



HUMAN RIGHTS VIOLATIONS AGAINST TRANSGENDER PERSONS IN EL SALVADOR

List of Issues Submitted to the United Nations Office of the High Commissioner for Human Rights

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List of Issues: Human Rights Violations against Transgender People in El Salvador

I. Introduction

The International Human Rights Clinic at the American University Washington College of Law,* in conjunction with Heartland Alliance, Ana Cisneros, *Asociación Solidaria para Impulsar el Desarrollo Humano* (Solidarity Association to Promote Human Development - ASPIDH Arcoiris), *Comunicando y Capacitando a Mujeres Trans Con VIH* (Communicating and Preparing Trans Women with HIV - COMCAVIS TRANS), y *Generación de Hombres Trans de El Salvador – HT 503* (El Salvador Generation of Trans Men – HT 503), have created this List of Issues (LOI) that identifies human rights violations against transgender persons ("trans" persons) in El Salvador. This collaborative report presents three principal objectives: (1) to highlight human rights violations against trans persons in El Salvador; (2) to evaluate El Salvador's compliance with the International Covenant on Civil and Political Rights (ICCPR); and (3) to produce recommendations to safeguard and promote human rights for trans persons. El Salvador ratified the ICCPR on November 30, 1979. In June 2015, the United Nations Office of the High Commissioner for Human Rights will evaluate this report and consider El Salvador's compliance with the ICCPR. This List of Issues, submitted by non-governmental organizations (NGOs), serves as an additional source of information for members on the United Nations Committee.

II. Background

Trans men and trans women in El Salvador encounter many challenges and difficulties in their own country. Trans persons are a unique population in that they have problems and needs that may differ from the needs of gay, lesbian, or bisexual persons. For example, trans persons have a psychological sexual identity that does not conform to their biological sexual assignment. For this reason, the topic of gender identity introduces unique challenges for both trans men and trans women.

In recent years, the Salvadorian government has implemented laws and mechanisms to protect the human rights of trans persons in El Salvador. We celebrate these advances and encourage the government to continue its work in coordination with trans persons and NGOs. However, there are still many areas in which El Salvador fails to protect, safeguard, and guarantee the human rights of trans men and trans women.

The government of El Salvador has implemented new initiatives that give trans men and trans women more political power, empowering them to advocate for the protection of their human rights. For example, in 2010, President Carlos Mauricio Funes Cartagena approved Executive Decree No. 56, called "*Disposiciones para evitar toda forma de discriminación en la Administración Pública, por razones de identidad de género y/o de orientación sexual,*" ("Regulations to prevent all forms of discrimination in the Public Administration, for reasons of gender identity and/or sexual orientation").¹ The Salvadorian government also created a new

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¹ Executive Decree No. 56, *Regulations to prevent all forms of discrimination in the Public Administration, for reasons of gender identity and/or sexual orientation*, available electronically at: http://asp.salud.gob.sv/regulacion/pdf/decretos/acuerdo_56_discriminacion_sexual.pdf; COMCAVIS, *Survey of the Perception of Human Rights of the LGBTI Population in El Salvador*, San Salvador, El Salvador, February 2013, p. 12.

government agency, called the Directorate for Sexual Diversity, which focuses specifically on the advancement of human rights for the lesbian, gay, bisexual, transgender and intersex (“LGBTI”) population.² This agency is under the supervision of the Secretary of Social Inclusion.³

In June 2012, LGBTI organizations and activists worked together with the Office of the Human Rights Ombudsman to establish the Permanent Forum of Human Rights for the LGBTI Population, (“Permanent Forum”), which is an institutional mechanism that provides a forum for civil society to discuss political issues.⁴ This forum consists of NGOs and independent LGBTI activists, and is located inside the Office of the Human Rights Ombudsman. The Permanent Forum has many objectives, including:

to ensure that the LGBTI population has access to the enjoyment of human rights, to carry out other actions like this one; to analyze the situation of the LGBTI population in [El Salvador], to establish and implement processes to sensitize officials entrusted with the administration of justice to this population, to establish groundwork for the creation of a law to eradicate all forms of discrimination against the LGBTI population, among others.⁵

These successes are essential in the fight for trans persons’ rights in El Salvador, but trans men and trans women still live in constant danger because El Salvador has not implemented sufficient legal mechanisms to fully protect their human rights.

Although the government of El Salvador has taken certain first steps in improving the situation for the trans population, these steps have proven ineffective. For example, Executive Decree No. 56, although written to protect LGBTI persons, has an inferior legal status compared

² *Principle Functions of the Leadership of Sexual Diversity*, 23 November 2012, available electronically at: http://inclusion-social.presidencia.gob.sv/index.php?option=com_content&view=article&id=59.

³ *Id.*

⁴ *Principle Functions of the Leadership of Sexual Diversity*, 23 November 2012, available electronically at: http://inclusion-social.presidencia.gob.sv/index.php?option=com_content&view=article&id=59.

⁵ Office of the Human Rights Ombudsman, *Counsel for the Defense of Human Rights launches Permanent Forum of Human Rights for the LGBTI Population*, 2012, available electronically at: <http://www.pddh.gob.sv/menupress/menunoti/316-pddh-lanza-mesa-permanente-sobre-derechos-humanos-de-la-poblacion-lgbti>.

to other laws in the country. Executive Decree No. 56 lacks mechanisms to drive inclusive public policy, or to implement and sanction discrimination complaints; it is only a mandate to "prevent" anti-discrimination for employment in the public administration. Moreover, Executive Decree No. 56 has not been ratified by the new president, Salvador Sánchez Cerén. Given that Executive Decree No. 56 does not have the force to report or sanction discrimination complaints, government officials and agents in the National Civil Police, Military Police, and Metropolitan Police Force continue to physically and verbally attack trans persons.⁶ Many activists and NGOs fighting for the rights of the trans population understand that trans persons are not heard, and that the government does not take their concerns seriously. This government inaction can be interpreted as if the government is failing to engage in serious dialogue with the Permanent Forum and the LGBTI civil society. It does not appear that the government wants to promote or approve initiatives necessary to safeguard, protect, and guarantee the human rights of trans persons and the LGBTI community more generally. Consequently, this LOI recommends strengthening the dialogue between the Permanent Forum and the Salvadorian government, implementing reforms recommended by the Permanent Forum because they are necessary to protect trans persons rights and the rights of the LGBTI population in general.⁷

In sum, although trans persons have been able to make some advancement in recent years, they still lack recognition of the fundamental human rights that every person deserves. Each person has the right to enjoy the protections established in the ICCPR, but the Salvadorian government has failed to protect and guarantee these fundamental rights.

