



# **Human Rights Violations of Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Guatemala: A Shadow Report**

**Submitted for consideration at the 104th Session of the Human Rights Committee**

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Submitted to the United Nations Human Rights Committee by:

- Organización Trans Reinas de la Noche Organizacion (OTRANS)
- Red Latinoamericana y del Caribe de Personas Trans (RED LACTRANS)
- The International Gay and Lesbian Human Rights Commission (IGLHRC)
- The Heartland Alliance for Human Needs & Human Rights
- The George Washington University Law School International Human Rights Clinic

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## EXECUTIVE SUMMARY

This report is a joint submission by Organización Trans Reinas de la Noche (OTRANS), Red Latinoamericana y del Caribe de Personas Trans (RED LACTRANS), the International Gay and Lesbian Human Rights Committee (IGLHRC), the Heartland Alliance for Human Needs and Human Rights, and the George Washington University Law School International Human Rights Clinic to the United Nations (UN) Human Rights Committee (“HRC” or “the Committee”) on the occasion of its consideration of the State of Guatemala’s implementation of the *International Covenant on Civil and Political Rights* (“the Covenant” or “the ICCPR”) at the 104<sup>th</sup> session taking place in New York City, USA, on 19<sup>th</sup> and 20<sup>th</sup> March 2012.<sup>1</sup>

The purpose of this report is to highlight the widespread and systematic human rights violations experienced by lesbian, gay, bisexual and transgender (LGBT) individuals in Guatemala. In particular, the report draws the attention of the Committee to the following breaches of the Covenant:

- Individuals in Guatemala are subject to discrimination on the basis of their sexual orientation and/or gender identity by both State and non-State actors, including in access to healthcare and education services.
- Though inadequate reporting makes exact numbers uncertain, it is clear that there are persistent violations of the right to life of LGBT persons in Guatemala on the basis of their sexual orientation and/or gender identity. Transgender women may be particularly at risk. In some instances, the State has been responsible for the extrajudicial killings of LGBT individuals.
- The Guatemalan State fails to adequately prevent, to investigate and/or to prosecute incidents of gender-based violence and killings, including against LGBT individuals.
- LGBT persons suffer cruel, inhuman and degrading treatment, including a constant threat of violence that amounts to torture, forced disappearances, sexual violence in detention centres and non-consensual medical testing.
- LGBT people in Guatemala are denied the right to a fair trial. Judges may refuse to hear controversial cases concerning rights violations based on sexual orientation and gender identity because they fear public reprisal.
- The Guatemalan State refuses to recognize the gender identity of transgender persons. By denying transgender individuals appropriate identity documents, the State withholds from them the status of legal personhood.

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<sup>1</sup> This report was authored by Timothy Merlo (J.D. 2012, The George Washington University Law School), and Supraja Murali (J.D. 2012, The George Washington University Law School) under the supervision of Professor Shana Tabak of the George Washington University Law School International Human Rights Clinic. The report was guided and edited by Stefano Fabeni (Heartland Alliance for Human Needs & Human Rights, Director of Global Initiative for Sexuality and Human Rights), Marcelo Ferreyra, (International Gay and Lesbian Human Rights Commission, Program Coordinator, Latin America and the Caribbean), Peter Dunne (International Gay and Lesbian Human Rights Commission), Jessica Stern (International Gay and Lesbian Human Rights Commission) and Marcela Romero (Red Latinoamericana y del Caribe de Personas Trans, Coordinator). Special thanks to the numerous Guatemalan and international activists and civil society organizations who contributed valuable information, reports, and comments throughout the drafting of this report.

- Human rights defenders who advocate for the rights of LGBT persons in Guatemala are subject to threats, harassment, abuse and, in extreme cases, physical violence by both state and non-state actors.
- Guatemalan law violates the rights of existing LGBT families and prevents other LGBT persons from founding a family because of their sexual orientation and/or gender identity.

The various rights violations referred to above are each exacerbated by the absence of systematic reporting and recording. The former U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary executions has noted that “structural changes in security and justice [in Guatemala] have not been put forward, neither to diminish the causes of crime nor to address the social, cultural and economic risk factors of violence.”<sup>2</sup> The failure to provide concrete, disaggregated statistics around LGBT violence and discrimination permits the Guatemalan authorities to ignore, and sometimes even misrepresent, homophobic and transphobic abuse.

The extent, breadth and severity of the State of Guatemala’s human rights violations amount to a clear breach of the terms of the Covenant.

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<sup>2</sup> U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Addendum Report on Mission to Guatemala of 21-25 August 2006, U.N. Doc. No. A/HRC/4/20/Add.2 (19 February 2007).

## I. INTRODUCTION

This shadow report on the human rights situation of LGBT people in Guatemala was written and submitted through the collaborative efforts of Organización Trans Reinas de la Noche (OTRANS), Red Latinoamericana y del Caribe de Personas Trans (RED LACTRANS), the International Gay and Lesbian Human Rights Commission (IGLHRC), the Heartland Alliance for Human Needs & Human Rights, and The George Washington University Law School International Human Rights Clinic.

Guatemala became party to the International Covenant on Civil and Political Rights on May 5, 1992.<sup>3</sup> Guatemala submitted its third report under Article 40 of the ICCPR on March 31, 2010.<sup>4</sup>

This shadow report discusses the human rights situation of LGBT people in Guatemala. The ICCPR guarantees protections to individuals that are guaranteed by the state and must be ensured in the form of positive and negative binding legal obligations. These rights are guaranteed to all people within the state territory or subject to the state's jurisdiction, regardless of that person's status under domestic law.<sup>5</sup>

Various UN bodies have recently called for States parties to ensure that their laws prohibit discrimination on the basis of sex, sexual orientation, and gender identity.<sup>6</sup> These calls to action represent an important step for the augmentation of human rights for LGBT individuals, which the UN Human Rights Council identified as a key concern when it passed Resolution 17/19, *Human rights, sexual orientation, and gender identity*, in June 2011.<sup>7</sup> Guatemala, then a member of the Human Rights Council, voted in support of this resolution.<sup>8</sup> In practice, however, the Guatemalan State has done little to protect the human rights of sexual minorities.

The Human Rights Committee has demonstrated serious concern for the rights of sexual minorities in several other countries. This should be taken as guidance by the government of Guatemala. In its recent Concluding Observations following its review of Jamaica, the Committee encouraged Jamaica to take steps to protect individuals from discrimination on the basis of sexual orientation and gender identity. It stated that Jamaica “should send a clear message that it does not tolerate any form of harassment, discrimination or violence against persons for their sexual orientation.”<sup>9</sup> While the specifics of those concluding observations focused on the situation of individuals who identify as homosexual, or, on rights associated with

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<sup>3</sup> Status of Ratifications, International Covenant on Civil and Political Rights, available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en)

<sup>4</sup> Third Periodic Report of Guatemala, U.N. Doc. No. CCPR/C/GTM/3 (March 31, 2010).

<sup>5</sup> General Comment 31 of the Human Rights Committee, CCPR/C/21/Rev.1/Add.13, at 4¶ 10, May 26, 2004.

<sup>6</sup> Concluding Observations of the Human Rights Committee: Jamaica, 103<sup>rd</sup> Session, 17 October-4 November 2011, Advance Unedited Version, available at <http://www2.ohchr.org/english/bodies/hrc/hracs103.htm>

<sup>7</sup> U.N. Human Rights Council, Resolution 17/19, Human rights, sexual orientation and gender identity, U.N. Doc. A/HRC/17/L.9/Rev.1 (June 17, 2011).

<sup>8</sup> U.N. Human Rights Council, Resolution 17/19, Human rights, sexual orientation and gender identity, U.N. Doc. A/HRC/17/L.9/Rev.1 (June 17, 2011).

