reassignment surgery, breast surgery, and hormonal treatment.*

***Recommendation # 7** The Human Rights Committee urges the Chilean government to create and implement education campaigns designed to inform and sensitize health care professionals to better meet the needs of LGBT people.*

Marital, Partnership, Adoption, and Parentage

Recommendation # 8: *The Human Rights Committee congratulates the Chilean government for its support to Civil Unions legislation and encourages the government to continue with its support.*

Recommendation # 9: *The Human Rights Committee urges the Chilean government to enact comprehensive family legislation that gives equal parent and adoption rights to LGBT people.*

Recommendation # 10: *The Human Rights Committee urges the Chilean government to support any judicial initiative taken by Judge Karen Atala before the Inter-American Court of Human Rights in order to overturn the judicial precedent by which sexual orientation could be a factor in denying children custody.*

Hate Crime Violence

Recommendation #11: *The Human Rights Committee urges the Chilean government to support the enactment of hate crimes legislation, including provisions for statistics collection, a cause of action, and enhanced criminal sentencing for hate crimes based on sexual orientation and gender identity.*

Recommendation #12: *The Human Rights Committee urges the Chilean government to repeal Article 373 of the Penal Code that allows the unrestricted discriminatory arrests against LGTB community.*

Recommendation #13: *The Human Rights Committee urges Chilean government to train police officers and other law enforcement officials in LGTB issues to make them especially sensitive in these matters and to prevent them from discriminatory practices based on sexual orientation.*

Recommendation #14: *The Human Rights Committee urges Chilean government to create an administrative organization with participation of civil society that would monitor the implementation of any antidiscrimination law or measure.*

Chile's Breach of its Obligations under the International Covenant on Civil and Political Rights to Protect the Rights of Sexual Minorities¹, Including Lesbian, Gay, Bisexual, and Transgender People

I. Introduction

1. The International Covenant on Civil and Political Rights² is Relevant and Binding on Chile

- 1.1. The International Covenant on Civil and Political Rights (ICCPR) is the principal international treaty setting out fundamental civil and political rights for all people. The ICCPR provides for numerous individual rights, including the rights of equal protection under the law,³ the right to be free from discrimination,⁴ and freedom from incursions on the right to privacy⁵ on the basis of sexual orientation.⁶ Chile has signed and ratified the treaty and, consequently, is bound by its provisions.⁷

¹ This report considers "sexual minorities" to include, *inter alia*, lesbian, gay, bisexual, and transgender persons (LGBT) and follows the description and purpose for using this term as outlined in *International Human Rights Law and Sexual Orientation*, 18 *Hastings Int'l & Comp. L.Rev.* 1, 1 (1994). In his article, Professor James Wilets describes "sexual minorities" as including "all individuals who have traditionally been distinguished by societies because of their sexual orientation, inclination, behavior, or gender identity" and does not include "individuals whose sexual identity is based upon non-consensual sexual behavior." Prof. Wilets draws the link between sexual minorities and sexual orientation in stating "oppression based upon sexual orientation is predicated on more than simply the existence of same-gender sexual relations...the oppression...is fueled by any group who challenges traditionally defined gender roles." *Id.* at 4. This report primarily uses the terms sexual minorities, LGBT, and sexual orientation interchangeably. However, there are distinctions between these terms and the authors recognize the weakness in combining the terms without a thorough analysis of the distinctions between them. Amnesty International defines "sexual orientation" as referring "to a person's 'emotional, sexual, romantic, or affectional [sic] attraction. It exists along a continuum that ranges from exclusive homosexuality to exclusive heterosexuality and includes various forms of bisexuality. It is different from sexual behavior because it refers to feelings and self-concept....Transgender is used as an umbrella term. It can be used broadly to describe individuals that do not conform to the gender role expectations of their biological sex. It encompasses people who seek sex reassignment, sometimes involving hormones or surgery, to bring their physical characteristics into conformity with their gender identity." Amnesty International, *USA: Stonewalled – still demanding respect. Police abuses against lesbian, gay, bisexual, and transgender people in the USA* (2006) at 9. [hereinafter *Stonewalled*], available at <http://web.amnesty.org/library/Index/ENGAMR510012006?open&of=ENG-347> (last visited February 1, 2007).

² International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, U.N. Doc. A/6316 (1966) [hereinafter ICCPR], available at <http://www.ohchr.org/english/law/ccpr.htm> (last visited February 1, 2007).

³ "Equal protection is the principle that all individuals have the right to have the laws of a specific jurisdiction apply to them in the same manner as those laws are applied to others similarly situated." Wilets, *supra* note 1 at 48.

⁴ "Non-discrimination is the principal that instruments of the state or private parties shall not discriminate among individuals based upon arbitrary criteria." *Id.* See also *General Comment #18: Non-Discrimination*, U.N. Human Rights Committee, U.N. Doc. CCPR General Comment #18, (1989) available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/3888b0541f8501c9c12563ed004b8d0e?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument) (last visited February, 2007).

⁵ The various kinds of privacy rights include "spatial areas where the government is prohibited from intruding, such as the home, the bedroom, or a person's body." It may also include "intangibles with which the government or other

2. The ICCPR Imposes Obligations on the Chile government under Articles 2, 17, and 26 and the *Toonen*⁸ and *Young*⁹ Cases to Protect LGBT¹⁰ People from Discrimination Based on Sexual Orientation

2.1. Article 2, paragraph 1 of the ICCPR requires Chile to guarantee all rights protected under the ICCPR without distinction of any kind, including discrimination based on sexual orientation¹¹ and other categories. Article 2 (1) provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2.2. Article 17 of the ICCPR protects all persons, including sexual minorities, from arbitrary or unlawful interference with privacy,¹² family, home or correspondence, and from unlawful attacks on honor and reputation. Article 17 provides:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to unlawful attacks on his honor and reputation.

individuals are prohibited from interfering, such as one's reputation or right to marry and found a family...and certain protected activities, such as oral communication or sexual activities." *Wilets*, *supra* note 1 at 59-60.

⁶ "There are at least three bases upon which to find that the rights of sexual minorities to equal protection and non-discrimination have been violated. The first is if a state makes certain acts between members of the same sex illegal while permitting the same acts between heterosexuals. The second basis is if a state discriminates against sexual minorities in its application of a law which is neutral on its face in terms of its application to heterosexuals or homosexuals. The third basis is if certain rights are granted to individuals or withheld from individuals on the basis of their sexual orientation." *Wilets*, *supra* note 1 at 48-49.