⁶ IGLHRC, Global Rights, et al., *The Violation of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in El Salvador*: Shadow Report to the United Nations Human Rights Committee, October 2010, p. 11.

⁷ COMCAVIS, *Survey of the Perception of Human Rights of the LGBTI Population in El Salvador*, San Salvador, El Salvador, February 2013, p. 23.

III. Recommended List of Issues

Trans persons, civil society organizations, and human rights activists continue reporting violations of the ICCPR, an agreement which El Salvador has ratified. This LOI focuses on four principal recommendations describing the human rights violations that trans people suffer and explains why those rights are so important for El Salvador to safeguard.

1) El Salvador should approve a gender identity law for trans persons.

The absence of a gender identity law in El Salvador results in severe human rights violations of trans persons. Salvadorian laws do not permit a trans person to change his or her name except in "exceptional circumstances," and only if the new name reflects the same gender used in the original identification document.⁸ The government lacks a mechanism allowing a trans person to change his or her gender identity in identification documents. Without identification documents that accurately reflect a trans person's gender expression, the government violates a trans person's fundamental rights – such as the right to vote, study, and work – as a result of the discrimination that government agencies and society perpetrate against trans persons. Hence, the absence of an identity law violates several ICCPR provisions: (1) Article 1, which establishes the right of self-determination;⁹ (2) Article 16, which establishes that everyone has the right to recognition before the law;¹⁰ (3) Article 19, which establishes the right to freedom of expression;¹¹ (4) Article 25, which establishes the inherent right to vote;¹² and (5) Article 26, which establishes that all persons are equal before the law.¹³

⁸ IGLHRC, Global Rights, et al., *The Violation of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in El Salvador: Shadow Report to the United Nations Human Rights Committee*, October 2010, p. 12.

⁹ Article 1, International Covenant on Civil and Political Rights.

¹⁰ Article 16, International Covenant on Civil and Political Rights.

¹¹ Article 19, International Covenant on Civil and Political Rights.

¹² Article 25, International Covenant on Civil and Political Rights.

¹³ Article 26, International Covenant on Civil and Political Rights.

The government's refusal to allow a trans person to change his or her gender identity in his or her *Documento Único de Identidad*, (Unique Identity Document - DUI), violates several articles of the ICCPR. Article 1 is violated, as the government prohibition hinders a trans person's right to free determination to live in accordance with his or her gender expression. The absence of an identity law also specifically violates Article 19 of the ICCPR, which safeguards an individual's right to free expression.¹⁴ In the case of trans persons, his or her psychological gender identity is the expression that should always be reflected, without prohibitions or fear of retaliation. Trans persons – both trans men and trans women – have the right to express their gender identities in everyday activities. Unfortunately, they are unable to do so because the Salvadorian government does not allow them to have an identity document, such as the DUI, to reflect their true identities. The absence of a gender identity law prevents trans persons from engaging in fundamental activities.

For example, according to a study conducted by one NGO, 42 percent of trans women have reported problems using their DUIs because of the "official" gender identity reflected in these documents.¹⁵ Although there are no statistics documenting the same problem for trans men, they also encounter difficulties using their DUIs.¹⁶ The discrimination against trans persons illustrates what occurs when trans persons use their DUIs. When a trans person takes a photo for a DUI, his or her appearance must conform to the "official" gender, and not the gender identity with which the trans person identifies.¹⁷ For example, a trans woman named Virginia F. was verbally assaulted by a delegate at DUICENTRO, the office where identification documents

¹⁴ Article 19, International Covenant on Civil and Political Rights.

¹⁵ COMCAVIS, ASPIDH, et al., *Report for the Meeting before the Inter-American Commission on Human Rights about the Violence against the Trans Woman Population in El Salvador*, Washington D.C., 29 October 2013, p. 8.

¹⁶ Anonymous testimony on file at the American University, Washington College of Law.

¹⁷ COMCAVIS, ASPIDH, et al., *Report for the Meeting before the Inter-American Commission on Human Rights about the Violence against the Trans Woman Population in El Salvador*, Washington D.C., 29 October 2013, p. 17.

are processed for Salvadorians. When she wanted to change the name that appeared on her DUI, the delegate verbally assaulted her saying, "that she was a man . . . [and that] she should come dressed as who she was or they would not process the document."¹⁸

Because of government officials' discriminatory policies, when taking the picture for the DUI, a trans woman cannot wear makeup and must pull back her hair, to appear more masculine in accordance with her identity document.¹⁹ Given that the DUI indicates that a trans woman's biological sex is male, a trans woman is obligated to appear looking like her masculine gender. Trans women are humiliated and suffer discrimination in everyday activities, including applying for loans, paying credit cards, or using a passport.²⁰

Another fundamental right, periodically realized by most individuals in the world, is the right to vote. However, the right to vote without restriction and without discrimination does not exist for a trans man or trans woman. If he or she wants to vote while appearing in conformance with his or her true gender identity, and not with the "official" identity known by the State, then the trans person will not be permitted to vote. For example, when a trans woman wants to participate in elections in El Salvador, she has to vote dressed in a way that reflects the gender identity of her DUI photo.²¹

On February 2, 2014, during the presidential elections, various cases of discrimination in which trans persons were denied the right to vote were documented. Salvadorian activist Ana Cisneros and the NGO, ASPIDH, presented a report on observations of the presidential elections, which revealed several cases of discrimination, including the following:

¹⁸ Complaint filed by Veronica F. at the Prosecutor's Office for Human Rights, 30 November 2010, physical copy on file at the American University, Washington College of Law.