<sup>9</sup> U.N. Human Rights Committee (HRC), Concluding Observations: Jamaica, 103<sup>rd</sup> Session, 17 October-4 November 2011, Advance Unedited Version, available at <http://www2.ohchr.org/english/bodies/hrc/hracs103.htm>.

sexual orientation, the HRC also demonstrated concern about rights associated with gender identity, as will be discussed below.<sup>10</sup>

Furthermore, during the course of the 2008 Universal Periodic Review Process at the Human Rights Council, Switzerland, Slovenia, and the Czech Republic made recommendations to Guatemala calling attention to the lack of compliance with human rights standards regarding LGBT individuals. These three countries recommended that Guatemala implement measures to combat discrimination against human rights defenders and others on the basis of sexual orientation and gender identity, and to end impunity for such attacks, including “specific education and awareness programmes for law enforcement, judicial and other authorities, with focus, *inter alia*, on protection of enjoyment of human rights by persons of minority sexual orientation and gender identity.”<sup>11</sup> Despite these calls to action, the Government has taken no steps to implement these much-needed changes in the intervening years.<sup>12</sup>

Despite the importance of observing and protecting LGBT rights, the State of Guatemala makes no mention of issues faced by the LGBT community in its report to the HRC.<sup>13</sup> The State’s failure to protect these rights results in egregious human rights violations, including violations of the right to protection from nondiscrimination, the right to equal treatment of men and women, the right to life, the right to freedom from torture, cruel, inhuman, and degrading treatment, the right to liberty, the right to security of person, the right to a fair trial, the right to legal personhood, the right to privacy, the right to freedom of expression, the right to freedom of association, the right to a family life, and the rights of children.

LGBT abuse in Guatemala is all the more surprising as, according to the recent *National Plan of Human Rights: 2007-2017* (published by the Presidential Commission of Human Rights Guatemala, 2007) there is a recognition of the “importance of developing a social culture of tolerance, of respect of difference...to create and promote public policies that allow the integration and acceptance of people of diverse sexual orientation in society.”

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<sup>10</sup> Concluding Observations: Jamaica, *supra* at ¶ 8. (“The state should amend its laws with a view to prohibiting discrimination on the basis of sex, sexual orientation, and gender identity”).

<sup>11</sup> U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Guatemala*, pp. 17, 19, U.N. Doc. No. A/HRC/8/38 (May 29, 2008).

<sup>12</sup> Interview with Anonymous Sources, in Washington, D.C. (October 28, 2011). On file with George Washington University Law School International Human Rights Clinic.

<sup>13</sup> Third Periodic Report of Guatemala, *supra* note 4.

## II. BACKGROUND

### A. Sexual Orientation and Gender Identity

Sexual orientation refers to “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.”<sup>14</sup> This term includes lesbian, gay, bisexual, or heterosexual (straight) orientations.<sup>15</sup>

Gender identity refers to

[E]ach person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.<sup>16</sup>

The external manifestation of a person’s gender identity is called gender expression.<sup>17</sup> Gender expression usually involves “masculine,” “feminine,” or gender-variant behavior.<sup>18</sup> Transgender people generally seek to make their gender expression match their gender identity, rather than their sex at birth.<sup>19</sup> In other words, a person whose sex at birth is determined to be male, but who has an internal sense of being a female, is a transgender woman.

Transgender is a term for people whose gender identity and/or gender expression and their sex at birth do not match.<sup>20</sup> This term may include transsexuals, cross-dressers, and other gender-variant people.<sup>21</sup> Altering one’s birth sex is not a simple or short process, but rather a process that occurs over a long period of time known as “transition.”<sup>22</sup> Steps that may be, but are not always, included in transition are: telling one’s family and friends, changing ones name and/or sex on legal documents, hormone therapy, and medical treatment including surgery.<sup>23</sup>

### B. Strong Pattern of Generalized Violence and Human Rights Offenses in Guatemala

Guatemala experienced an armed conflict from 1962 to 1996. Even now, years after conflict has ended, the country still suffers from extremely high rates of violence. Recorded killings in

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<sup>14</sup> *The Yogyakarta Principles: The Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* at 6 FN 1 (March 2007) available at [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm)

<sup>15</sup> *Ibid.*

<sup>16</sup> The Gay & Lesbian Alliance against Defamation (GLAAD), *Media Reference Guide 7* (8th Edition, May 2010).

<sup>17</sup> GLAAD Media Guide, *supra* note 16 at 9.

<sup>18</sup> GLAAD Media Guide, *supra* note 16 at 8.

<sup>19</sup> GLAAD Media Guide, *supra* note 16 at 8.

<sup>20</sup> GLAAD Media Guide, *supra* note 16 at 8.

<sup>21</sup> GLAAD Media Guide, *supra* note 16 at 8.

<sup>22</sup> GLAAD Media Guide, *supra* note 16 at 9.

<sup>23</sup> GLAAD Media Guide, *supra* note 16 at 9.

Guatemala routinely exceed 5,000 per year.<sup>24</sup> In fact, in 2010, 4,925 violent deaths were recorded, including 41 lynchings, as well as 6,132 reports injury as a result of violent attacks.<sup>25</sup> This general societal violence is intrinsic to the documented, widespread patterns of social cleansing and lynching.<sup>26</sup> Though much of this violence occurs at the hands of private individuals, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions recommends that the State must take responsibility and take steps to reduce these occurrences.<sup>27</sup> Within Guatemalan society, minority groups, including LGBT individuals, are subject to particularly high levels of violence.

### C. Lack of Reporting and Recording

Justice systems in Guatemala are ineffective largely due to a lack of infrastructure for recording and reporting crimes, discrimination, and violations of human rights. As described by Phillip Alston, the U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions:

Structural changes in security and justice have not been put forward, neither to diminish the causes of crime nor to address the social, cultural and economic risk factors of violence. Insecurity and impunity affect daily life and generate mistrust and social dissatisfaction. All this is exacerbated by the lack of adequate attention to victims.<sup>28</sup>

As the systems stand, even where statistics exist, their accuracy is questionable. Statistics that may actually reflect hate crimes or discrimination may instead be characterized as reflecting drug trafficking or gang violence, thereby allowing the government to overlook important societal issues pertaining to the LGBT community.<sup>29</sup> In addition to a lack of clarity around the causes of violence, in Guatemala the security and justice sectors also lack appropriate methods to disaggregate statistics, which results in unclear statistics that may not accurately portray the impact of violence in various communities. Furthermore, these statistics, whether accurate or not, may be misused by the police. Thus, in any individual crime that is documented by the police, a record of the crime itself may exist, but numerous important details relevant to the appropriate classification and understanding of what actually transpired, may be missing.

Another area in which reporting and recording of statistics fails the LGBT community in Guatemala is in the area of HIV/AIDS infection rates. These statistics reflect infection rates for men who have sex with men (MSM) and for female sex workers, but may or may not accurately reflect numbers among the population of transgender women sex workers (who are regarded

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<sup>24</sup> U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Addendum Report on Mission to Guatemala of 21-25 August 2006, U.N. Doc. No. A/HRC/4/20/Add.2 ¶ 7 (19 February 2007).

<sup>25</sup> U.N. Office of the High Commissioner on Human Rights, *Report of the High Commissioner on Human Rights on the activities of her office in Guatemala, Addendum*, p. 6, U.N. Doc. No. A/HRC/16/20/Add.1 (Jan. 26, 2011).

<sup>26</sup> See generally Alston, *supra* note 24.

<sup>27</sup> Alston, *supra* note 24 at ¶¶ 7-8.

<sup>28</sup> High Commissioner Addendum, *supra* note 25 at p. 6.

<sup>29</sup> Anonymous Sources, *supra* note 12.

under Guatemalan law as male).<sup>30</sup> The lack of accurate statistics makes it difficult to fully call attention to the problems faced by the transgender community in Guatemala.

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<sup>30</sup> Telephone Interview with Dr. Tamara Adrian, Partner, Adrian & Adrian, Caracas, Venezuela (November 9, 2011).