⁷ For a thorough discussion of general international law principles and obligations arising thereunder, see George E. Edwards, *International Human Rights Law Violations Before, During, and after Hurricane Katrina: An International Law Framework for Analysis*, 31 *Thurgood Marshall Law Review* 353-425 (2006); *Expert Witness Affidavit of Professor George E. Edwards on International Human Rights Law, International Humanitarian Law, and International Criminal Law: U.S.A. v. David M. Hicks, U.S. Military Commissions, Guantanamo Bay, Cuba* (tendered to the Military Commissions at Guantanamo Bay on 14 November 2005). See Vienna Convention on the Law of Treaties, art. 1(a), May 23, 1969, 1155 U.N.T.S. 31 and Restatement (Third) of the Law on the Foreign Relations Law of the United States 3 (1987).

⁸ *Nicholas Toonen v. Australia*, U.N. Human Rights Committee, No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (04/04/94), [hereinafter *Toonen*], available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/d22a00bcd1320c9c80256724005e60d5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d22a00bcd1320c9c80256724005e60d5?Opendocument) (last visited February 1, 2007).

⁹ *Edward Young v. Australia*, U.N. Human Rights Committee, No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (18/09/03), [hereinafter *Young*], available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3c839cb2ae3bef6fc1256dac002b3034?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3c839cb2ae3bef6fc1256dac002b3034?Opendocument) (last visited February 1, 2007).

¹⁰ In this submission, the term "LGBT" or "LGBT people" refers to lesbian, gay, bisexual, and transgender people.

¹¹ The Human Rights Committee has interpreted Articles 2 and 26 to include sexual orientation in "sex." See *Toonen*, *supra* note 8.

¹² The Human Rights Committee concluded that an Australian law prohibiting sodomy was arbitrary and violated the privacy provisions of Article 17 of the ICCPR. See *Toonen*, *supra* note 8.

2. Everyone has the right to the protection of the law against such interference or attacks.

2.3. Article 26 of the ICCPR prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground based on sexual orientation¹³ and other categories. Article 26 provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

2.4 Toonen¹⁴ Decision

In *Toonen v. Australia*, the Human Rights Committee ruled that a Tasmania sodomy law was arbitrary and violated the privacy and non-discrimination provisions under Articles 2, 17, and 26 of the ICCPR. Most significantly, the Committee determined that the reference to “sex” in Articles 2 and 26 of the ICCPR includes sexual orientation.¹⁵

2.5 Young¹⁶ Decision

In *Young v. Australia*, the Human Rights Committee ruled that Australia violated Article 26 by denying pension rights to a surviving same sex partner of a war veteran. The Committee concluded that the State failed to show a justifiable distinction between same sex and heterosexual couples and that excluding same sex partners from pension benefits was neither reasonable, nor objective.¹⁷

¹³ See *Toonen*, *supra* note 8.

¹⁴ *Id.*

¹⁵ Alex Conte, Scott Davidson & Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* 167-168 (2004) (citing *Toonen* at para 8.7).

¹⁶ *Young*, *supra* note 9.

¹⁷ *Id.* para. 10.4.

3. The Human Rights Committee Challenges States to Account for Government Measures to Protect LGBT Persons from Discrimination

3.1 Human Rights Committee Concluding Observations¹⁸

In Concluding Observations, the Human Rights Committee has expressed concern to States parties about practices that discriminate on the basis of sexual orientation and has urged countries bound by the ICCPR to remove and prohibit any discrimination on the grounds of sexual orientation. The Committee has also extended its appreciation when States parties take steps to secure equal protection for LGBT people. These countries have included Austria,¹⁹ Chile,²⁰ China,²¹ El Salvador,²² Finland,²³ Greece,²⁴ Namibia,²⁵ the Philippines,²⁶ Poland,²⁷ Slovakia,²⁸ Trinidad and Tobago,²⁹ and the United Kingdom of

¹⁸ "The final phase of the Committee's examination of the State report is the drafting and adoption of its concluding observations. For this, the country rapporteur prepares, with the assistance of the secretariat and based on the constructive dialogue held during the plenary session, draft concluding observations for the consideration of the Committee... This draft is discussed by the Committee in private session with a view to adopting it by consensus. The concluding observations, once adopted, are usually not made public until the day preceding the end of the session. They are forwarded to the State party concerned and included in the Committee's annual report." U.N. Human Rights Committee, *Human Rights Committee - Working Methods*, available at <http://www.ohchr.org/english/bodies/hrc/workingmethods.htm#a2c> (last visited February 1, 2007).

¹⁹ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: Austria*.

CCPR/C/79/Add.103 (19/11/98), at para. 13, available at

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/873443bcd091d2da802566c8005e7609?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/873443bcd091d2da802566c8005e7609?Opendocument) (last visited February, 2007).

²⁰ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: Chile*. CCPR/C/79/Add.104 (30/03/99), at para. 20, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/c1804ad46b00b64880256763004abebe?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/c1804ad46b00b64880256763004abebe?Opendocument) (last visited February 1, 2007).

²¹ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee (Hong Kong): China*.

CCPR/C/79/Add.117 (12/11/99), at para. 15, available at

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/d3f40053e45c17fd80256820005cfd6?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d3f40053e45c17fd80256820005cfd6?Opendocument) [hereinafter *China*] (last visited February 1, 2007).

²² U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: El Salvador*.

CCPR/CO/78/SLV (22/07/2003), at para. 16, available at

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3557ff1fd8be8377c1256db200552abe?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3557ff1fd8be8377c1256db200552abe?Opendocument) [hereinafter *El Salvador*] (last visited February 1, 2007).

²³ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: Finland*.

CCPR/CO/82/FIN. (02/12/2004), at para 3(a), available at

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6d5bb984e19b576ec1256f6b0052fe35?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6d5bb984e19b576ec1256f6b0052fe35?Opendocument) [hereinafter *Finland*] (last visited February 1, 2007).

²⁴ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: Greece*.

CCPR/CO/83/GRC (25/04/2005), at para. 5, 19, available at

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/0b0fece5de7503b0c1256ffc00489e4b?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/0b0fece5de7503b0c1256ffc00489e4b?Opendocument) [hereinafter *Greece*] (last visited February 1, 2007).