¹⁹ *Id.*

²⁰ COMCAVIS, ASPIDH, et al., *Report for the Meeting before the Inter-American Commission on Human Rights about the Violence against the Trans Woman Population in El Salvador*, Washington D.C., 29 October 2013, p. 8.

²¹ *Id.* at 17.

Case 1: A grave and [symbolic] incident was that of Camilla Portillo. The government did not want to permit her to vote. It was not until after diplomats from Germany and other international observers arrived, that she was allowed to vote.²²

Case 2: . . . [T]hree trans women were not permitted to vote at [their designated voting station in *Centro Escolar Ramón Belloso en la Colonia Monsterrat*] in San Salvador. . . We were advised to petition to the court, requesting an investigation of the incident involving its citizens and asking that we be permitted to exercise our right to vote in the second round. In some cases there is a predominant discussion that we are men and we should go that way. . .²³

Consequently, to vote in El Salvador, a trans woman would need to change her appearance so that it does not reflect her true gender identity. If a trans woman arrives to vote dressed in a way that expresses her feminine gender identity, the officials do not permit her to vote.²⁴ This is not only embarrassing to the person, but it also violates a trans person's right to vote because he or she is forced to present themselves with the "official" gender identity reflected in the DUI, and if he or she fails to do so, that person cannot exercise his or her right to vote. These restrictions violate several rights of trans persons: the right to vote, the right to recognition before the law, and the right to free expression.

In addition, Article 26 of the ICCPR, which guarantees that every person is equal before the law,²⁵ is also violated by the absence of a gender identity law. Although El Salvador has ratified the ICCPR, and the Salvadorian constitution establishes in Article 3 that all people are equal before the law,²⁶ El Salvador still fails to protect trans persons from discrimination. In fact, the absence of a gender identity law promotes the discrimination against trans men and trans

²² Ana Cisneros y ASPIDH Arcoiris, *Report on Observations of the Presidential Elections*, San Salvador, El Salvador, 13 February 2014, p. 4-5.

²³ *Id.*

²⁴ COMCAVIS, *Survey of the Perception of Human Rights of the LGBTI Population in El Salvador*, San Salvador, El Salvador, February 2013, p. 16.

²⁵ Article 26, International Covenant on Civil and Political Rights.

²⁶ Article 3 of the Constitution of El Salvador.

women because without this law, trans persons cannot move forward, study, or succeed in society expressing their true gender identities.

The lack of a gender identity law also has consequences in education. The majority of trans persons work in the informal labor sector, and this tends to occur because of the absence of a gender identity law. Without a law that assures that transgender identity will be recognized by the government, trans men and trans women struggle to receive driver's licenses and academic degrees.²⁷ Given that many jobs in the formal sector require academic degrees, it is imperative that trans persons have access to education without discrimination.

At this time, trans persons do not have full access to education, because no law exists to prevent discrimination. For example, Ambar Alfaro, a trans woman, was a student at the National Institute for Off-campus Education of Colonia Miramar ("Institute"). On July 21, 2012, the director of the Institute humiliated Ambar by discriminating against her.²⁸ Ambar was finishing her first year working toward her undergraduate degree when the director of the Institute told her that she could not take her school picture dressed as a woman. The director told her to "cut her hair, cover her breasts, put on a suit jacket and tie, and start growing her facial hair, because if she did not comply with his instructions she would not be able to graduate."²⁹ Bravely, Ambar refused and told the director of the Institute that he could not stop her from graduating and that he could not force her to take a photo looking like a man. Further, she reminded him that another trans student had already made a complaint for this same form of discrimination and that they would have to accept her with her gender expression.³⁰ The director

²⁷ COMCAVIS, *Survey of the Perception of Human Rights of the LGBTI Population in El Salvador*, San Salvador, El Salvador, February 2013, p. 12.

²⁸ Complaint filed by Ambar Alfaro at the Prosecutor's Office for Human Rights, 23 July 2012, physical copy on file at the American University, Washington College of Law.

²⁹ *Id.*

³⁰ Complaint filed by Ambar Alfaro at the Prosecutor's Office for Human Rights, 23 July 2012, physical copy on file at the American University, Washington College of Law.

of the Institute responded, "that doesn't mean that we would allow anyone to do so."³¹ Ambar also suffered discrimination from a professor at the Institute. The professor knew that Ambar only felt comfortable when she was identified as a woman, yet the professor insisted on calling Ambar by her "official" masculine name.³² Ambar was unable to graduate, as she gave up her studies because of the discrimination she suffered from the director and professor at the Institute. The discrimination that Ambar suffered continues to go unpunished, as not even the Office of the Human Rights Ombudsman has responded to her complaint. As this example demonstrates, the discrimination and humiliation suffered by trans persons is so severe that it prevents an atmosphere of dignity and respect in schools.

Other obstacles result from the absence of a gender identity law. Access to health care for trans men and trans women is affected by the lack of an identity law. When a trans woman needs medical services, health centers do not recognize her as a trans woman, but rather as a man, and this occurs in large part because of the gender identity reflected in the DUI.³³ For this reason, a trans woman does not have access to holistic health care, which should include psychological, sexual, and reproductive care.³⁴ Given the lack of access to holistic health care, at least three trans women have died as a result of self-medicating.³⁵ Health services for the LGBTI population are oriented toward the prevention of HIV/AIDS and fail to consider the broader sexual and reproductive health of trans persons.

Trans men also lack access to hormone treatment. The Salvadorian government has prohibited surgical operations that reassign sexual organs. For this reason, many trans men flee

³¹ Complaint filed by Ambar Alfaro at the Prosecutor's Office for Human Rights, 23 July 2012, physical copy on file at the American University, Washington College of Law.

³² *Id.*

³³ IGLHRC, Global Rights, et al., *The Violation of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in El Salvador*: Shadow Report to the United Nations Human Rights Committee, October 2010, p. 8

³⁴ *Id.*

³⁵ Anonymous testimony on file at the American University, Washington College of Law.

to other countries, such as Guatemala, to obtain treatment and surgery.³⁶ Trans men who do not have money for hormonal treatments or surgery outside of the country desperately wait for a physical reason to justify the operation. As one trans man stated, "We pray for breast cancer so that we can get these surgeries here in our country."³⁷ This demonstrates how the government violates trans persons' right to free determination. It is the government's duty to permit these treatments and surgeries, as well as to sensitize doctors and medical professionals to treat trans persons with respect and dignity.