### III. SUBSTANTIVE VIOLATIONS

#### A. Articles 2 (Nondiscrimination) and 26 (Equality before the Law)

Articles 2(1) and 26 of the Covenant provide for the respect, equality, and nondiscrimination of all individuals on the grounds of, *inter alia*, race, color, and sex. In the landmark decision of *Toonen v Australia* in 1994, the Committee found not only that the reference to “sex” in Articles 2(1) and 26 must be taken to include sexual orientation, but also that laws which criminalize consensual homosexual acts expressly violate the privacy protections of Article 17.<sup>31</sup> In the past twelve months alone, the Committee has five times called upon states to end the criminalization of sexual conduct between adults of the same sex.<sup>32</sup> Furthermore, it has recommended that at least two states take positive steps to end national prejudice and discrimination against LGBT people.<sup>33</sup> In its recent Concluding Observations on Iran at the 103<sup>rd</sup> Session, the HRC specifically noted the “harassment” and “persecution” which transgender individuals face and called upon the state party to ensure legal protections on the basis of gender identity.<sup>34</sup>

LGBT individuals in Guatemala are subject to discrimination both by State and non-State actors. Recent statistics suggest that homophobia and transphobia remain deeply embedded within the social fabric. According to a nationwide survey, 74% of Guatemalans would not vote for a homosexual political candidate, while 70% believe that homosexuality is a medical condition. Less than 40% of those surveyed stated that they would accept an LGBT family member.<sup>35</sup> According to a complementary survey of the LGBT community of Guatemala, 72% of LGBT individuals report experiencing violations of the rights to health, work, and education.<sup>36</sup>

Transgender women in Guatemala report widespread discrimination in terms of their access to housing. Indeed, so pervasive is the refusal to rent to transgender women that they are often forced to live in small, crowded spaces which become one of the only places that these women can find acceptance.<sup>37</sup>

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<sup>31</sup>Toonen v. Australia, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994, Accessed at: <http://www.unhcr.org/refworld/docid/48298b8d2.html> [accessed 28 September 2011].

<sup>32</sup> Human Rights Committee, Concluding Observations: Ethiopia, ¶ 12 (2011) UN Doc. CCPR/C/ETH/CO/1; Human Rights Committee, Concluding Observations: Colombia, ¶ 14 (2010) UN Doc. CCPR/C/TGO/CO/4; Human Rights Committee, Concluding Observations: Jamaica, ¶ 8 (2011) UN Doc. CCPR/C/JAM/CO/3, (Advance Edited Version); Human Rights Committee, Concluding Observations: Iran, ¶ 10 (2011) UN Doc. CCPR/C/IRN/CO/3 (Advance Edited Version); Human Rights Committee, Concluding Observations: Kuwait, ¶ 30 (2011) UN Doc. CCPR/C/KWT/CO/2 (Advance Edited Version).

<sup>33</sup> Human Rights Committee, Concluding Observations: Mongolia, ¶ 9 (2011) UN Doc CCPR/C/MNG/CO/5; Human Rights Committee, Concluding Observations: Poland, ¶ 8 (2010) UN Doc CCPR/C/POL/CO/6.

<sup>34</sup> Human Rights Committee, Concluding Observations: Iran ¶ 10 (2011) UN CCPR/C/IRN/CO/3.

<sup>35</sup> Unpublished CID-Gallup Survey (on file with George Washington University Law School International Human Rights Clinic).

<sup>36</sup> Colectivo Amigos contra el SIDA, *Situación General de los Derechos Humanos de las Personas Gay, Bisexuales, y Transexuales de las Ciudades Costeras de Guatemala* (Accessed at <http://www.amigoscontraelsida.net/>)

<sup>37</sup> Anonymous sources, *supra* note 12.

Through its failure to prevent discrimination and promote equality before the law, the Guatemalan Government fails in its obligation to ensure that LGBT individuals may access: (1) healthcare, (2) education and (3) employment.

### 1. Access to Healthcare

The realization of access to healthcare is closely related to and dependent upon the principle of non-discrimination enshrined within the ICCPR.<sup>38</sup> Despite the State's obligation not to discriminate against any group, for LGBT individuals in Guatemala, access to healthcare is extremely limited. For instance, on two separate occasions in 2011, staff at one of the principle state hospitals, the Hospital Roosevelt, turned away transgender women seeking basic assistance, declaring that they were ineligible for any medical care at that hospital.<sup>39</sup>

HIV/AIDS remains a serious health concern for the LGBT population in Guatemala. While rates of infection for the population-at-large decreased by 25% from 2001 to 2009, they continued to increase for certain "at risk" groups, including MSM, transgender women, and sex workers.<sup>40</sup>

Guatemalan human rights defenders attribute the increasing infection rates among MSM and transgender women to a multiplicity of factors. First, the lack of comprehensive sexual education (with explicit references to homosexuality and transsexuality) leads LGBT individuals to engage, often unknowingly, in risky behavior.<sup>41</sup> Second, the rejection of LGBT youth from families and expulsion from schools means that many enter the labor market at young ages.<sup>42</sup> Advocates allege that without options, sex work becomes essential to the survival of transgender women and girls.<sup>43</sup> Sex workers generally are one of the most-at-risk-populations for HIV infection.<sup>44</sup> However, advocates allege that the young ages at which transgender girls and young women enter sex work means that they are often unaware of sexually transmitted infections (STIs) and the importance of precautionary measures, such as condom use.<sup>45</sup> Third, the existence of patriarchal structures and expectations mean that gay men and MSM in Guatemala are frequently forced to hide their sexuality and enter into heterosexual marriages, often while continuing to engage in extramarital homosexual intercourse.<sup>46</sup> Driving gay culture underground creates an environment of secrecy and shame that inhibits the right to health. Fourth, the association of homosexuality with HIV/AIDS in Guatemala is so widespread that people living with

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<sup>38</sup> See Office of the United Nations High Commissioner for Human Rights and World Health Organization, *Fact Sheet No. 31: The Right to Health*, pp. 7-8, available at <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>

<sup>39</sup> "A un Año de 'Desaparición' de Catherine Mishel Barrios, más 30 Mujeres Transexuales asesinadas en Guatemala," 28th February, 2012. Accessed January 31, 2012 at <http://www.carlaantonelli.com/notis-28022011-realidad-transexuales-guatemala.htm>

<sup>40</sup> Mirva Lempiainen, "In Guatemala, HIV Infections Rise for Women," *The Interdependent*, June 6, 2011. Accessed January 31, 2012 at <http://www.theinterdependent.com/110606/in-guatemala-hiv-infections-rise-for-women>

<sup>41</sup> Anonymous Sources supra 12.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> Lempiainen, *supra* note 40.

<sup>45</sup> Anonymous Sources, *supra* note 12.

<sup>46</sup> Lempiainen, *supra* note 40.

HIV/AIDS, including those who are LGBT, frequently conceal their status in order to avoid homophobic and transphobic discrimination.<sup>47</sup>

In addition to discrimination in access to healthcare generally and HIV/AIDS treatment and prevention specifically, transgender individuals experience discriminatory restrictions in accessing healthcare fundamental to their well-being: hormone treatment and sex reassignment surgery.<sup>48</sup> When a transgender person chooses to transition, the refusal of hormone treatment and sex reassignment surgery is a violation of that person's rights under the Covenant. It may prevent the individual from ever realizing and expression their true identity.

## 2. Access to Education

LGBT individuals in Guatemala experience discrimination in access to education. Guatemalan law guarantees access to free primary and secondary education.<sup>49</sup> However, because of limited resources, the current education system cannot meet the total demand, particularly among rural and indigenous communities.<sup>50</sup> In the context of these shortages, children who identify as or are perceived to be LGBT are disproportionately affected.<sup>51</sup> Within this group, transgender students are particularly vulnerable. Rejected by their families and communities at young ages, advocates allege that many transgender girls and young women are forced to leave school in order to support themselves.<sup>52</sup>

Discrimination against LGBT students is not limited to primary and secondary education; it exists throughout the education system. For example, a transgender student passed the entrance exam at El Instituto Técnico de Capacitación y Productividad (INTECAP), the primary technical training center in Guatemala.<sup>53</sup> When the director of INTECAP learned that she was transgender, he told her that the institute's regulations established that they could not take on students like her but "only men and women."<sup>54</sup> As a result, she was barred from admission to the school.

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<sup>47</sup> Lempianen, *supra* note 40.

<sup>48</sup> "Colectivos de transexuales de Guatemala piden Ley que reconozca derechos y combata la Transfobia", (May 28, 2011). Accessed January 31, 2012 at <http://www.sentidog.com/lat/2011/05/transexuales-de-guatemala-promueven-ley-para-combatir-la-transfobia/>.

<sup>49</sup> Article 74 of the Guatemalan Constitution: Citizens have the right and obligation to receive initial education, pre-school, primary and basic education, within the age limits established by the law. The education is free. The State shall provide for and promote scholarships and educational credits

<sup>50</sup> U.N. Committee on the Rights of the Child, *Consideration of reports submitted by states parties under article 44 of the Convention on the Rights of the Child; Concluding Observations: Guatemala*, ¶ 80, U.N. Doc. No. CRC/C/GTM/CO/3-4 (Oct. 1, 2010).