²⁵ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: Namibia*.

CCPR/CO/81/NAM (30/07/2004), at para. 22, available at

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/685cd776fea41fafc1256ee1004c3160?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/685cd776fea41fafc1256ee1004c3160?Opendocument) [hereinafter *Namibia*] (last visited February 1, 2007).

²⁶ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: Philippines: Philippines*.

CCPR/CO/79/PHL (01/12/2003), at para. 18, available at

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/5c1a26dde6327ef0c1256df300525589?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/5c1a26dde6327ef0c1256df300525589?Opendocument) [hereinafter *Philippines*] (last visited February 1, 2007).

Great Britain and Northern Ireland,³⁰ and the United States of America.³¹ The following are examples:

- i. In its concluding Observations to China, El Salvador, Namibia, the Philippines, Slovakia, Trinidad and Tobago, and the United Kingdom, the Committee has urged the enactment of legislation including protection from discrimination based on sexual orientation.³²
- ii. The Committee has urged Greece and Poland to recognize fully the right of sexual minorities not to be discriminated against and to adequately investigate and punish discriminatory acts and attitudes against persons on the basis of sexual orientation. The Committee also urged the implementation of appropriate training for officials in order to reduce de facto discrimination and sensitize them to the rights of sexual minorities.³³
- iii. The Committee urged the United States of America to address through hate crime legislation widespread incidences of violent crimes against those with minority sexual orientation status, including violence perpetrated by law enforcement individuals. The Committee also noted the failure of the United States to outlaw employment discrimination on the basis of sexual orientation in many states.³⁴
- iv. The Committee positively reinforces States parties that have taken measures to comply with their obligation to protect sexual minorities. For example, the Committee has expressed appreciation to the government of Finland for enacting

²⁷ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: Poland*. CCPR/CO/82/POL (02/12/2004), at para. 5, 18, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/66db176cab27b16c1256f43005ba2e7?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/66db176cab27b16c1256f43005ba2e7?Opendocument) (last visited February 1, 2007); U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee : Poland*. CCPR/C/79/Add.110 (29/07/99), at para. 23, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/a61db0e519524575802567c200595e9c?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/a61db0e519524575802567c200595e9c?Opendocument) [hereinafter *Poland 1999*] (last visited February 1, 2007).

²⁸ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: Slovakia..* CCPR/CO/78/SVK (22/08/2003), at para. 4, available at [http://www.unhchrch/tbs/doc.nsf/\(Symbol\)/dfb4fef7e44230e3c1256d7a0044c29c?Opendocument](http://www.unhchrch/tbs/doc.nsf/(Symbol)/dfb4fef7e44230e3c1256d7a0044c29c?Opendocument) [hereinafter *Slovakia*] (last visited February 1, 2007).

²⁹ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: Trinidad and Tobago*. CCPR/CO/70/TTO (03/11/2000), at para. 11, available at [http://www.unhchrch/tbs/doc.nsf/\(Symbol\)/34eab73064e6d232c125698c0047b14a?Opendocument](http://www.unhchrch/tbs/doc.nsf/(Symbol)/34eab73064e6d232c125698c0047b14a?Opendocument) [hereinafter *Trinidad and Tobago*] (last visited February 1, 2007).

³⁰ U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee (Crown Dependencies): United Kingdom of Great Britain and Northern Ireland*. CCPR/C/79/Add.119 (27/03/2000), at para. 14, available at [http://www.unhchrch/tbs/doc.nsf/\(Symbol\)/981284eaf88fd518c12569fc00485004?Opendocument](http://www.unhchrch/tbs/doc.nsf/(Symbol)/981284eaf88fd518c12569fc00485004?Opendocument) [hereinafter the *United Kingdom*] (last visited February 1, 2007).

³¹ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: United States* CCPR/C/USA/CO/8/Rev.1 (18/12/2006) at para. 25, available at <http://daccessdds.un.org/doc/UNDOC/GEN/G06/459/61/PDF/G0645961.pdf?OpenElement>. [hereinafter the *United States*] (last visited January 23, 2007).

³² See *Namibia*, supra note 25; *Trinidad and Tobago*, supra note 29; *Slovakia*, supra note 28; *Philippines*, supra note 26; *the United Kingdom*, supra note 30; *China*, supra note 21; and *El Salvador*, supra note 22.

³³ See *Greece*, supra note 24; and *Poland*, supra note 27.

³⁴ See *United States*, supra note 31.

legislation that creates equal protection from discrimination based on sexual orientation.³⁵

3.2 Human Rights Committee Lists of Issues³⁶

The Human Rights Committee has requested States parties to account for measures their respective governments have taken to protect LGBT people from discrimination and other human rights violations. The following are examples:

- i. In 2002, the Committee asked Egypt to “provide information on the existence, in law and in fact, of discrimination based on sexual orientation” and to explain further how “‘debauchery’ and ‘attacks on religion’ on the basis of sexual orientation are justified in the light of Articles 17 and 26 of the Covenant.”³⁷
- ii. In 2004, the Committee asked Barbados if it envisioned, “adoption of legislation which would prohibit discrimination on any ground such as race, color, sex, including sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status as well as against persons with disabilities in employment, education, and other services?”³⁸
- iii. In 2005, the Committee requested that Brazil discuss one of its programs entitled “Brazil without Homophobia” and “explain action taken at the level of the States in response to reported cases of discrimination based on sexual orientation and acts of violence against affected groups.”³⁹

4. Chile Violates and Must Take Additional Steps to Comply with the ICCPR in Protecting LGBT People from Discrimination

³⁵ See *Finland*, *supra* note 23.

³⁶ “First, the country rapporteur presents the draft list of issues for discussion to the Country Report Task Force. Once the members have made their observations, the list of issues is adopted by the Task Force as a whole. The Task Force then allocates to each of its members principal responsibility for a certain number of questions included in the list of issues, based in part on the areas of particular expertise or interest of the member concerned. Once the list of issues is adopted and edited, it is transmitted to the State party.... It should be noted that States parties are encouraged to use the list of issues to better prepare for a constructive discussion, but are not expected to submit written answers.” U.N. Human Rights Committee, *Human Rights Committee - Working Methods*, available at <http://www.ohchr.org/english/bodies/hrc/workingmethods.htm#a4> (last visited February 1, 2007).