Despite the great need for a gender identity law to protect trans persons, one reason that the Salvadorian government has still not approved an identity law is because the general public does not support a law that would eradicate discrimination. In a study conducted by the US Agency for International Development (USAID), 72.4 percent of Salvadorians disagree with the idea of a gender identity law.³⁸ Considering that the majority of the Salvadorian community does not support an identity law, legislators are not incentivized to approve one. However, the State has an obligation to respect and guarantee human rights to all its citizens, even without support from the majority of the population. The government needs to recognize that a gender identity law is imperative in preventing human rights violations against trans men and trans women. Homophobia does not justify government inaction. Trans persons are not able to engage freely in basic and fundamental activities, all because of the absence of a gender identity law that could promote the acceptance of trans persons.

³⁶ Anonymous testimony on file at the American University, Washington College of Law.

³⁷ *Id.*

³⁸ COMCAVIS, PDDH, y PNUD, *Report on the Human Rights Situation of Trans Women in El Salvador*, San Salvador, El Salvador, May 2013, p.19.

Recommended questions:

- a) Would the State of El Salvador confirm if it has discussed the possibility of approving a gender identity law? If El Salvador is not considering the law, what is the justification of the State for not considering it?
- b) What protections can the State offer to the trans population when they participate in elections so that they do not encounter discrimination and violence?
- c) What type of protection can the State provide so that trans persons can attend school without discrimination?
- d) What type of protection can the State provide so that trans persons can find satisfactory work?
- e) What type of actions can the Ministries of Health, Education, and Labor take in order to combat and sanction discrimination and transphobic taunting, and to educate their public servants?

2) El Salvador should amend its civil penal code to classify discrimination as a setback and harm against trans persons and LGBTI persons in general.

As previously discussed in the Background Information section of this paper,³⁹ El Salvador implemented Executive Decree No. 56, called "Regulations to avoid all forms of discrimination in the Public Administration, for reasons of gender identity and/or sexual orientation."⁴⁰ Although Executive Decree No. 56 indicates that government entities cannot discriminate on account of sexual orientation or gender identity,⁴¹ the violations against trans persons and LGBTI persons continue.

To date, Executive Decree No. 56 has had no impact in El Salvador. Due to the state's non-violent discrimination against trans people, it is in violation of the ICCPR. Article 1 of the

³⁹ See *supra* note 1 and accompanying text.

⁴⁰ Executive Decree No. 56: *Regulations to prevent all forms of discrimination in the Public Administration, for reasons of gender identity and/or sexual orientation*, available electronically at: http://asp.salud.gob.sv/regulacion/pdf/decretos/acuerdo_56_discriminacion_sexual.pdf.

⁴¹ Article 1 and 2 of Executive Decree No. 56: *Regulations to prevent all forms of discrimination in the Public Administration, for reasons of gender identity and/or sexual orientation*, available electronically at: http://asp.salud.gob.sv/regulacion/pdf/decretos/acuerdo_56_discriminacion_sexual.pdf.

ICCPR,⁴² which establishes the right to free determination and to the economic, cultural, and social development of all people, is violated by the Salvadorian government when government agents discriminate against trans persons in government offices. Article 2 of the ICCPR ensures the right to an effective remedy if a person's human rights are violated.⁴³ El Salvador has violated this article because it maintains impunity and ignores incidents of discrimination against trans persons that are carried out by government and civil actors. El Salvador has also violated Article 26 of the ICCPR, which establishes the principle of nondiscrimination.⁴⁴ The Salvadorian government tolerates discrimination and fails to sanction government and civil actors that discriminate and verbally assault trans persons.

No legal framework truly protects trans persons from discrimination based on gender identity or sexual orientation. The Salvadorian constitution establishes in Article 3 that all persons are equal before the law,⁴⁵ but the principle of non-discrimination on account of gender expression and identity are not written in the Salvadorian constitution. The Salvadorian Civil Code also fails to reflect the principles of equality and non-discrimination on account of sexual orientation or gender expression. The most recent anti-discrimination law passed was the law of Equality, Equity, and Eradication of Discrimination against Women. However, the State does not have an identity law that recognizes trans women as women, and thus the current law does not protect trans women.⁴⁶ Although Executive Decree No. 56 was implemented in 2010, indicating that government agencies should not discriminate on account of sexual orientation or

⁴² Article 1, International Covenant on Civil and Political Rights.

⁴³ Article 2, International Covenant on Civil and Political Rights.

⁴⁴ Article 26, International Covenant on Civil and Political Rights.

⁴⁵ Article 3, Constitution of El Salvador.

⁴⁶ *Law of Equality, Equity, and Eradication of Discrimination against Women*, available electronically at: <http://www.asamblea.gob.sv/eparlamento/indice-legislativo/buscador-de-documentos-legislativos/ley-de-igualdad-equidad-y-erradicacion-de-la-discriminacion-contra-las-mujeres>.

gender identity, discriminatory actions on account of the Salvadorian government continue to occur.

One of the greatest shortcomings of Executive Decree No. 56 is that it lacks sanctions for those who violate it – a subject that is discussed further in Section Four of this paper.⁴⁷ Consequently, given that there are no laws to sanction or eradicate discrimination, trans persons are vulnerable when they try to exercise their most fundamental rights. Government employees discriminate against trans persons with impunity. For example, in one government office, *Ciudad Mujer* (Women's City),⁴⁸ various jobs were offered to trans women. One of these trans women was Cindy.⁴⁹ She filed a complaint that the employees at *Ciudad Mujer* discriminated against her and against her trans colleagues.⁵⁰ Employees at *Ciudad Mujer* discriminated against these women by saying that "of those we have hired, many have been real women."⁵¹ Although the victims of discrimination filed complaints, those who discriminated against them were never disciplined, and Cindy decided to quit because she would not tolerate such discriminatory oppression at *Ciudad Mujer*.⁵²

Further, activists at COMCAVIS, ASPIDH, Generación de Hombres Trans de El Salvador – HT 503, and Ana Cisneros affirm that discrimination is one of the greatest barriers to trans persons seeking formal-sector employment in El Salvador. Therefore, the government of El Salvador violates Article 1 of the ICCPR as this discrimination interferes with free determination and economic development of trans persons.