<sup>51</sup> Anonymous Sources, *supra* note 12.

<sup>52</sup> *Ibid*; Interview with Dr. Adrian, *supra* note 30.

<sup>53</sup> "A un Año ...," *supra* note 39.

<sup>54</sup> "A un Año ...," *supra* note 39.

### 3. Access to Employment

In recent surveys<sup>55</sup> carried out by the rights groups, Organización Trans Reinas de la Noche and RedLacTrans, 22% of transgender women respondents stated that the factor most inhibiting their social inclusion was a lack of access to employment.<sup>56</sup> Despite this, transgender women experience systematic restrictions in entering the Guatemalan jobs market.

According to the results of the survey, 23% of transgender women recalled having suffered stigma and discrimination in their attempts to find employment. 21% of respondents stated that they were certain that they had been denied employment solely on the basis of their gender identity.<sup>57</sup> The lack of legal protections surrounding gender identity, and the fact that the State party does not grant transgender individuals appropriate identity documentation, means that employers can disregard transgender applications with relative impunity.<sup>58</sup>

The survey concludes: “Rejection and marginalization, due to gender identity, are key factors that impede the development of trans [women], and these factors primarily affect their search for work.”<sup>59</sup>

According to a prominent transgender advocate, because of their exclusion from the education system, and thus their consequent exclusion from developing the necessary skills to participate in the labor market, a large number of transgender women enter the sex work industry as their only means of survival. The members of OTRANS state that sex work is the “price they must pay” in order to be able to live and express their true gender identity. It is an imposition by a social system that seeks to deny them their rights.<sup>60</sup>

#### **B. Article 3 (Equal Treatment of Men and Women)**

Article 3 provides for the equal treatment of men and women.<sup>61</sup> Taken together, Article 2 and Article 3 mandate that “[s]tates parties take all necessary steps to enable every person to enjoy” all individual rights recognized in the Covenant.<sup>62</sup> This means that states must take all steps necessary “to put an end to discriminatory actions, both in the public and the private sector, which impair the equal enjoyment of rights.”<sup>63</sup>

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<sup>55</sup> Informe Guatemala. Transfobia, agresiones y crímenes de odio. 2007-2011. Accessed February 1, 2012, at <http://issuu.com/onusidaguatemala/docs/informetransfobiaguatemala/1> (translation by Shana Tabak, George Washington University Law School Human Rights Clinic).

<sup>56</sup> *Ibid* at Page 10.

<sup>57</sup> *Ibid* at Page 30.

<sup>58</sup> *Ibid* at Page 32.

<sup>59</sup> *Ibid* at Page 30.

<sup>60</sup> Anonymous Sources, *supra* note 12.

<sup>61</sup> ICCPR, Article 3.

<sup>62</sup> U.N. Human Rights Comm. [ICCPR], General Comment No. 28: Equality of Rights between men and women (article 3), ¶ 3, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (March 29, 2000) [hereinafter General Comment No. 28].

<sup>63</sup> General Comment No. 28, *supra* note 62, at ¶ 4.

The frequency and severity of violence against women -- including lesbians, bisexual women, and transgender (LBT) women – demonstrates that the State of Guatemala has failed to protect women and to ensure the equal treatment of men and women.<sup>64</sup> In 2009, a reported 720 women suffered violent deaths.<sup>65</sup> At least 35 LGBT people were murdered between 1996 and 2006, though the lack of official figures and social stigma of homosexuality and transexuality suggest the actual numbers are significantly higher.<sup>66</sup> In 2009 and 2010, at least thirty transgender individuals were killed in Guatemala.<sup>67</sup> (For more information, see Section C. Article 6 – Right to Life.)

Guatemalan police frequently fail to investigate reported incidents of violence against women, a problem rooted in gender bias. Of the 30,873 reported incidents of violence against women in 2009, only 0.7% of the cases led to a prosecution and 0.2% to criminal sentences. As the UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions has noted, expense does not abrogate the failure to protect, and the State of Guatemala should significantly increase its prosecution rate.<sup>68</sup> Human Rights Watch (HRW) has documented that investigations into crimes against women, including LBT women, are often inadequate and obstructed by investigating police officers who operate with a gender bias.<sup>69</sup> In a recent survey of transgender women in Guatemala, 29% of respondents identified the police as the principle cause of discrimination against them.<sup>70</sup>

Though in 2008 Guatemala passed the *Law Against Femicide and Other Forms of Violence Against Women*, a positive development, gender-based violence continues today.<sup>71</sup> A troubling aspect of the 2008 law is its failure to specifically combat gender-based violence related to sexual orientation and gender identity. While it is uncertain whether LBT women fall within the terms of the femicide law, the fact that they experience high levels of violence as a result of their gender and sexuality means that legal protections specifically designed to address homophobic and transphobic violence are needed to ensure the right of these women to equal treatment.

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<sup>64</sup> See generally U.N. Committee on the Elimination of all forms of Discrimination against Women (CEDAW), *Concluding Observations*, and U.N. Doc. No. CEDAW/C/GUA/CO7 (Feb. 10, 2009).

<sup>65</sup> U.N. Office of the High Commissioner on Human Rights (OHCHR), *Report of the High Commissioner on Human Rights on the activities of her office in Guatemala*, U.N. Doc. No. A/HRC/13/26/Add.1 (March 3, 2010)

<sup>66</sup> Alston, *supra* note 24, ¶ 7

<sup>67</sup> MSMGF, “The harsh reality of transgender people in Guatemala,” (Feb. 24, 2011). Accessed January 31, 2012 at <http://www.msngf.org/index.cfm/id/11/aid/3099> [in Spanish].

<sup>68</sup> Alston, *supra* note 24.

<sup>69</sup> “World Report 2011: Guatemala,” Human Rights Watch, available at <http://www.hrw.org/world-report-2011/guatemala>; see generally Alston, *supra* note 24.

<sup>70</sup> “Informe Guatemala: Transfobia, Agresiones, y Crimenes de Odio”, pp. 31, Organizacion Trans Reinas de la Noche, May 1, 2011: Accessed January 31th 2012, <http://issuu.com/onusidaguatemala/docs/informetransfobiaguatemala/1>

<sup>71</sup> Anonymous Sources, *supra* note 12.

### C. Article 6 (Right to Life)

Article 6 guarantees the right to life and provides that no person should be arbitrarily deprived of his or her life. The Committee has described Article 6 as “the Supreme right from which no derogation is permitted.”<sup>72</sup> In its 2011 Concluding Observations for Jamaica, the Committee called upon the State to “closely monitor allegations of extrajudicial killings” and to ensure that all such allegations are “investigated in a prompt and effective manner with a view to eradicating such crimes, bringing perpetrators to justice and hence fighting impunity, and providing effective remedies to victims.”<sup>73</sup>

At least 35 LGBT people were murdered in Guatemala between 1996 and 2006 on the basis of their sexual orientation or gender identity.<sup>74</sup> From 2009 to 2010, at least 30 transgender individuals were killed,<sup>75</sup> including a three-week period from late October to early November 2009 when no less than 3 transgender women were murdered.<sup>76</sup> During the first months of 2011, the government itself recorded the killing of 4 transgender individuals.<sup>77</sup>

Moreover, these official numbers do not reflect those LGBT individuals whose sexual orientation or gender identity was not accurately recorded at the time of their murder. As the Special Rapporteur on extrajudicial, summary or arbitrary executions noted with regard to his country mission to Guatemala in 2007, “Given the lack of official statistics and the likely reticence if not ignorance of the victims’ family members, there is reason to believe that the actual numbers [of murders of LGBT people] are significantly higher.”<sup>78</sup>

The Government of Guatemala has not only failed to protect the right to life of LGBT individuals, but, at times, has been directly responsible for their deaths. On December 17, 2005, for example, four men in police uniforms, riding police motorcycles stopped two transgender women at an intersection in Guatemala City’s Zone One.<sup>79</sup> They shot Paulina (legal name J.P.) Mendez Cartagena twice in the head, and she died minutes later.<sup>80</sup> The police shot Sulma (legal

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<sup>72</sup> Human Rights Committee, General Comments, General Comment 14, 11th September (1984).

<sup>73</sup> Human Rights Committee, Concluding Observations: Jamaica, ¶ 16 (2004) UN Doc. CCPR/C/JAM/CO/3 (Advance Edited Version).