³⁷ U.N. Human Rights Committee, *List of Issues: Egypt*. CCPR/C/76L/EGY (05/08/02) at para. 26, available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/6570c78e33bd94a9c1256c1d002639cf/\\$FILE/G0243847.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/6570c78e33bd94a9c1256c1d002639cf/$FILE/G0243847.pdf) (last visited February 1, 2007).

³⁸ U.N. Human Rights Committee, *List of Issues: Barbados*. CCPR/C/83L/BRB (01/12/2004), at para. 15, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/8469c9684cb6bdf5c1256f6b004f6299?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/8469c9684cb6bdf5c1256f6b004f6299?Opendocument) (last visited February 1, 2007).

³⁹ U.N. Human Rights Committee, *List of Issues: Brazil*. CCPR/C/85L/BRA. (25/07/2005), at para. 9, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e04952da601808fac125707700569686?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e04952da601808fac125707700569686?Opendocument) (last visited February 1, 2007).

4.1 Chile has failed to fulfill its obligations under the ICCPR because discrimination with respect to sexual orientation continues to pervade, including in the following areas, discussed *infra*:

- i. Labor and Employment (see *infra*, paras 5-6)
- ii. Education (see *infra*, paras 7-8)
- iii. Health Care (see *infra*, paras 9-10)
- iv. Marital, Partnership, Adoption, and Parentage Rights (see *infra*, paras 11-12)
- v. Hate Crime Violence (see *infra*, paras 13-14)

II. EMPLOYMENT

5. Information on Employment Discrimination based on Sexual Orientation in Chile.

5.1. LGBT people are discriminated against in the workplace. Though the Constitution of Chile provides for the freedom to work and the protection of that freedom and also prohibits discrimination not based on personal competence, skill or capability,⁴⁰ LGBT people are often discriminated against in the workforce in Chile because there are no specific provisions or laws in Chile expressly prohibiting discrimination against LGBT people in employment. LGBT people are discriminated against with respect to hiring and firing. Because of this, LGBT people fear dismissal and cannot disclose their sexual orientation at their work places.

5.2. The following examples illustrate the effects of employment discrimination based on sexual orientation:

- i. LGBT people can be dismissed from their work based on their sexual orientation,⁴¹ Or even accused of this conduct.⁴²

⁴⁰ Constitution of Chile, chp. III, art. 19(16), available at <http://confinder.richmond.edu/admin/docs/chile.pdf>.

⁴¹ INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION, CHILE PACKET # 4, 2002 REPORT: AN OVERVIEW OF THE MAIN EVENTS INVOLVING SEXUAL MINORITIES IN CHILE – EXPULSION OR ARBITRARY DISMISSALS, (2002) http://www.asylumlaw.org/legal_tools/index.cfm?category=404&countryID=233. Judge Daniel Calvo, a married father of five, was removed from his post as a member of the Santiago Court of Appeals in January 2004 after a local television station, Chilevision, reported on his visit to a steam bath frequented by gay men. In February 2002, Carlos Zamora was fired by the Gasco Company due to his sexual orientation and for being falsely identified as a person living with HIV/AIDS. Also in July 2002 The enterprise, “Computacion Victor Sanzay Compania Limiteda” was able to get the economist Andrea Benki dismissed from a program at UCV Television where he was a panelist based solely on the fact of being transsexual.

⁴² UNIFIED MOVEMENT OF SEXUAL MINORITIES (MUMS), [hereinafter MUMS], REPORT OF HUMAN RIGHTS AND DISCRIMINATION 2006, AT 87(2006) <http://www.mums.cl/sitio/contenidos/noticias/23oct06.htm>. “An employee of the Military Bishopric was fired from his position as the organist because of having homosexual orientation. The musician, identified with the initials M.D., was fired last May 30 after a former couple told a priest of the bishopric that he was a homosexual. M.D. worked in the Military Cathedral since November of 2004 and during his two years in the place, had

- ii. LGBT people can be denied a job based on their sexual orientation⁴³
- iii. Self-employed LGBT people are discriminated against in Chile⁴⁴

6. Steps Chile Needs to Take to Comply with the ICCPR by Protecting LGBT People from Employment Discrimination

- 6.1. Chile needs to take concrete steps to comply with the ICCPR mandate to protect LGBT people from employment discrimination based on their sexual orientation. We respectfully submit the following recommendation:

Recommendation #1: The Human Rights Committee urges the Chilean government to enact comprehensive legislation to protect all employees from discrimination on the basis of sexual orientation.

III. EDUCATION

7. Information on Discrimination in Schools Based on Sexual Orientation in Chile.

- 7.1 The Chilean government recognizes the Right to Education as being fundamental to its citizens. Under its Chapter III – Constitutional Rights and Obligations, the Political Constitution of Chile under number 10 establishes the right to education.⁴⁵ The Chilean Constitution provides all individuals the right to education.⁴⁶ But this right is deprived via discrimination as exemplified by a report entitled “Report on Human Rights and Discrimination of 2006” published by MUMS Chile (Unified Movement of the Sexual

been characterized for the responsibility and commitment to his work. Nevertheless, some days after this former couple knew about his sexual orientation, he was informed by his employer that he was fired. The reasons given by the commander Jorge Towers about the dismissal was that some of the nuns would take charge of the work since that moment on, clarifying that this situation had nothing to do with the sexual orientation of the affected since they did not have any problem with the homosexuals.”

⁴³ *Id.* at 84. “Since two years ago Andrés Rivera decided to show himself to the world that even when he was born in a body of woman, he always had felt himself as a man. He lost friends and work. By the time he recovered emotionally and began dressing with tie and shirt, bringing to light his sexual orientation, he was to be hired as teacher of Education of Children in the University Arturo Prat and to work in the city Hall of Rancagua and to form an organization to defend the rights of transgender people. But just when all seemed to be going well, a new problem arose that requiring him to seek justice. Thus he relates what happened: ‘I applied for a job in the University of Rancagua. I went to the interview where I told the hiring committee about my condition [being transgender]. They told me that my contract from March through the summer had been approved, and they gave me the schedule of classes. But it so happens that the day of the orientation for new faculty, the new principal of the school told me that she did not want me on her team. They left me without work by discrimination and, therefore, I sued them”.