⁴⁷ See *infra* note 86 and accompanying text.

⁴⁸ Program implemented by the Secretary of Social Inclusion, which guarantees rights to Salvadorian women. More information available electronically at:

http://www.ciudadmujer.gob.sv/index.php?option=com_content&view=article&id=175&Itemid=84.

⁴⁹ Anonymous testimony on file at the American University, Washington College of Law.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

Government discrimination against trans persons is also commonplace when trans persons want to exercise their right to vote. As previously mentioned, when a trans woman tries to exercise her right to vote in elections expressing her feminine gender, she is harassed when people learn that she is a trans woman, and government employees adhering to the laws and politics of the State refuse her the right to vote.⁵³ In some instances, the harassment results in violence.⁵⁴ Consequently, civil society, through the Permanent Table, has tried on many occasions to initiate dialogue with the Electoral College and Supreme Electoral Tribunal so that the government agency respects the right to suffrage for trans persons.⁵⁵

On July 31, 2014, Pati Hernández, founder of ASPIDH and current Technical Adviser of the NGO, signed an agreement with the Supreme Electoral Tribunal, acting as a representative of ASPIDH. The agreement is an advancement on the part of the Supreme Electoral Tribunal in recognizing how delegates from the electoral college have discriminated trans men and trans women's right to vote. However, this agreement is not sufficient to ensure that electoral representatives will respect the right to suffrage for trans persons. The greatest achievement of the agreement is that the Supreme Electoral Tribunal promised to "proportion the basic conditions that sexually diverse citizens are addressed . . . in voting centers formulating necessary steps for continuity in strengthening the facilitation of electoral rights to LGBTI citizens."⁵⁶ Although the agreement discusses facilitating the sensitization of government actors to protect the right to vote for trans persons and LGBTI,⁵⁷ there is still need for change. To

⁵³ See *supra* notes 18 and 20.

⁵⁴ ASPIDH, *Report on LGBTI Electoral Observations, Presidential Elections, Second Round*, El Salvador, 9 March 2014, physical copy on file at American University, Washington College of Law.

⁵⁵ Anonymous testimony on file at the American University, Washington College of Law.

⁵⁶ ASPIDH and the Supreme Electoral Tribunal, *Covenant between the Supreme Electoral Tribunal and ASPIDH for the Adoption of Protection Measures for Civil, Political, and Labor Rights for LGBTI Persons*, p. 4, available electronically at: http://www.slideshare.net/ASPIDHARCOIRISTRANS/convenio-de-cooperacion-tse-aspidh-arcoiris?qid=e39a3205-b85f-40e3-882e-d7223b733bc3&v=default&b=&from_search=7.

⁵⁷ *Id.* at 5.

ensure that the trans persons' and LGBTI community's right to vote is truly protected by a legal framework, we recommend the following: (1) classify the discrimination against trans and LGBTI persons as a harm and prejudice in the Salvadorian Civil Code; (2) amend the electoral code to consecrate the right to free expression and non-discrimination on account of sexual orientation or gender expression; (3) include in these laws the sanctioning of government agents who do not implement the recommended amendments.

Recommended questions:

- a) Has the State of El Salvador considered implementing a law that would sanction or penalize government actors who discriminate on account of sexual orientation or gender identity? If the State has not done so, why not?
- b) What protections has the State offered to the trans population who participate in elections so that they do not encounter discrimination and violence?
- c) Has the State of El Salvador launched an investigation of the discriminatory acts against trans persons and LGBTI who are refused the right to vote?
- d) Has the State of El Salvador launched an investigation of discriminatory acts against trans persons and LGBTI in the labor sector?
- e) What mechanisms does the State of El Salvador have in order to implement discrimination complaints?

3) The State of El Salvador needs to amend its penal code to classify hate crimes against trans persons and LGBTI persons in general.⁵⁸

Since 1997, the LGBTI population has suffered not only from discrimination, but also from hate crimes that have killed many trans persons.⁵⁹ Navi Pillay, former High Commissioner of the United Nations described hate crimes as varying "from harassment and torture to kidnappings and murders"⁶⁰ targeted against the LGBTI population. The government's failure to classify hate crimes against trans persons is especially problematic, given that since 2003, there has been a 400 percent increase in homicides against trans women for expressing their gender identity.⁶¹ It is alarming that in the face of this atmosphere of violence and continued assassinations, the government of El Salvador has not implemented a law or public policy to fight the increasing violence against trans persons.

In violation of Article 2 of the ICCPR,⁶² which guarantees that if the rights of a person are violated, they have a right to an effective remedy, El Salvador has failed to investigate incidents of violence and homicide against trans persons. Additionally, El Salvador violates Articles 7 and 26 of the ICCPR.⁶³ Article 7 of the ICCPR establishes that no one should be subjected to torture or cruel and inhumane treatment.⁶⁴ Current evidence suggests that the government of El Salvador is an accomplice and facilitator of torture and cruel and inhumane treatment, on account of the lack of government action in prosecuting the state actors who

⁵⁸ This section uses pseudonyms to protect the identity of the victims.

⁵⁹ Gloria Marisela Morán, Diario Digital, *The death of the Asecha after a Gay Rights March*, 2 July 2014, available electronically at: <http://www.contrapunto.com.sv/reportajes/la-muerte-los-asecha-despues-de-una-marcha-gay>, last visited 3 December 2014; Corroborated by Karla Avelar, Director of COMCAVIS TRANS on 3 December 2014.

⁶⁰ United Nations, *Day against Homophobia: United Nations remembers its obligation to States to protect sexual minorities*, 17 May 2013, available electronically at: http://www.un.org/spanish/News/story.asp?newsID=26488#.VI9u0CvF_wo.

⁶¹ Pasca, *Report for the Meeting before the Inter-American Commission on Human Rights about the Violence against the Trans Woman Population in El Salvador*, 29 October 2013, p. 11.

