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## Case Note 2018/2

### Report of the investigation in Chile under article 13 of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, CRC/C/CHL/INQ/1

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**Key words:** Residential care; serious and systematic violations of rights.

**Subject matter:** Serious violations of the rights enunciated in the CRC, considering that Chile's residential protection system has resulted in a widespread violation of the rights of thousands of children and adolescents under the protection of the State

**CRC Provisions:** art. 2, art. 3, art. 4, art. 6, art. 9, art. 12, art. 18, art. 19, art. 23, art 24, art. 25, art. 28, art. 31, art. 34 and, art. 37

**CRC OP3 Provisions:** art. 13 (paragraph 1); art 35 rules of procedure

**Other relevant communications:** N/A

**Source:** [https://www.ohchr.org/Documents/HRBodies/CRC/CRC\\_C\\_CHL\\_INQ\\_1.pdf](https://www.ohchr.org/Documents/HRBodies/CRC/CRC_C_CHL_INQ_1.pdf)

#### (I) Outline of the substantive issues

On July 22, 2016, the Committee received a request for investigation regarding the situation of children and adolescents (NNA) deprived of a family environment who are in residential care centres, under the direct or indirect control of the National Service of Minors (SENAME). In Chile, residential programs are intended for the care of children without an adequate family environment and might be directly managed by the State (CREAD) or by non-for-profit organizations (OCAS). By the end of 2016, the number of children admitted to residential centres was 14,245. Per data from SENAME, between January 2005 and June 2016, 210 children died in residential centres (40 in CREAD and 170 in OCAS centres). Between July 1 and December 31, 2016, another 46 deaths were reported. The inquiries made by the Prosecutor's Office since September 2016 showed, among the causes of a significant number of these deaths, serious negligence on the part of the personnel responsible for the care of children and adolescents. The events described indicated a possible serious and systematic violation of the rights set forth in the Convention.

In accordance with article 13, paragraph 1, of the Optional Protocol and article 35 of the Committee's Rules of Procedure concerning the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (Regulations), the Committee decided to conduct a confidential investigation about the potential grave or systematic violation of various provisions of the Convention with respect to a significant percentage of children and adolescents under the protection of the State party. The State party authorized the visit of the two experts appointed by the Committee. The visit took place between January 8 and 12, 2018. The experts visited the regions of Santiago and Valparaíso - including 4 protection centres under control of SENAME and 2 centres controlled by NGO’s - and interviewed more than 100 individuals and representatives of public and private organizations.

## **(II) Procedural issues**

Chile ratified the Convention on the Rights of the Child on August 13, 1990 and the Optional Protocol on September 1, 2015. The procedure of Article 13 entered into force domestically, on December 1, 2015. The communication was received by the Committee on July 22, 2016. After being considered as reliable, the Committee examined it during its 74th meeting (January 16 - February 3, 2017) and decided, without prejudging the merits of the information, to register the investigation request. In accordance with Article 13, paragraph 1, of the CRC OP3 and article 35 of the Committee's Rules of Procedure concerning the CRC OP3, the Committee decided to request Chile to submit comments on the issues raised to the Committee. Chile submitted its observations to the Committee on May 18, 2017. After reviewing all available information and considering that the described situation met the criteria for the establishment of an investigation, the Committee decided to conduct a confidential investigation into the potential grave or systematic violation of various provisions of the CRC.

## **(III) Findings**

The Committee determined the existence of grave and systematic violations of at least fifteen rights recognized in the CRC against children under residential care in Chile. These included article 2 (non-discrimination); articles 3.1 (best interest); the obligation to ensure compliance with standards by the institutions in charge of protection (art. 3.3.); the obligation to adopt general measures of implementation, in accordance with article 4; the right to life, survival and development (art. 6); the right not be separated from the family except in the best interests of the child (art. 9); the right to be heard and have views taken into consideration (art. 12); appropriate assistance to parents and legal representatives as far as the child is concerned (art. 18); protection from violence (art. 19); the right of the child with disabilities to adequate care for a full and decent life (art. 23); the right to the highest possible level of health (art. 24); the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement (art. 25); the right to education (art. 28); the right to rest, leisure and culture (art. 31); the right to be protected against sexual exploitation and abuse (art. 32) and; the right to be protected against torture and cruel, inhuman or degrading treatment (art. 37).

The Committee considered the State to be responsible for “grave” violations of the rights considering that Chile's residential care system has resulted in a widespread violation of the rights of thousands of children and adolescents under the protection of the State over a long period. These rights included: a) violation of their obligation to respect the rights of children during their stay in the residences under direct administration of the State, which had resulted in a re-victimization of children by the staff; b) violation of their obligation to protect for not providing adequate protection and care for children and adolescents who enter the residential care system after being victimized, nor the necessary care for their recovery and physical and psychological rehabilitation; c) violation of their obligation to enforce the rights of children and adolescents based on the lack of effective and timely measures to end violations of rights, both in their family of origin and in the privately administered residences.

Along with these grave violations, the Committee also determined the existence of “systematic” violations of the rights enunciated in the Convention. These were based on the following facts: a) the lack of a comprehensive law for the protection of children based on a human rights perspective; b) the existence and continued and extended use of judicial measures that fail in their purpose of protection and recovery; c) the maintenance of an administrative staff of SENAME which was not adequately capacitated in human and financial resources and; d) the inability and / or unwillingness to take effective and timely measures despite the fact that the situation of the residential protection system was known through official reports from the executive, judicial and legislative branches.