⁴⁴ *Id.* A commentator of a variety show (Day to Day) on Televisión Nacional, Víctor Gutiérrez showed on camera a gay magazine of naked GogoBoys where a competitive dancer Fabrico posed, ostensibly to discredit the dancer based on his sexual orientation.

⁴⁵ Constitution of Chile, *supra* note 40. It indicates that “the objective of education is the complete development of the individual in the various stages of his life. . . . The State shall provide special protection for the exercise of this right. Basic education is mandatory . . . the State must finance a gratuitous system designed to ensure access thereto by the entire population. It is the duty of the State to promote the development of education at all levels . . . It is the duty of the community to contribute to the development and improvement of education.”

⁴⁶ *Id.*

Minorities)⁴⁷, which documents the case of a student accused of being homosexual and forced to end his school year before the end of the term.⁴⁸

7.2 Educational institutions are a source of discrimination against LGBTs. School administrators have expelled many students for being lesbian or homosexual. One example, presented in the 2006 "Report on Human Rights and Discrimination" mentioned above, indicates that lesbian conduct is not only criticized but also seen as abnormal conduct in school.⁴⁹

- i. Two high school students were expelled for displaying homosexual behavior at school. Senior high school student Gabriela Martinez, eighteen, was expelled from the San Ramon Polytechnic in Santiago after she was seen holding hands with her seventeen-year-old girlfriend near the school. MOVILH filed a complaint on her behalf, leading the Ministry of Education to demand the student be reinstated. The school complied.⁵⁰
- ii. In another case, fourth-year high school student Mayra Espinoza, nineteen, was expelled from the Jose Francisco de Vergara Lyceum at Viña del Mar when she was seen kissing another female classmate on the lips. At the urging of Congresswoman Laura Soto and members within the Ministry of Education, the student was allowed to return to school but was forced to finish her studies early.⁵¹

7.3 The Chilean Catholic Church encourages homophobic attitudes, has been recognized by MOVILH as having homophobic attitudes⁵², and has considerable influence on Chilean education. The International Religious Freedom Report for Chile for 2006 released by

⁴⁷ MUMS, *supra* note 42.

⁴⁸ *Id.* at 83. A student stated he was not a homosexual, but was accused of it, and was prohibited from participating in his graduation. The constant attacks and aggressions of his classmates made the School Authorities decide to end his school year in August of 2005 (it usually ends by December). The student discriminated against indicated that he had to bear the constant mockeries of his companions, threats by mail, as well as the humiliating spilling of moisturizing cream on his clothes and in his chair, simulating semen. The youth indicated that his teachers also discriminated against him, ignoring what his peers did to him during the four years of schooling. The student finished his school year with a grade average of 6.5; nevertheless, and despite the student's insistence that he was not a homosexual, the school did not permit him to graduate.

⁴⁹ MUMS, *supra* note 42. A student of the female boarding School, Corina Urbina, of San Felipe, denounced to the board of directors of the school that some of her classmates had lesbian behaviorisms, for which she had proof of which that entailed photos taken on their cell phones while kisses were being exchanged. The inspector was entrusted to verify these allegations. The students allowed him access to their devices. Once the right to privacy was broken he proceeded to revise the photos, ensuring that the school would expel the participating students. The situation caused a media din affirming the statements of the type: "The problem is that already they stigmatized them as the lesbians." The boarding school alleged that had withdrawn the kissing students until the school psychologist verified that the students had no other problems interacting with others. This circumstance exemplifies how discrimination in the school builds lesbianism as being abnormal.

⁵⁰ *Supreme Homophobia*, INTER PRESS SERVICE NEWS AGENCY, www.ispsnews.net/print.asp?idnews=27280 (last visited Jan. 24, 2007).

⁵¹ *Id.*

⁵² MUMS, III INFORME ANUAL SOBRE DERECHOS HUMANOS DE LAS MINORIAS SEXUALES CHILENAS: 2004 (3RD ANNUAL REPORT ON HUMAN RIGHTS OF CHILEAN SEXUAL MINORITIES: 2004), 46 (2004) <http://www.movilh.org/documentos/informeddhh2004.doc>.

the United States Bureau of Democracy, Human Rights, and Labor reports that religious education classes are required twice a week in Chile and that 92 percent of public schools and 81 percent of private schools offered instruction based only on the Catholic faith.⁵³ The government has a responsibility to ensure that the views of the Church on homosexuality do not interfere with all students' right to an education. It is unclear how this religious education requirement affects the student's free exercise of sexual orientation when certain religious beliefs which limit sexual orientation may be taught or discouraged.

- 7.4 The Chilean Ministry of Education is taking positive steps towards countering discrimination against LGBTs in school; however, the ministry must play a role in not only responding to these events but also in preventing them. An Advisory Council to address widespread concern among students as to the equality of educational access in Chile did consult with organizations promoting homosexual rights in creating recommendations to the government to improve schools. Their report was given to the President this December, and it is hoped that the government will continue to move in the direction of non-discrimination by prohibiting the expulsion of students and discrimination on the basis of sexual orientation against students by both teachers and other students.⁵⁴

8. Steps Chile needs to take to comply with the ICCPR by protecting LGBT youth from discrimination in education:

- 8.1 Chile needs to take concrete steps to comply with the ICCPR mandate to protect LGBT people from discrimination in the educational system based on their sexual orientation. We respectfully suggest the following recommendations:

Recommendation # 2: The Human Rights Committee urges the Chilean government to enact comprehensive legislation that protects all students from discrimination on the basis of sexual orientation.

Recommendation # 3: The Human Rights Committee urges the Chilean government to grant LGBT students equal access to education. Specifically, the government should provide LGBT students with procedures and policies that would prevent schools from dismissing LGBT students based on their sexual orientation.

Recommendation # 4: The Human Rights Committee urges the Chilean government to implement an education policy on school curriculums to prohibit discrimination based on sexual orientation and to ensure that religious teaching does not interfere with the freedom of sexual orientation.

⁵³ U.S. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, THE INTERNATIONAL RELIGIOUS FREEDOM REPORT FOR CHILE FOR 2006, available at <http://www.state.gov/g/drl/rls/irf/2006/71453.htm>.

⁵⁴ *Chilean Education Reform Update: September 2006*, THE AMERICAS SOCIETY AND COUNCIL OF THE AMERICAS, <http://www.counciloftheamericas.org/coa/publications/Electionupdates.html> (last visited Jan. 19, 2007).