⁶² Article 2, International Covenant on Political and Civil Rights.

⁶³ Articles 7 and 26, International Covenant on Political and Civil Rights.

⁶⁴ Article 7, International Covenant on Political and Civil Rights.

perpetrate torture and cruel and inhumane treatment of trans persons. El Salvador is also in violation of Article 26 of the ICCPR,⁶⁵ which establishes the principle of non-discrimination. The government has permitted state actors to discriminate and refuses to investigate violent acts and homicides simply because the victims are trans persons or of the LGBTI population.

The Salvadorian penal code does not reflect the principles of equality and non-discrimination for sexual orientation or gender expression. The Salvadorian government has not established a law classifying hate crimes and other forms of discrimination against trans persons. Article 174 of the Salvadorian Penal Code does condemn acts of torture and other morally degrading acts,⁶⁶ as reflected in the definition of the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. The United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment defines the term torture as:

act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason *based on discrimination of any kind*, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁶⁷

Similarly, Article 174 of the Salvadorian penal code establishes that:

[c]omitting torture by an authority or public servant who, abusing his position, and with the intention of obtaining a confession or information of whatever person or to punish because of whatever act that he or she has committed or is suspected of committing, *or for whatever reason based in a form of discrimination*, has subjected to conditions or procedures by nature, duration, or other circumstances, subjected to physical or mental suffering . . . of whatever method, attacking against moral integrity. The person at fault

⁶⁵ Article 26, International Covenant on Political and Civil Rights.

⁶⁶ Article 174 of the Salvadorian penal code, available electronically at: http://noticias.juridicas.com/base_datos/Penal/lo10-1995.12t7.html.

⁶⁷ Article 1 of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (emphasis added).

for torture shall be punished with a prison sentence between two and seven years if the attack was grave, and of prison from one to three years if it is not grave.⁶⁸

However, evidence suggests that public servants and the government tacitly and on occasion directly engage in discrimination by torturing and inflicting attacks against the moral integrity of trans persons. Highlighting the lack of investigation in the assassinations of trans persons and gays, for which the government is not accused of these crimes. Therefore, in Section Four of this paper, we present evidence that public servants have tortured or attacked the integrity of trans victims, and that these crimes continue without investigation and punishment.⁶⁹

The government does not have a mechanism to collect data identifying victims of hate crimes against either trans persons or LGBTI people. It is important to highlight that the deaths of trans women have been documented by Salvadorian NGOs, such as ASPIDH or COMCAVIS, among other organizations. When a trans person's death receives public recognition, it is only because civil society has exposed to the public the information it has gathered, in contrast to the Salvadorian government, which does nothing. For this reason, many assassinations are not reported as LGBTI-related deaths, because the government identifies the deceased by the "official" name in his or her DUI. Many unreported deaths occur, as families and friends of trans persons fail to report deaths to the authorities out of fear of retaliation, either from police or gang members. These assassinations and assaults would not be documented if not for the efforts by NGOs to track the deaths of trans persons. Homicides of trans men have not yet been systematically documented by NGOs, as trans men have recently organized to combat the increasing discrimination and assault against them.

⁶⁸ Article 174 of the Salvadorian penal code, available electronically at: http://noticias.juridicas.com/base_datos/Penal/lo10-1995.12t7.html.

⁶⁹ See *infra* note 86 and accompanying text.

To contextualize the increasing levels of violence in El Salvador, the following data summarizes the deaths that have occurred since 2008, which continue to go unpunished. In 2008, 13 assassinations of gay men and trans women were registered.⁷⁰ In 2009, there were 23 assassinations of gay men and trans women.⁷¹ The story of a young woman named Tania demonstrates why these murders were undoubtedly hate crimes. On June 9, 2009, Tania, an adolescent transgender woman of only 16 years of age, was kidnapped, tortured, raped, and killed.⁷² The people responsible for Tania's death attacked her in such a way that her autopsy report noted that she died due to severe contuse craneo-facial trauma – in simple terms, they killed her by smashing her face.⁷³

In 2010, ten murders were reported.⁷⁴ ASPIDH reported that between 2012 and 2013, 32 complaints were presented at the Office of the Human Rights Ombudsman "about the abuse police perpetrated specifically against trans women," which were never investigated and continue to go unpunished.⁷⁵ In 2012, it is estimated that there were 14 assassinations of trans women and gay men, and in 2013, eight assassinations of trans women and gay men have been documented.⁷⁶

In 2014, seventeen years after the first LGBTI pride parade, it is still dangerous for trans women to participate in the LGBTI movement because of the risk of violence. These dangers demonstrate the importance of a law that recognizes hate crimes. For example, after the LGBTI

⁷⁰ Magdalena Flores, *Homophobia behind assassinations in the gay community*, 18 June 2009, available electronically at: <http://www.archivocp.contrapunto.com.sv/violencia/homofobia-detras-de-los-asesinatos-en-comunidad-gay>, last visited 3 December 2014.

⁷¹ Víctor Hugo Dueñas, *Diario El Mundo*, "Hate crimes" put El Salvador into mourning, 2 August 2010, available electronically at: <http://elmundo.com.sv/crimenes-de-odio-enlutan-el-salvador>.

⁷² *Id.*

⁷³ ASPIDH, *Compilación de Casos presentado a la Fiscalía General*, (2013) p. 6.

⁷⁴ Pasca, *Report for the Meeting before the Inter-American Commission on Human Rights about the Violence against the Trans Woman Population in El Salvador*, 29 October 2013, p. 10-11.