Based on these findings, the Committee adopted a series of recommendations. These included immediate requests for the closure of state-controlled centres for residential care (CREAD) and a set of legislative and policy measures for the prevention and protection of children.

#### **(IV) Commentary**

This is a landmark case for the protection of children under residential care. There are two aspects in this decision that should call our attention. Pursuant to article 35 of its Rules of Procedure regarding the CRC OP3, the Committee assessed whether the violations of rights were grave and / or systematic. In doing so, the Committee considers that the violations are "grave" if they are likely to cause substantial harm to the victims. In determining such causality, it is necessary to consider the scale, prevalence, nature and impact of the violations found. The term "systematic", in turn, is defined by the Committee as referring to the organized nature of the acts that lead to repeated violations and the improbability of their random occurrence.<sup>1</sup>

The interpretation of these terms by the Committee seems to be coherent with the way in which gross, serious and/or systematic violations of human rights have been defined and utilized by

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<sup>1</sup> Paras. 111-113.

human rights bodies and courts in the past.<sup>2</sup> It is also an important definition for assessing future communications submitted before the Committee, particularly in countries with weak or incomplete child protection systems.

At the same time, the decision adopted by the Committee is also important as it specifies a set of concrete obligations for States, in the context of residential care. In doing so, the Committee incorporates the well-known standards on alternative care for children, developed by the UN General Assembly.<sup>3</sup> But the Committee goes beyond the general principles and obligations regarding private institutions and organizations providing protection-related services, in this case, residential care.

The Committee declares that the State is directly responsible for the violations carried out in the public centres (CREAD), as well as those carried out in the OCAS or other private centres. And this conclusion is reached not only for lack of supervision, but also because these centres, for the purposes of attribution of responsibility, should be considered *agents of the State*, by acting in the exercise of public functions by delegation of the State. In interpreting Chile’s obligations in this matter, the Committee follows its own previous opinion that “States are not exempt from their obligations under the Convention and its optional protocols when they delegate their functions or entrust their performance to a private company or to a non-profit organization”.<sup>4</sup>

In a context of continuous privatization of sensitive social services provided for children in the Americas<sup>5</sup> - including care facilities and programs - this interpretation could play an important role in determining the state’s responsibility in further communications.

Finally, it is worth noting that this decision had a considerable impact in the public opinion in Chile. The Committee’s findings were publically acknowledged by the Ministry of Justice and Human Rights, as well as SENAME. Members of Congress also reacted to this decision calling, among many other aspects recommended by the Committee, to establish a reparations fund for victims. At the same time, the new Government adopted a National Pact on Children (*Acuerdo Nacional de Infancia*)<sup>6</sup> that includes specific measures for the protection of children in alternative care. Even when these measures were adopted before the Committee reached a conclusion on this case, the decision has been instrumental to their legitimacy. These measures include, among others, the strengthening of programmes for families, the preferential use of foster care (over residential care) and the design of specific standards for protection centres. The Government has

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<sup>2</sup> Lori F Damrosch, “Gross and Systematic Human Rights Violations”, Max Planck Encyclopedia of Public International Law [MPEPIL], 2011 in: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1732>; Geneva Academy of International Humanitarian Law and Human Rights, “What amounts to ‘a serious violation of international human rights law’? An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty”, *Academy Briefing No. 6, August 2014*, Geneva.

<sup>3</sup> UN General Assembly, [Guidelines for the Alternative Care of Children](#), A/RES/64/142, 24 February 2010.

<sup>4</sup> Committee on the Rights of the Child, [General comment No. 16 \(2013\) on State obligations regarding the impact of the business sector on children’s rights](#), CRC/C/GC/16, 17 April 2013, par. 25.

<sup>5</sup> Cfr., IACHR, report [The Right of Boys and Girls to a Family. Alternative Care. Ending institutionalization in the Americas](#), OEA/Ser.L/V/II. Doc. 54/13, October 17, 2013, paragraphs 323 et seq.

<sup>6</sup> See: [http://www.minjusticia.gob.cl/media/2018/07/Acuerdo\\_Nacional\\_por\\_la\\_Infancia.pdf](http://www.minjusticia.gob.cl/media/2018/07/Acuerdo_Nacional_por_la_Infancia.pdf)

also committed itself to new laws on the financing of private institutions, social services for protection and juvenile justice and a revised adoption act, among others.

**(V) Further reading**

- Inter-American Commission on Human Rights, Towards the Effective Fulfillment of Children’s Rights: National Protection Systems, OEA/Ser.L/V/II.166 Doc. 206/17, 30 November 2017, in: <http://www.oas.org/en/iachr/reports/pdfs/FulfillmentRights-Children.pdf>
- National Standards for Children’s Residential Centres, Department of Health and Children, Government of Ireland, 2014, in: <https://health.gov.ie/wp-content/uploads/2014/03/natstand-report.pdf>
- Guide to the Children’s Homes Regulations including the quality standards, April 2015, Department for Education, United Kingdom, in: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/463220/Guide\\_to\\_Children\\_s\\_Home\\_Standards\\_inc\\_quality\\_standards\\_Version\\_1.17\\_FINAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/463220/Guide_to_Children_s_Home_Standards_inc_quality_standards_Version_1.17_FINAL.pdf)

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