Recommendation # 5: The Human Rights Committee urges the Chilean Government to establish a mechanism to train teachers and school officials on matters of sexual orientation.

IV. HEALTH CARE

9. Information on Discrimination in Health Care Based on Sexual Orientation in Chile.

9.1 Denial of healthcare due to sexual orientation in Chile is prevalent. Several deaths have resulted from the fact that no law exists to specifically ban discrimination against LGBTs. According to research conducted by the Universidad de Santiago, Santiago, Chile, there is still significant discrimination against sexual minorities regarding access to medical treatment and health care. Some cities illustrated higher levels of homophobia and provided lower levels of confidentiality for homosexual patients.⁵⁵ The following examples illustrate LGBT discrimination in the Chilean health care industry:

- i. Hospitals and medical personnel sometimes deny opportune medical services to LGBT persons based on their sexual orientation.⁵⁶
- ii. Health care companies also deny medical services to LGBTs who have HIV. For instance, in the city of Punta Arenas a young man sued a health care company for discrimination when he was denied medical services because he had been diagnosed with HIV. Instead of treating him, the hospital sent him to another hospital.⁵⁷
- iii. According to Tim Frasca, General Coordinator of the Chile AIDS Prevention Council, HIV transmission is higher among homosexuals in Chile; yet prevention campaigns are directed mainly at heterosexuals. For instance, in the early 1990's the Dutch government financed a Chilean HIV prevention campaign, however, gay-related issues received no funding even though ninety percent of HIV transmission was among homosexuals. Ten years later, only five percent of prevention funds are given to gay-related projects.⁵⁸

⁵⁵*Diagnosis on Sexuality and Discrimination suffered by people living with HIV/AIDS in five cities of Chile*, INTERNATIONAL GAY AND LESBIAN RIGHTS COMMISSION, CHILE PACKET # 4, http://www.asylumlaw.org/legal_tools/index.cfm?category=404&countryID=233 (last visited Feb. 11, 2007).

⁵⁶ *Id.* at 80. MUMS' reports mention at least one case with serious consequences for the patient who was not promptly attended by the medical personnel.

⁵⁷ *A young man living with Aids wins his Lawsuit against a medical center due to discrimination*, INTERNATIONAL GAY AND LESBIAN RIGHTS COMMISSION, CHILE PACKET # 5, http://www.asylumlaw.org/legal_tools/index.cfm?category=404&countryID=233 (last visited Feb. 11, 2007).

⁵⁸ *MSM – Death & Erasure of Gay Identity*, *Gay Today*, 7/26/99, INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION, CHILE PACKET # 3, http://www.asylumlaw.org/legal_tools/index.cfm?category=404&countryID=233 (last visited Feb. 11, 2007).

- iv. Gay and transgender persons living with HIV/AIDS in Chilean prisons are subject to inhumane treatment. They are often denied medical attention for their infections. In the few instances where these prisoners do receive medical attention, they are treated with penicillin with little regard to how this might affect their already fragile immune systems. They do not get antiretroviral medications and are kept isolated from the rest of the prison population. In 1997, thirty-seven inmates were tested for HIV using the same ten needles despite notifications that some were HIV positive. As a result, two inmates were infected with HIV and died of AIDS. They received no medical treatment.⁵⁹
- v. HIV-positive persons are also discriminated against by employers, forcing some to resign from their jobs. Additionally, if a person's homosexual status is revealed, he or she may be dismissed. For instance, a young man by the name of Carlos Zamora was fired by the Gasco Company because of his sexual orientation and for being accused of having HIV.⁶⁰ Zamora, with the help of MOVILH, filed a lawsuit against the company, and the case became public. This case is only the second of its type to become public.
- vi. Health Insurance plans in Chile fail to consider medical procedures that may be required by LGBTs. For instance, plans do not cover transgender breast surgery, sexual reassignment surgery, and/or the respective hormonal treatment.⁶¹ Lack of coverage has caused some transgender persons to resort to unregistered clinics that illegally offer surgeries. The Movimiento Unificado de Minorías Sexuales – (MUMS) has denounced casualties of transgender persons who suffered death or permanent injury due to surgeries received from illegal in-home clinics.⁶²
- vii. Homophobia plays a huge role with regards to HIV/AIDS discrimination. While 48% of health workers surveyed in 1997 revealed that they were favorable to working with HIV victims, the health care setting is still discriminatory.⁶³ Patients describe experiences such as being denied

⁵⁹ *HIV/AIDS and Human Rights: Stories from the Frontlines –“Prisoners in Chile subjected to inhumane conditions”*, International Council of Aids Service Organizations, June 1999, INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION, CHILE PACKET # 3, http://www.asylumlaw.org/legal_tools/index.cfm?category=404&countryID=233 (last visited Feb. 11,2007).

⁶⁰ , INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION, CHILE PACKET # 4, 2002 REPORT: AN OVERVIEW OF THE MAIN EVENTS INVOLVING SEXUAL MINORITIES IN CHILE (IN ENGLISH AND SPANISH), 2002 (2002) http://www.asylumlaw.org/legal_tools/index.cfm?category=404&countryID=233.

⁶¹ MUMS, *supra* note 42. Regarding the medical coverage for these issues the Unified Movement of Sexual Minorities, says “the fact that this does not occur relies on that being transgender becomes part of irregular home interventions; it is therefore not within the minimum protection framework for staying alive.”

⁶² *Id.* at 91-92.

⁶³ *Understanding and responding to HIV/AIDS- related stigma in the health sector (excerpt)*, 2003 Pan American Health Organization, INTERNATIONAL GAY AND LESBIAN RIGHTS COMMISSION CHILE PACKET # 5, http://www.asylumlaw.org/legal_tools/index.cfm?category=404&countryID=233 (last visited Feb. 11, 2007).

access to antiretroviral treatment, discrimination in health services, and infringement of medical ethics. For example, a patient may inquire about the result of his or her medical exam, and the doctor may respond loudly in a crowded waiting room that he or she has HIV and is going to die.⁶⁴ Homosexual patients living with HIV are sometimes treated differently from heterosexuals living with HIV. An AIDS victim described his experience as follows:

“When I entered the program I did it as a heterosexual . . . but two years passed and my homosexuality emerged. . . Then the treatment changed immediately. Here they discriminate against you. . . the treatment they give heterosexuals is different from the treatment they give homosexuals... I’m on rescue therapy.”⁶⁵

10. Steps Chile needs to take to comply with the ICCPR by protecting LGBT people from discrimination in health care:

10.1. Chile needs to take concrete steps to comply with the ICCPR mandate to protect LGBT people from discrimination in health care based on their sexual orientation. We respectfully suggest the following recommendations:

Recommendation # 6 The Human Rights Committee urges the Chilean government to create health care plans that cover medical treatment necessary for the transgender community such as sexual reassignment surgery, breast surgery, and hormonal treatment.