⁷⁵ *Id.*

⁷⁶ *Id.*

pride parade on June 28, 2014, there were four assassinations, and three of those victims were trans women.⁷⁷ On July 2, 2014, a trans woman was killed, and on July 3, 2014, another trans woman assassinated.⁷⁸ It is estimated that in 2014, there have been 14 assassinations of trans women, 2 assassinations of gay men, and one documented assassination of a trans man.⁷⁹ Also, the current Director of ASPIDH confirmed that there were 180 cases of aggression against the trans population as of November 2014.⁸⁰

One of the most recent murders was that of a trans man. On December 3, 2013, Juan, a trans man, was shot to death in front of his house.⁸¹ Juan was well known in the community because he was a bus driver, and he also provided transportation to his comrades in the LGBTI pride parade. Unfortunately, of the 13 assassinations reported in 2013, including that of Juan, not one was investigated or brought to justice by the police or by the Attorney General of the Republic. Three activists confirmed the fact that none of the assassinations of trans women or gays had been investigated or prosecuted by the State and continue with impunity.⁸² Further, as will be discussed further in a later section of this report, many of the violent aggressions that trans persons suffered were perpetrated by agents of the State and when the victim wanted to complain and seek justice, they were denied access to the system.⁸³ Discrimination, acts of violence, assassinations, and other hate crimes are only fueled by the absence of investigation

⁷⁷ Gloria Marisela Morán, Diario Digital, *The death of the Asecha after a Gay Rights March*, 2 July 2014, available electronically at: <http://www.contrapunto.com.sv/reportajes/la-muerte-los-asecha-despues-de-una-marcha-gay>, last visited 3 December 2014.

⁷⁸ *Id.*

⁷⁹ News Red LACTRANS, *ASPIDH disseminates information about human rights violations against the trans population before the Inter-American Court of Human Rights in Mexico*, (noting that at least 7 assassinations were trans women), available electronically at: <http://redlactrans.org.ar/site/paises/el-salvador/el-salvador-noticias>.

⁸⁰ Xenia Gonzalez, El Mundo, *Impunidad rodea los crímenes de odio contra personas trans*, 19 November 2014, available electronically at: <http://elmundo.com.sv/impunidad-rodea-los-crimenes-de-odio-contra-personas-trans>

⁸¹ Irvin Alvarado, La Prensa Grafica, *Attorney General of the Republic reports assassination in Santiago Nonalco*, 3 December 2014, (the report identified José Carlos with his "official" name in his DUI and did not identify him as a trans man) available electronically at: <http://www.laprensagrafica.com/2014/12/03/fgr-informa-sobre-asesinato-en-santiago-nonualco>, last visited 13 December 2014.

⁸² Anonymous testimony on file at the American University, Washington College of Law.

⁸³ See *infra* note 88 and accompanying text.

and indictment of those who attack trans persons.⁸⁴ In El Salvador, trans persons must fight alone, without government protection against transphobia, because hate crimes are not part of the penal code in El Salvador. Trans persons cannot find justice through police channels, even for charges of common crimes, because officials refuse to take their complaints and investigate cases where the civil society or the same police officials have discovered attacks against trans persons.⁸⁵

As previously discussed, El Salvador has violated Article 2 of the ICCPR by failing to investigate and provide effective judicial recourse. Additionally, government inaction suggests that the State is complicit in facilitating torture and cruel and inhumane treatment against trans persons. Public servants discriminate against trans persons by allowing cases to sit uninvestigated and unprosecuted, when the only reason for doing so is because of the victims' sexual orientation or gender expression. Consequently, the State is in violation of Articles 7 and 26 of the ICCPR due to its failure to prosecute cases of attacks and assassinations against trans and LGBTI victims.

Recommended questions:

- a) Has the State of El Salvador considered implementing a law that would prohibit hate crimes on account of sexual orientation and/or gender identity? If the government has not done so, why not?
- b) Has the State of El Salvador launched an investigation of the homicides involving trans persons from 2008 to 2014? If the government has not done so, why not?
- c) Has the State of El Salvador collected data on LGBTI murder victims from 1998 to 2014? If the government has not done so, why not?

⁸⁴ *Sexual Diversity in El Salvador: A Report on the Human Rights Situation of the LGBT Community*, University of California, Berkley, School of Law, July 2012, p. 17.

⁸⁵ See *infra* notes 88-89 and accompanying text.

- d) Has the State of El Salvador prosecuted the government actors who have tortured and committed inhuman and degrading acts?

4) El Salvador needs to implement a plan to eradicate government impunity.

Executive Decree No. 56, which was approved in 2010 and is the only legal mechanism to prevent discrimination within the Salvadorian government, is particularly problematic for the trans population. The main problem with Executive Decree No. 56 – called "Dispositions to avoid all forms of discrimination in the Public Administration, for reasons of gender identity and/or sexual orientation" – is that it does not penalize those who violate anti-discriminatory norms dictated by the Decree.⁸⁶ Article 1 and Article 2 of Executive Decree No. 56 indicate that government entities cannot discriminate against an individual based on sexual orientation or gender expression, either directly or indirectly.⁸⁷ However, cases involving discrimination by government actors suggest that government officials continue discriminating against trans persons and that the Salvadorian government is complicit and perpetuating torture and denigrating and inhuman acts against trans persons.

Civil society activists have highlighted that government entities continue to violate Executive Decree No. 56 because they do not feel threatened that the government will actually prosecute them for perpetrating discrimination. Further, LGBTI activists have called, paradoxically, Executive Decree No. 56 *homolesbotransphobic*, given that it calls to *avoid* discrimination and not to *eradicate* it completely.

In particular, trans persons do not have access to legal remedies for their human rights violations. Even though the National Civil Police is supposed to help victims of abuse, the trans

⁸⁶ Executive Decree No. 56, *Regulations to prevent all forms of discrimination in the Public Administration, for reasons of gender identity and/or sexual orientation*, available electronically at:

http://asp.salud.gob.sv/regulacion/pdf/decretos/acuerdo_56_discriminacion_sexual.pdf.