<sup>74</sup> Alston, *supra* note 24.

<sup>75</sup> MSMGF, *supra* note 67.

<sup>76</sup> International HIV/AIDS Alliance, “Special report: Transphobia and hate crimes in Guatemala,” (April 6, 2010). Accessed January 31, 2012 at <http://www.aidsalliance.org/Newsdetails.aspx?Id=543>.

<sup>77</sup> Transgender Europe, “Press Release—30 September 2011,” Accessed January, 31, 2012 at <http://www.questioningtransphobia.com/wp-content/uploads/2011/09/TGEU-TMM-PR-Sept2011.pdf>

<sup>78</sup> Alston, *supra* 24.

<sup>79</sup> “Guatemala: Fear for Safety: Sulma, Other Transvestite Sex Workers in Guatemala City and Members of Integral Sexuality AIDS Support Organisation (OASIS),” Amnesty International, (Dec. 21, 2005), available at <http://www.amnesty.org/en/library/asset/AMR34/044/2005/en/2f773836-d474-11dd-8743-d305bea2b2c7/amr340442005en.html>

Human Rights Watch, “Guatemala: Transgender People Face Deadly Attacks,” February 20, 2006, available at <http://www.hrw.org/news/2006/02/20/guatemala-transgender-people-face-deadly-attacks>

<sup>80</sup> *Ibid.*

name Kevin) Robles three times, but she survived with serious injuries.<sup>81</sup> Following the attack, the police warned Sulma that, as a witness to the incident, her life was in danger.<sup>82</sup>

As the Special Rapporteur on extrajudicial, summary or arbitrary executions noted, “There has been impunity for murders motivated by hatred towards persons identifying as gay, lesbian, transgender, and transsexual.”<sup>83</sup> In approximately 34% of cases of violent crimes against transgender women, the assailants could be identified, but there is little evidence of charges ever being brought.<sup>84</sup>

A prominent activist described the experience of living as a transgender women in Guatemala as a virtual “death penalty.”<sup>85</sup> Due to a multitude of factors - including, but not limited to, the prevalence of HIV infection, entering sex work at a young age, the risk of severe physical and sexual violence on the streets - the life expectancy of a transgender woman in Guatemala is approximately 25 years.<sup>86</sup>

#### **D. Prohibition of Torture and Cruel, Inhuman or Degrading Treatment or Punishment; Right to Liberty and Security of Persons; and Treatment of Persons Deprived of Liberty (Art 7, 9, and 10)**

Articles 7, 9 and 10(1), recognize the right of every individual to be free from torture; arbitrary arrest; and cruel, inhuman or degrading treatment or punishment. 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.<sup>87</sup> The time and place of all interrogations must be recorded, together with the names of all those present, and this information should be available for purposes of judicial or administrative proceedings. 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.”<sup>88</sup> In recent Concluding Observations, the HRC has called for an end to “enforced disappearance,” “arbitrary detention,”<sup>89</sup> “torture” and “forced

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<sup>81</sup> *Ibid.*

<sup>82</sup> Furthermore, Sulma Robles; transgender sex workers in the vicinity; and the staff of OASIS (Organizacion de Apoyo a una Sexualidad Integral frente al SIDA, a non-government organization working to prevent HIV/AIDS and to protect the rights of LGBT people) were subjected to police surveillance following their reporting of the attacks. Human Rights Watch, “Guatemala: Transgender People Face Deadly Attacks,” February 20, 2006, available at <http://www.hrw.org/news/2006/02/20/guatemala-transgender-people-face-deadly-attacks>

<sup>83</sup> Alston, *supra* 24.

<sup>84</sup> “Informe Guatemala ...,” *supra* note 55; “Ximena Navarrete actual Miss Universo llega a apoyar a la Comunidad Transexual de Guatemala víctimas de abusos,” (July 27, 2011), available at <http://www.radarg.com/index.php/noticias/?m=201107>

<sup>85</sup> Anonymous Sources, *supra* 12.

<sup>86</sup> “Informe Guatemala ...,” *supra* note 55.

<sup>87</sup> Human Rights Committee, General Comment No. 20, 10 March, (1992).

<sup>88</sup> Human Rights Committee, General Comment No. 21, ¶ 4, 10 April, (1992).

<sup>89</sup> Human Rights Committee, Concluding Observations, Togo, ¶ 17, UN Doc CCPR /C/TGO/CO/4, 18 April 2011.

displacement.”<sup>90</sup> It has reaffirmed that a judge should not admit evidence obtained under torture,<sup>91</sup> and where allegations of mistreatment in detention have been made, the State must put in place the appropriate structures to ensure that all claims are robustly and transparently investigated.<sup>92</sup>

### 1. Prohibition of Torture and Cruel, Inhuman or Degrading Treatment or Punishment

The prohibition of torture relates not only to physical abuse but also to “acts that cause mental suffering to the victim,” including intimidation.<sup>93</sup> In Guatemala, the transgender community lives under threat of physical attack. In 2010, for instance, a transgender woman and human rights defender named Johana Ramirez was the victim of an attempt on her life. While in a public place, she realized that she was being followed by a group of four men. When Johana recognized that one of them had a gun and was preparing to shoot her, she narrowly escaped the attack by running away and hiding in a nearby store.<sup>94</sup>

Forced or involuntary disappearances also qualify as torture under the terms of the Covenant as well as other international human rights law.<sup>95</sup> Transgender individuals in Guatemala may be subject to forced disappearances that amount to torture. On February 23, 2010, for instance, a witness observed a young man in a blue jeep abduct a transgender woman named Catherine Mishel Barrios from the Central Historic district of Guatemala City.<sup>96</sup> She has never reappeared. According to local activists and media reports, the State has taken no steps to locate Catherine or identify what happened to her.<sup>97</sup>

Rape within Guatemalan detention centers is widespread,<sup>98</sup> and rape in detention is an act, which the Committee has interpreted as torture.<sup>99</sup> Because the Government of Guatemala routinely

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<sup>90</sup> Human Rights Committee, Concluding Observations, Ethiopia, ¶ 16 UN Doc CCPR/C/ETH/CO/1, 25 July 2011.

<sup>91</sup> Human Rights Committee, Concluding Observations, Kazakhstan, ¶ 22, UN Doc CCPR/C/KAZ/CO/1, 21 July 2011.

<sup>92</sup> *Ibid* at 14.

<sup>93</sup> 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).

<sup>94</sup> International HIV/AIDS Alliance, “Special report: Transphobia and hate crimes in Guatemala,” (Apr. 6, 2010) available at <http://www.aidsalliance.org/Newsdetails.aspx?Id=543>

<sup>95</sup> In its recent Concluding Observations on El Salvador, the Committee considered past instances of 'enforced disappearances' under the heading of Article 7 (CCPR/C/SLV/CO/6) at para 5. Similarly, in its Concluding Observations on Ethiopia, the Committee also considered "enforced disappearance" in the Somali Regional State of Ethiopia as a violation of Article 7 (CCPR/C/ETH/CO/1) at para 16. Likewise, see the report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, ¶¶ 9-10, U.N. Doc. No. A/56/156, (July 3, 2001).

<sup>96</sup> “A un Año ...,” *supra* note 39.

<sup>97</sup> Anonymous Sources, *supra* 12.

<sup>98</sup> Bureau of Democracy, Human Rights, and Labor, Department of State, 2008 Human Rights Report: Guatemala, 2008 Country Reports on Human Rights Practices (March 11, 2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100641.htm> [hereinafter 2008 DRL Guatemala Report]; Comisión Específica Para el Abordaje del Femicidio [Special Commission to Address Femicide], Estrategia para el Abordaje del Femicidio Una Visión desde el Estado [Strategy for Addressing Femicide: A Vision from the State] at 18 (2006), cited in Karen Musalo, Elisabeth Pellegrin, S. Shawn Roberts, Crimes Without Punishment: Violence Against Women in Guatemala, *Hastings Women’s Law Journal*, p. 181.