Recommendation # 7 The Human Rights Committee urges the Chilean government to create and implement education campaigns designed to inform and sensitize health care professionals to better meet the needs of LGBT people.

V. Marital, Partnership, Adoption, and Parentage Rights

11. Information on Discrimination in Marital, Partnership, Adoption, and Parentage Rights.

11.1 The Chilean government has continually voiced support for the legislation creating civil unions for gay and lesbian couples.⁶⁶ At the moment, the Chilean congress is debating a bill on civil unions that protects gay and lesbian couples⁶⁷ and the LGBT community has

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Presentan a President Bachelet Campaña sobre Pacto de Union Civil el día de su cumpleaños (On President Bachelet’s birthday, it is presented the campaign about the Pact of civil unions)*, GAY CHILE, http://www.gaychile.com/esp/det_news.php?cont=1475 (last visited Jan. 19, 2007). President Michele Bachelet has been supported of a new bill on civil union for gays and lesbian couples.

⁶⁷ *Diputado Rossi y Movilh lanzan campaña por el Pacto de Union Civil (PUC) en Iquique (Congressman Rossi and Movilh launch a campaign for the Pact on Civil Unions (PUC) in Iquique)*, MOVIMIENTO DE INTEGRACION AND LIBERACION HOMOSEXUAL (MOVEMENT OF HOMOSEXUAL INTEGRATION AND LIBERATION), <http://www.movilh.cl/modules.php?name=News&file=article&sid=468> (last visited Jan. 19, 2007).

mobilized in order to obtain approval of a bill creating civil unions, which in Spanish is called "Pacto de Uniones Civiles (PUC)".⁶⁸

11.2 Courts have recognized same sex couples as families for certain effects such as domestic violence.⁶⁹ However, there are uncertainties in the arena of Chilean family law because the Chilean Supreme Court has denied child custody in the case of a lesbian mother on account of her sexual orientation.⁷⁰ The petitioner in the case was a judge named Karen Atala. The case received national attention because the Supreme Court bluntly unacknowledged different psychological studies about lesbianism and motherhood and the testimony of the minors involved in case.⁷¹ The case is going to be brought to the Inter-American Court of Human Rights.

11.3 The following examples illustrate LGBT discrimination in the Chilean health care industry:

- i. The lack of any law to allow civil unions for gay and lesbian couples prevents LGBT people from enjoying the same basic domestic rights as heterosexual couples. Such rights include the sharing of health insurance, division of common property after separation, and visitation in jails or hospitals.
- ii. The denial of custody rights to LGBT parents based on their sexual orientation.
- iii. The denial of adoption rights.⁷²

12. Steps Chile needs to take to comply with the ICCPR by protecting LGBT people from discrimination in marital, partnership, adoption, and parentage rights:

⁶⁸ *Minoría Sexuales celebran apertura de multi tienda a parejas gays y lesbians (Sexual Minorities celebrate the startup of a multi-store for gays and lesbian couples)*, MOVIMIENTO DE INTEGRACION AND LIBERACION HOMOSEXUAL (MOVEMENT OF HOMOSEXUAL INTEGRATION AND LIBERATION)

<http://www.movilh.cl/modules.php?name=News&file=article&sid=474> (last visited Jan. 19, 2007).

⁶⁹ *Corte de apelaciones de la Serana afirma que conviviente homosexuales constituyen familia (Court of appeals from La Serana upholds that homosexual couples constitute a family)*, MOVIMIENTO DE INTEGRACION AND LIBERACION HOMOSEXUAL (MOVEMENT OF HOMOSEXUAL INTEGRATION AND LIBERATION),

<http://www.movilh.cl/modules.php?name=News&file=article&sid=477> (last visited Jan. 19, 2007). This is the case of Honorino Muñoz accused of domestic violence against his homosexual partner. The court for the first time in Chile upheld the sentence based on domestic violence within a homosexual relationship.

⁷⁰ *Chile: High Court Discriminates Against Lesbian Mother*, HUM. RIGHTS WATCH, <http://hrw.org/english/docs/2004/06/02/chile8722.htm> (last visited Jan. 19, 2007). "Karen Atala, a judge from the town of Los Andes, had been awarded custody of her three daughters by an appeals court. Her former husband appealed, arguing that the court had wrongfully put Atala's rights before those of her children. Accepting the appeal by 3 votes to 2, a Supreme Court panel held that Atala's open lesbian relationship disqualified her from the right to custody that separated mothers in Chile enjoy unless barred by exceptional circumstances. The decision is final, and she has no other avenue of appeal."

⁷¹ MUMS, *supra* note 52, at 40. The MUMS' report criticizes this decision saying, "(a)...[T]o justify a judgment based on assumptions, the Supreme Court disregarded the value of the scientific evidence from psychologists', social workers', and other professionals' reports presented by the parties or ordered by the court as elements contributing to the judges' opinions when weighing all the evidence. (b) The Court from Letras de Villarica (the trial court) had considered the children's opinions, which the Supreme Court did not."

⁷² This is a consequence of the denial of custody rights for LGBT parents.

- 12.1** Chile needs to take multiple steps to comply with the ICCPR mandate to protect LGBT people from discrimination in regards to family relations, adoption, civil unions and parentage. We respectfully suggest the following recommendations:

Recommendation # 8: The Human Rights Committee congratulates the Chilean government for its support to Civil Unions legislation and encourages the government to continue with its support.

Recommendation # 9: The Human Rights Committee urges the Chilean government to enact comprehensive family legislation that gives equal parent and adoption rights to LGBT people.

Recommendation # 10: The Human Rights Committee urges the Chilean government to support any judicial initiative taken by the Judge Karen Atala before the Inter-American Court of Human Rights in order to overturn the judicial precedent by which sexual orientation could be a factor in denying children custody.