⁸⁷ *Id.*

community is persecuted and humiliated by these very same government agents. Activists state that when filing complaints, the police harass trans persons and do not take their allegations seriously.⁸⁸ The activists try to raise awareness amongst police officers, explaining that their lives are in danger, but the police usually respond with sarcasm and derogatory language. For example, ASPIDH reported before the Inter-American Commission on Human Rights in Mexico that the "Attorney General of the Republic of El Salvador, entrusted to lead the criminal investigations, has not initiated even one investigation of the cases reported, much less provided official correspondence. Of the cases reported, not one case has been assigned a prosecutor."⁸⁹ Additionally, ASPIDH emphasized instances of homophobia by the government, in which the Attorney General of the Republic of El Salvador

refused to accept the complaints, the prosecutors in charge of taking complaints, principally the delegations in Soyapango, Santa Ana, La Libertad, Ahuachapán, Morazán . . . [explaining] that the Attorney General did not permit victims to enter, as it is only under the pressure of social networks that the Attorney General, Luiz Martinez, processed the complaints, [and] personally called each of the headquarters. This was the way we succeeded in processing our complaints.⁹⁰

ASPIDH also provided evidence regarding several activists from the organization who witnessed an incident of aggression against a trans woman on an early morning in June 2013, carried out by the CAM and agents of the mayor's office. However, the Prosecutor's Office of the Santa Ana Central Delegation did not allow the trans woman to submit a complaint directly against the CAM agents or the mayor's office, even though she was the victim of the attack.⁹¹ The Prosecutor's Office also prohibited the trans woman victim from providing evidence showing the

⁸⁸ Anonymous testimony on file at the American University, Washington College of Law.

⁸⁹ ASPIDH, News Red LACTRANS, *ASPIDH disseminates information about human rights violations against the trans population before the Inter-American Court of Human Rights in Mexico*, August 2014, available electronically at: <http://redlactrans.org.ar/site/wp-content/uploads/2014/10/CIDH-%20ASPIDH%20DENUNCIA.pdf>.

⁹⁰ *Id.*

⁹¹ Correspondence of the case of S., the complaint was finally presented when delegate Yanira Díaz intervened, who took the case. Physical copy of this correspondence is archived at American University, Washington College of Law.

physical lesions that she had as a result of the physical assault carried out by CAM agents or the mayor's office.⁹² Various activists from civil society had to intervene before the victims could finally present their complaints.

In addition, the National Civil Police and the Office of the Attorney General of the Republic lack coordination on the eradication of government impunity for crimes against LGBTI people. If the National Civil Police do not send a notice to the prosecutor's office, or if the prosecutor's office does not receive the notice in time, a case is closed without further investigation. The Office of Audits is expected to vigilantly ensure the processing of these cases, but this office has not taken the activists' allegations seriously.⁹³ For example, in several departments throughout the country – including Soyapango, Santa Ana, La Libertad, Ahuachapán, and Morazán – prosecutors refused to accept complaints from trans persons, and would not even let victims enter the office.⁹⁴ The Attorney General failed to resolve these complaints, which include allegations of police brutality. The same police unit has committed crimes against trans persons and continues to go unpunished without investigation.

Discrimination against trans persons continues to persist, due to widespread government impunity. Instead, the government must act to eradicate discrimination altogether. Through the Transparency Law, activists and LGBTI organizations note that as November 2014, the Directorate of Sexual Diversity, under the Secretary of Social Inclusion, has not related specific indicators or other evidence related to the agency's goals, short of the material of inclusion of the trans population.⁹⁵ These government institutions have neither provided information to civil

⁹² Correspondence of the case of S., the complaint was finally presented when delegate Yanira Díaz intervened, who took the case. Physical copy of this correspondence is archived at American University, Washington College of Law.

⁹³ Testimony of Pati Hernández, Former Director of ASPIDH and current Technical Advisor of ASPIDH, 27 October 2014.

⁹⁴ *Id.*

⁹⁵ Anonymous testimony on file at the American University, Washington College of Law.

society, nor have they facilitated a recollection of their work since their creation in 2010. The Salvadorian government leaves this vulnerable community of trans men and trans women exposed to transphobia in the country, as the government fails to monitor or sanction itself as a government, and fails to protect the human rights of its citizens.

Recommended questions:

- a) Does the State of El Salvador plan to amend Executive Decree No. 56 to include a mechanism for complaints and sanctions of the discrimination perpetuated by government agencies and agents?
- b) What does the State of El Salvador plan to do in order to accept the complains from trans persons at the delegations in Soyapango, Santa Ana, La Libertad, Ahuachapán, and Morazán that are currently refusing to permit trans victims to enter to report human rights abuses?

IV. Recommendations

1. Amend the Constitution to establish the principle of nondiscrimination for sexual orientation and/or gender expression.
2. Write and approve an identity law sensitive to the needs and vulnerabilities of both trans women and trans men so that they can enjoy the fundamental rights such as the right to vote, work, make a living, medical attention, among others.
3. Write and approve a law that penalizes government officials who engage in discriminatory practices.
4. Write and approve a general anti-discrimination law for LGBTI persons, working with the Secretary of Social Inclusion, the Office of the Human Rights Ombudsman, and LGBTI activists and organizations in El Salvador.
5. Amend the penal code to classify hate crimes against trans persons.
6. Amend the civil code to classify discrimination as a harm and prejudice against trans persons and lesbians, gay, bisexual and intersex persons.
7. Elaborate the national policy of Sexual Diversity, so that the Directorate of Sexual Diversity develops programs and mechanisms for citizen participation.

8. Reform Executive Decree No. 56 to eliminate discriminatory concepts. For example, the language stating, "eliminate discrimination," should be rephrased to state, "eradicate discrimination." Also add sections regarding the application and sanction of discriminatory behavior.
9. Reform the Ministries of Labor, Education, Health, Safety, and the Women's Institute so that their corresponding internal strategic plans apply Executive Decree No. 56.
10. Implement the inclusion of integrated health in the Ministry of Health, so that trans persons' specific health needs receive attention.

V. Conclusions

In recent years, the State of El Salvador has started to recognize certain rights of trans men and trans women in the country, but these advances are not sufficient to guarantee the human rights of trans persons. Many of the human rights violations against trans persons occur (1) because of the absence of an identity law; (2) because of the absence of classifying discrimination on account of sexual orientation or gender identity in the civil code; (3) because of the absence of a hate crime classification in the penal code and discrimination as a crime against trans persons; and (4) because of the impunity protecting government actors. It is imperative that El Salvador take action to protect the rights of trans men and women, because the violence and discrimination against trans persons is rising at an alarming rate. The periodic review of El Salvador presents the perfect opportunity for the State to confront these human rights violations against trans persons and to affirm its promise to protect and safeguard the rights of trans persons. It is also an opportunity for El Salvador to comply with the international conventions, such as the ICCPR, to which El Salvador is a party.