<sup>99</sup> CCPR/C/JAM/CO/3 (Advance Edited Version) Geneva, 17 October – 4 November 2011. Accessed at <http://www2.ohchr.org/english/bodies/hrc/hrcs103.htm>.

houses transgender women in men's prisons and jails, they are at high risk of sexual violence including rape.<sup>100</sup> One transgender woman, for instance, reported that she was raped in a Guatemalan prison more than eighty times in a single year.<sup>101</sup> Furthermore, the act of housing transgender women with men disregards their identities and can produce substantial mental distress that amounts to torture. Because incarcerated gay men may be stereotyped as physically weak, may be assumed to consent to all male-on-male sexual contact, and/or may be isolated from other prisoners and networks of support, they are at high risk of sexual violence.<sup>102</sup> Lesbians who are incarcerated, like all incarcerated women, are at risk of sexual violence. The perpetrators may be prison officials themselves or other incarcerated individuals. However, because the State controls all activities within detention centers, the State is also responsible for all sexual violence by individuals acting in their official capacity, outside their official capacity, and by individual private actors against incarcerated LGBT individuals.

## 2. Right to Liberty and Security of Person

Documented incidents of arbitrary arrest in Guatemala -- including of LGBT individuals -- constitute violations of article 9(1).<sup>103</sup> Police threaten "persons engaged in prostitution and other commercial sexual activities with false drug charges to extort money or sexual favors."<sup>104</sup> LGBT sex workers are subjected to particular harassment, despite the fact that prostitution is legal in Guatemala.<sup>105</sup> By threatening and in some cases illegally detaining women engaged in prostitution, the police are acting in violation of both the Guatemalan penal code, and in violation of the prohibition on arbitrary arrests under Article 9.<sup>106</sup>

Detained individuals find themselves in jail and prison conditions in Guatemala that are "harsh and dangerous," in violation of Article 10(1).<sup>107</sup> In 2009, for instance, the General Prison System Directorate reported to the HRC that twenty people in their custody were killed.<sup>108</sup> Despite the State's responsibility to diligently protect the safety of those in custody under Article 10, prison officials breach the minimum standard of care required when they permit inherently dangerous situations to develop.<sup>109</sup> As indicated above, LGBT individuals in detention are frequently

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<sup>100</sup> "In this context, the Special Rapporteur wishes to stress the plight and extreme vulnerability of transgender male-to-female persons who, in most circumstances, will be imprisoned in male detention facilities, even though they identify with the female gender, and recommends that States consider taking appropriate measures to avert further victimization of transgender persons in detention, as well as lesbian and gay prisoners." Note by the Secretary-General transmitting the interim report of the Special Rapporteur on the independence of judges and lawyers. A/66/289 at para 81.

<sup>101</sup> Anonymous Sources, *supra* note 12.

<sup>102</sup> Just Detention International, "LGBTQ Detainees Chief Targets for Sexual Abuse in Detention", February 2009. Accessed January 31, 2012 at

[http://www.spr.org/en/fact\\_sheets.aspx](http://www.spr.org/en/fact_sheets.aspx).

<sup>103</sup> 2008 DRL Guatemala Report, *supra* 97.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> Codigo Penal de Guatemala. Accessed February 1, 2012 at [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDYQFjAB&url=http%3A%2F%2Fwww.oas.org%2Fdil%2Fesp%2FCodigo\\_Penal\\_Guatemala.pdf&ei=814pT434AuPL0QHk4\\_mmAg&usg=AFQjCNHBZnJ86Pdcyq\\_DbfZ\\_t1kU-I2qBw](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDYQFjAB&url=http%3A%2F%2Fwww.oas.org%2Fdil%2Fesp%2FCodigo_Penal_Guatemala.pdf&ei=814pT434AuPL0QHk4_mmAg&usg=AFQjCNHBZnJ86Pdcyq_DbfZ_t1kU-I2qBw)

<sup>107</sup> 2008 DRL Guatemala Report, *supra* 98.

<sup>108</sup> High Commissioner, *supra* note 6, ¶ 43.

<sup>109</sup> Alston, *supra* note 24.

subjected to emotional, physical and sexual abuse by fellow inmates, treatment that prison officials fail to prevent and/or adequately punish.<sup>110</sup>

Prisoners in Guatemala have been subject to medical testing without their consent. One transgender woman reported that, while in prison, she was given an HIV test without her consent.<sup>111</sup> This is illegal under Guatemalan law, which requires that obligatory testing be limited to specific circumstances and that the written, informed consent of the test subject be obtained.<sup>112</sup> In addition to carrying out non-consensual testing, authorities in Guatemalan prisons also fail to provide appropriate medical care. The same transgender woman who reported being subject to the HIV test also stated that officials did not provide her with medical assistance when they learned that she was HIV-positive.<sup>113</sup>

#### **E. Article 14 (Right to a Fair Trial and Impartiality of the Judiciary)**

Article 14 guarantees that “all persons shall be equal before the courts and tribunals.” By its General Comments, the Committee has noted that Article 14 enshrines the right to a “fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>114</sup> In its Concluding Observations at the 103<sup>rd</sup> Session, the Committee highlighted the importance of an efficient prosecution and the significance of the independence of judges.<sup>115</sup>

The Guatemalan Congress has consistently failed to enact laws to ensure a fair, consistent and effective judiciary.<sup>116</sup> In this environment, it is perhaps unsurprising that there have been numerous attacks on the independence of the judiciary. Activists allege that judges are often unwilling to take on cases that arouse strong public sentiment, because they fear retribution should popular opinion disagree with their ruling.<sup>117</sup> In 2001, a Justice of the Peace in Senahú was lynched by a mob that disagreed with a decision in one of his cases.<sup>118</sup> While the government attributes its inability to guarantee effective prosecution to its limited resources, the

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<sup>110</sup> Anonymous Sources, *supra* note 12.

<sup>111</sup> Anonymous Sources, *supra* note 12.

<sup>112</sup> Decree 27-2000, Article 19: The conduct of any test for the diagnosis of HIV infection and their results must respect the confidentiality of persons should be conducted with due respect for the applicant, with advice and guidance before and after the test, unless otherwise provided in this Act. Article 20 - Prohibits the authorization of the tests for the diagnosis of infection a compulsory HIV. Except in the following cases: a) When a judgment of the physician, which consist in the clinical record, there is need for test purposes exclusively for the care of patient's health, in order to count with a better criterion of treatment. b) In the case of donation of blood and blood products, breast milk, semen, organs and tissues. c) When necessary for purposes of criminal procedure and with previous order of the competent judicial authority.

<sup>113</sup> Anonymous Sources, *supra* note 12.

<sup>114</sup> General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14) : . 04/13/1984, para 1.

<sup>115</sup> Human Rights Committee, Concluding Observations, Kuwait, ¶ 26, UN Doc CCPR/C/KWT/CO/2, Geneva, 17 October – 4 November 2011 (Advance Edited Version) .

<sup>116</sup> Alston, *supra* 24.

<sup>117</sup> Economic and Social Council (ECOSOC), Special Rapporteur on the independence of judges and lawyers, *Report on the mission to Guatemala*, ¶ 46, U.N. Doc. No. E/CN.4/2002/72/Add.2 (Dec. 21, 2001).

<sup>118</sup> *Ibid.*

UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions has noted, “one would imagine that Guatemala could do better than single-digit conviction rate for murder without spending an additional dollar.”<sup>119</sup>

In Guatemala, there is a culture of impunity in which courts fail to hold perpetrators accountable for crimes committed on the basis of sexual orientation and/or gender identity, thus violating the rights of these individuals to a fair trial. As indicated, official records as well as accounts by human rights defenders and community members suggest that there have been few, if any, prosecutions brought for homophobic or transphobic offences.<sup>120</sup>

LGBT human rights defenders in Guatemala have been subject to false charges intended to intimidate them into silence. For example, in 2008, gay-rights human rights defender Jorge Lopez was arrested on a charge of attempted murder.<sup>121</sup> Though the government had no evidence of any wrongdoing on his part, he was held under house arrest for eight months.<sup>122</sup> The charges were eventually dropped, but he and his organization, OASIS, had to focus much of their energy over that time to prove his innocence, hampering their ability to actively advocate on behalf of their constituents.<sup>123</sup>

#### **F. Article 16 (Legal Personhood) and Article 17 (Right to Privacy)**

Articles 16 and 17 recognize the rights to legal personhood and privacy respectively. Under Article 16, everyone has the “the right to recognition everywhere as a person before the law.” Article 17(1) states that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.” Article 17(2) further provides that “everyone has the right to the protection of the law against such interference or attacks.” By its General Comment 16, the Committee has noted that Article 17 affords “protection to personal honour and reputation and [that] States are under an obligation to provide adequate legislation to that end. Provision must also be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible.”<sup>124</sup> In the landmark decision of *Toonen v Australia* in 1994, the Committee found that laws that criminalize consensual homosexual acts expressly violate the privacy protections of Article 17.<sup>125</sup> Read together, Articles 16 and 17 create an obligation for States to recognize the self-identified gender of transgender persons.