VI. Hate Crime Violence

13. Information on Hate Crime Violence against Sexual Minorities in Chile.

- 13.1** The concept of “hate crimes” does not exist under the present Chilean Criminal Code. “Hate Crimes” are those crimes based on a bias against race, religion, disability, ethnic/national origin, or sexual orientation⁷³.
- 13.2** Typically in Chile, these crimes committed against the sexual minorities are not either reported⁷⁴ or nationally collected in an official database. Only 44% of the cases are reported⁷⁵; in some cases, where the suspected perpetrators belong to the Carabineros (the Chilean national police), the families of the victims are more reluctant to report the crimes⁷⁶. In addition, these cases are typically not appropriately investigated and crimes against sexual minorities are mostly held in impunity.⁷⁷
- 13.3** Neo-Nazi groups have increasingly participated in the crimes of physical violence against sexual minorities. During 2005-2006 the number of crimes reportedly committed by Neo-Nazi groups increased by 23%.⁷⁸ The transgender population is especially

⁷³ Countries such as the United States have passed legislation such as the Hate Crime Statistic Act recognizing these types of crime. See Hate Crimes Statistic Act of 2006 28 USC § 534 (2006).

⁷⁴ MUMS, *supra* note 42, at 73. “LGTB people do not dare to denounce the crimes because they do not believe in the police procedures.”

⁷⁵ *Id.*

⁷⁶ *Id.* at 72.

⁷⁷ *Id.* at 8 and 41. In the case of the Divine Night club in Valparaíso, more than fifteen LGTB people died, and until now the case was in impunity.

⁷⁸ *Id.* at 69.

vulnerable to the violent attacks from civilians and Neo-Nazi groups. Since 2002, more than 40 murders of transgender people have been reported in Chile.⁷⁹

13.4 Notably, the police are participants in the aggression against sexual minorities.⁸⁰ Despite the decriminalization of sodomy abusive arrests have continued. Chilean police have arrested LGTB people under article 373 of the Penal Code that allows arrests for “behaviors against good habits and morals”. Many of the arrests do not have probable cause and the victims are released by the police prior to any intervention of the prosecutor or the Public Ministry. Such incidents suggest that the arrests are made for the purposes of harassment alone. Police officers are not prosecuted on account of such misbehavior, and the Public Ministry does prevent such abusive arrests.⁸²

14. Steps Chile needs to take to comply with the ICCPR by protecting LGBT people from hate crime related violence:

14.1 Chile needs to take multiple steps to comply with the ICCPR mandate to protect LGBT people from hate crimes. We respectfully suggest the following recommendations:

Recommendation #11: The Human Rights Committee urges the Chilean government to support the enactment of hate crimes legislation, including provisions for statistics collection, a cause of action, and enhanced criminal sentencing for hate crimes based on sexual orientation and gender identity.

Recommendation #12: The Human Rights Committee urges the Chilean government to support the derogation of Article 373 of Penal Code that allows the unrestricted discriminatory arrests against the LGTB community.

Recommendation #13: The Human Rights Committee urges the Chilean government to train police officers and other justice enforcement officials in LGTB issues to make them especially sensitive in these matters and prevent them from discriminatory practices based on sexual orientation.

Recommendation #14: The Human Rights Committee urges the Chilean government to create an administrative organization with participation of civil society that would monitor the implementation of any antidiscrimination law or measure.

⁷⁹ *Id.* at 8.

⁸⁰ *Id.* at 69. Given the number of violent acts, the State security forces and Neonazis groups displayed the most aggressive conducts against the LGTB people. See also *Id.* at 70. One case of the death of a LGTB person perpetrated by a police officer (carabiniero) and four cases of police misconduct.

⁸² *Id.* at 50-51. This is because the LGTB people are released before the mandatory intervention of the Public Ministry (Public Defendant) which monitors the legality of the police procedures. This also prevents the Judge of Civil Guaranties (Juez de Garantías) from intervening.

Conclusion

LGBT persons in the Chile are entitled to full recognition of the rights recognized under the International Covenant on Civil and Political Rights. Unfortunately, in many areas, the current legal climate in Chile fails to afford LGBT persons equal protection under the law, freedom from discrimination, or freedom from incursions on the right to privacy.

Violations of the ICCPR in Chile are numerous. Many LGBT people have no legal recourse when they are harassed, fired, or denied employment based on their sexual orientation or gender identity. In public schools, LGBT students are often inadequately protected against discrimination and harassment and are in fact at times harassed by the school administrations themselves. A court could disregard the relationship with the non-legal parent and decide to place the child with distant family members with whom the child has no bond, or to make the child a ward of the state. If a child is separated from a parent's same sex partner, emotional trauma and unnecessary litigation costs often result. Chilean law fails to explicitly protect LGBT people from discrimination in health care, resulting in the perpetuation of stigmatization and the denial of numerous rights afforded to the heterosexual population. Same sex marriages are not recognized as legal marriages, and LGBT couples are denied rights, responsibilities, and privileges available to heterosexuals. LGBT couples and parents are denied equal protection of the law in regards to adoption, foster care, and parental rights. LGBT couples are vulnerable to family separation and experience increased hardships as a result of policies that do not allow LGBT residents and citizens the right to sponsor their immigrant partners for permanent resident status. Hate crimes are not a recognizable criminal act. Chilean protection fails to explicitly protect the transgender population, who suffer pervasive discrimination in areas such as hate crimes, employment, and health care.

The Chilean government maintains the international legal obligation to ensure that all people within its territory and subject to its jurisdiction, including LGBT persons, are afforded all internationally recognized human rights, which include the civil and political rights protected under the ICCPR. While the *Toonen* and *Young* decisions of the Human Rights Committee clearly demonstrate that sexual orientation is included under the protections provided by Articles 2, 17, and 26 of the ICCPR, the United States has continued to perpetuate a legal system in which LGBT persons suffer discrimination on the basis of their sexual orientation and/or gender identity.

Thus, we respectfully request that the Human Rights Committee conclude that the Chilean government is in violation of its obligations under Articles 2, 17, and 26 of the ICCPR. We urge the Human Rights Committee to call on the Chilean government to make a probing examination of its policies to protect the civil and political rights of its LGBT population and to implement legislation and policies to ensure that all LGBT persons in Chile are afforded the human rights protections to which they are entitled.