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<sup>119</sup> Human Rights Council, *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, ¶ 59, U.N. Doc. No. A/HRC/4/20/Add.2 (Feb. 19, 2007).

<sup>120</sup> Informe Guatemala ..., *supra* note 55.

<sup>121</sup> Guatemala Human Rights Commission/USA, “Three FRENA Leaders Murdered in Five Months,” Issue #6, March 2010, available at [http://www.ghrc-usa.org/Publications/El\\_Quetzal/Issue6.pdf](http://www.ghrc-usa.org/Publications/El_Quetzal/Issue6.pdf).

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> U.N. Human Rights Comm., *General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)*, ¶ 11, (1988), available at <http://www.unhchr.ch/tbs/doc.nsf/0/23378a8724595410c12563ed004aeecd?Opendocument>.

<sup>125</sup> Whatever their manifestation, homophobia and transphobia are often at core a violation of the right to privacy. The consensual sexual acts an LGBT individual engages in as part of her private life is often the justification for a range of human rights violations committed against her. In this way, Article 17 cannot be isolated from those other

All individuals in Guatemala are required to be registered for legal status.<sup>126</sup> Under Article 1 of the *Civil Code of Guatemala*, legal status “begins with birth and ends with death.” As such, “legal status” is treated as equivalent to legal personhood, and the State issues identity documents on this basis.<sup>127</sup> However, because Guatemala refuses to recognize the self-identified gender of transgender persons, these individuals are often unable to obtain appropriate identity documents, effectively denying them status as a legal person as required under international law.<sup>128</sup>

When a transgender individual lacks legal personality, she or he effectively becomes undocumented. This means that, for example, if a transgender woman is the victim of violence, the State may only document this violence under her legal, male birth name.<sup>129</sup> This has the effect of keeping transgender women from accessing important services, such as assistance available for women through the social security system. Because the physical appearance of transgender persons and their names rarely correspond with their identity documents, they are often turned away from service providers such as hospitals.<sup>130</sup> Furthermore, driven by transphobic shame and disgust, families may refuse to identify deceased transgender individuals.<sup>131</sup> The lack of identification of transgender individuals by family members, coupled with the State’s inability to identify their bodies because they may not have lived under their legal names, results in transgender individuals being buried under the title “No Name.”<sup>132</sup> Under the Committee’s jurisprudence, such forcible exclusion of an individual from the legal system represents a violation of Article 16 and 17.<sup>133</sup>

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abuses which LGBT individuals experience. Rather, it must be seen as intersecting with all such rights violations occurring under the Covenant. *Toonen v. Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994, available

at: <http://www.unhcr.org/refworld/docid/48298b8d2.html> [accessed 28 September 2011].

<sup>126</sup> Article 4 of the Civil Code of Civil. Accessed February 1, 2012 at [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDUQFjAA&url=http%3A%2F%2Fbiblio3.url.edu.gt%2FLibros%2F2011%2Fcodigo.pdf&ei=CGQpT8LJGaaN0QGlp\\_jcAg&usg=AFQjCNF9p3wgGKKG18GNGyvA3TA4NJ8XJw](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDUQFjAA&url=http%3A%2F%2Fbiblio3.url.edu.gt%2FLibros%2F2011%2Fcodigo.pdf&ei=CGQpT8LJGaaN0QGlp_jcAg&usg=AFQjCNF9p3wgGKKG18GNGyvA3TA4NJ8XJw)

<sup>127</sup> Accessed at

<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDUQFjAA&url=http%3A%2F%2Fbiblio3.url.edu.gt%2FLibros%2F2011%2Fcodigo.pdf&ei=vfsmT4faO6iU0QHT4dz6CA&usg=AFQjCNF9p3wgGKKG18GNGyvA3TA4NJ8XJw>

From the language of Guatemala’s submission on their compliance with this right, it appears that “all persons” relates to all those who are legally within the territory of Guatemala; it is unclear what the state’s position on illegal immigrants or migrants is. Third Periodic Report of Guatemala, *CCPR/C/GTM/3* at ¶¶ 450-452.

<sup>128</sup> Dr. Adrian, *supra* 31; “Colectivos de transexuales de Guatemala piden Ley que reconozca derechos y combata la Transfobia”, (May 28, 2011), available at <http://www.sentidog.com/lat/2011/05/transexuales-de-guatemala-promueven-ley-para-combatir-la-transfobia/>

<sup>129</sup> Dr. Adrian, *supra* 30.

<sup>130</sup> Anonymous Sources, *supra* 12.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> Human Rights Committee (HRC), *Report of the Human Rights Committee*, ¶ 192, Volume I, 100<sup>th</sup> – 102<sup>nd</sup> Sessions, U.N. Doc. No A/66/40. Important jurisprudence from the European Court of Human Rights (ECHR) provides excellent guidance on the interpretation of these rights.

Important jurisprudence from the European Court of Human Rights (ECtHR) provides excellent guidance on the interpretation of these rights.<sup>134</sup> In *Goodwin v. United Kingdom*, the ECtHR held that the failure of a state to give legal recognition to the identified gender of a transgender person results in “an unsatisfactory situation” in which transgender individuals live “in an intermediate zone as not quite one gender or the other,” a situation which is not sustainable and which violated the basic human right to legal personhood.<sup>135</sup> The Court found the United Kingdom had violated the applicant’s right to privacy, as well as other rights. The applicant in *Goodwin* was a post-operative, male-to-female transgender individual, and much of the language of the Court’s decision specifies the relevance of the post-operative status. Individuals in Guatemala have limited access to labor and healthcare resources, putting sexual reassignment surgery out of reach for most transgender persons. Even so, the right of transgender individuals to legal identity must still be observed. As such, the HRC should take guidance from and extend the ECtHR’s jurisprudence by recognizing that there is a lack of legal personhood for transgender individuals in Guatemala, in violation of the State’s obligations under article 16.

### **G. Freedom of Opinion and Expression (Article 19)**

Article 19 of the Covenant affirms the rights of free expression and opinion. In its most recently published General Comments, the Committee stated that both of these ideas represent “the foundation stone for every free and democratic society.”<sup>136</sup> All domestic laws should uphold freedom of expression, and media within the state must be able to operate without “censorship or restraint.” Freedom of opinion extends to all areas of society, including “political discourse,” “discussion of human rights,” and “journalism.” In the past twelve months, the Human Rights Committee has noted its strong concern for the verbal and physical harassment of journalists and human rights defenders.<sup>137</sup>

In Guatemala, human rights defenders are among the groups most vulnerable to censorship of opinion and expression. The Human Rights Section of the Public Prosecutor’s Office and the civil society-run Protection Unit for Human Rights Defenders both noted an increase in the reported number of threats and attacks against defenders over 2009 -- registering 346 and 343 cases respectively.<sup>138</sup>

Because of negative socio-cultural beliefs about homosexuality and transexuality, individuals who advocate for LGBT persons are at heightened risk when exercising free expression and opinion. For instance, in late 2009, following the murder of three transgender women within a

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<sup>134</sup> The ECtHR, formed under the European Convention on Human Rights, enforces legal protections guaranteed by that treaty. The ECtHR offers excellent jurisprudence on human rights through individual complaints. While the exact terms of the European Convention and the ICCPR are different, both guarantee a right to legal personhood. Because human rights are inalienable, and universal, the HRC can and should look to other human rights enforcement bodies, such as the ECHR, for guidance on the interpretation and application of different rights.

<sup>135</sup> *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 18, ¶ 90 (2002).

<sup>136</sup> Human Rights Committee, Concluding Observations, CCPR/C/GC/34, 21 July 2011.

<sup>137</sup> Human Rights Committee, Concluding Observations, ¶ 25 UN Doc CCPR/C/KAZ/CO/1, 21 July 2011; Human Rights Committee, Concluding Observations, Ethiopia, ¶ 24 UN Doc CCPR/C/ETH/1, 25 July 2011.

<sup>138</sup> High Commissioner, *supra* note 65, ¶ 25.

period of one month, transgender rights defender Johana Ramirez held a press conference to publicize their killings and to demand an investigation. Following the press conference, Johana reported being followed and experiencing death threats.<sup>139</sup>

## H. Freedom of Assembly and Association (Articles 21 and 22)

Articles 21 and 22 of the Covenant provide for the right of peaceful assembly and association. The Committee has denounced attacks on demonstrations and obstacles to peaceful protest as violations of Article 21. In its Concluding Observations on Argentina, the Committee recommended that “[a]ttacks against human rights defenders and persons participating in peaceful demonstrations should be promptly investigated and the perpetrators disciplined or punished as required” and that the State Party provide information on measures taken in its next report.<sup>140</sup>

Organizations that serve the LGBT community in Guatemala are subjected to discrimination, harassment, and violence. In October 2008, for instance, two Guatemalan organizations, *Amigos Contra el Sida* and *Asociación Gay de Samayac*, organized an event advocating for HIV treatment and prevention.<sup>141</sup> Local churches had prevented the event from being held in the desired location, the municipal hall. Police provided some protection during the event but left early. After they departed, an individual threw a tear gas bomb into the gathering. A similar attack took place in 2007 at an LGBT festival in a town outside of Guatemala City. There, police arrested representatives of a non-government organization dedicated to HIV/AIDS prevention who were distributing condoms, claiming that they were kidnappers.<sup>142</sup>

## I. Article 23 (Family Life)

Article 23 states that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” In its previous Concluding Observations, the Committee has welcomed the legal recognition of same-sex civil partnerships<sup>143</sup> and has called upon States to grant the same benefits to non-married homosexual couples as are already available to non-married heterosexual couples.<sup>144</sup>

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<sup>139</sup> International HIV/AIDS Alliance, “Special report: Transphobia and hate crimes in Guatemala,” (April 6, 2010), available at <http://www.aidsalliance.org/Newsdetails.aspx?Id=543>.

<sup>140</sup> Human Rights Committee, Concluding Observations, Argentina, ¶ 13, (2001) UN Doc. CCPR/O/56/40.

<sup>141</sup> Int’l Gay and Lesbian Human Rights Commission, “Guatemala: Action Alert-Demand an Investigation into Attack on ‘Our Gay Beauty’ Event,” (Oct. 31, 2008), available at <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/globalactionalerts/551.html>.

<sup>142</sup> Int’l Gay and Lesbian Human Rights Commission, “Guatemala: Action Alert-Demand an Investigation into Attack on ‘Our Gay Beauty’ Event,” (Oct. 31, 2008), available at <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/globalactionalerts/551.html>.

<sup>143</sup> Human Rights Committee, Concluding Observations, New Zealand, ¶ B(3)(a), UN Doc CCPR/C/NZL/CO/5, 18 August, 2011.

<sup>144</sup> Human Rights Committee, Concluding Observations, Japan, ¶ 29 Un Doc CCPR/C/JPN/CO/5, 18<sup>th</sup> December, 2008.

The State of Guatemala is openly hostile towards LGBT families. President Otto Perez Molina has publicly condemned adoption by homosexual couples.<sup>145</sup> Furthermore, in 2007, the Guatemalan legislature introduced the “Integral Protection for Marriage and Family Act,” which would bar single parents and same-sex couples from the definition of “family” under Guatemalan law. This bill has yet to be voted on but remains in the legislature. If it were to be passed, it would have egregious ramifications.<sup>146</sup> The proposed law would both legitimize and promote a culture of discrimination against LGBT families. For instance, the leading newspaper *El Periódico* ran an article in December 2009 announcing that same-sex couples could raise families in Guatemala, however the conclusion revealed the story to be a joke, insinuating that the notion of LGBT families deserved mockery.<sup>147</sup> The law would also discriminate against single persons, including LGBT single persons, who would like to adopt children.<sup>148</sup>

The ECtHR in *Goodwin* held that prohibiting a transgender woman from marrying as a woman constituted a violation of that woman’s right to marriage and family life.<sup>149</sup> The HRC should take the ECtHR decision as guidance and recommend that the State allow transgender women to marry their male partners.

#### **J. Article 24 (Special Protection of Children)**

Article 24(1) states that children shall have “the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”

As noted in Section A (2) of this report, LGBT youth in Guatemala are in need of special protection. Schools provide no instruction on the concepts of sexual orientation or gender identity but rather tend to reinforce cultural stereotypes and heteronormative standards.<sup>150</sup> LGBT young persons in detention experience serious physical and sexual abuse and need to be protected.<sup>151</sup> One transgender girl, younger than 18 years old, was raped repeatedly while held in the men’s section of a detention center.<sup>152</sup>

In 2009, Guatemala passed the *Law against Sexual Violence, Exploitation and Human Trafficking*, a positive development, with the intent of protecting children against sexual

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<sup>145</sup> Ines Benitez, Inter Press Service, “Concern over Bill that Would Restrict Definition of ‘Family,’” (Oct. 4, 2007), available at <http://ipsnews.net/news.asp?idnews=39528>.

<sup>146</sup> Human Rights Watch, “Guatemala: Reject Bill Threatening Families,” (Sept. 30, 2007), available at <http://www.hrw.org/news/2007/09/30/guatemala-reject-bill-threatening-families>.

<sup>147</sup> Ludwig Zolorzano, *El Periodico*, “Los gays podran formar familia en Guatemala,” (Dec. 28, 2009), available at <http://www.elperiodico.com.gt/es/20091228/pais/130254>.

<sup>148</sup> Anonymous Sources, *supra* note 12.

<sup>149</sup> See *Goodwin*, *supra* note 135 at ¶¶ 97-104.

<sup>150</sup> Anonymous Sources, *supra* note 12.

<sup>151</sup> 2008 DRL Guatemala Report, *supra* note 98.

<sup>152</sup> Anonymous Sources, *supra* note 12.

abuse.<sup>153</sup> There have been few, however, if any, convictions for sexual exploitation since the adoption of the Law.<sup>154</sup>

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<sup>153</sup> Committee on the Rights of the Child (CRC), *Consideration of reports submitted by states parties under article 44 of the convention, Concluding Observations: Guatemala*, ¶ 94, U.N. Doc. No. CRC/C/GTM/CO/3-4, (Oct. 1, 2010).

<sup>154</sup> UNITED STATES DEPARTMENT OF LABOR'S BUREAU OF INTERNATIONAL LABOR AFFAIRS, *Guatemala Report*, 2011, P. 328: "The Government received and investigated 235 complaints of trafficking in 2010; however, the data did not distinguish between adult and child trafficking cases. No information was available on the number of convictions in cases of child trafficking. During the reporting period, the Government achieved convictions in 7 cases of commercial sexual exploitation of children and 4 convictions in cases of employing minors in dangerous work. *See also*, Committee on the Rights of the Child (CRC), *Consideration of reports submitted by states parties under article 44 of the convention, Concluding Observations: Guatemala*, ¶ 94, U.N. Doc. No. CRC/C/GTM/CO/3-4, (Oct. 1, 2010).

#### **IV. RECOMMENDATIONS**

The State of Guatemala must adopt legislative, administrative, and judicial measures to ensure respect, protection, and promotion of, and minimize violation of, human rights without any distinction based on an individual's sexual orientation or gender identity. To that end, the Human Rights Committee should recommend:

- A. Guatemala should take action to end all violence committed against individuals on the basis of their sexual orientation and gender identity. In particular, the State party should introduce a comprehensive system of laws which protect LGBT persons from discrimination and violence.
- B. Guatemala should take appropriate measures to ensure that all persons have the enjoyment of their rights and are entitled to access basic services, such as healthcare and education, regardless of their sexual orientation and gender identity. In this regard, particular attention should be paid to the vulnerability of transgender persons.
- C. Guatemala should adopt appropriate laws which permit transgender persons to legally transition, and to receive identity documents which reflect an individual's identified gender.
- D. Guatemala should end impunity for individuals who violate the human rights of LGBT persons and those who defend the rights of LGBT persons. The State party should put in place measures to fully investigate alleged crimes on the basis of sexual orientation and gender identity, and where appropriate, should ensure that such crimes are properly prosecuted and punished. If and when a person is forcibly disappeared, Guatemala must take all steps necessary to locate the individual, and to ensure his or her immediate return to safety.