

Sexual Diversity in El Salvador

A REPORT ON THE HUMAN RIGHTS SITUATION
OF THE LGBT COMMUNITY

July 2012



*International Human Rights Law Clinic
University of California, Berkeley, School of Law*

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The International Human Rights Law Clinic (IHRLC) designs and implements innovative human rights projects to advance the struggle for justice on behalf of individuals and marginalized communities through advocacy, research, and policy development. The IHRLC employs an interdisciplinary model that leverages the intellectual capital of the university to provide innovative solutions to emerging human rights issues. The IHRLC develops collaborative partnerships with researchers, scholars, and human rights activists worldwide. Students are integral to all phases of the IHRLC's work and acquire unparalleled experience generating knowledge and employing strategies to address the most urgent human rights issues of our day. For more information, please visit www.humanrightsclinic.org.

Contents

Executive Summary.....I
Glossary of Terms.....5
Introduction.....6
International and Regional Legal Frameworks Protecting LGBT Rights.....7
Systemic Violence and the LGBT Community.....13
Discrimination against LGBT Individuals and PLWHA in Health Care.....25
Discrimination against LGBT Individuals and PLWHA in Education and Employment.....39
Conclusion and Recommendations.....47
Author and Acknowledgements.....51

Executive Summary

El Salvador has emerged from a devastating civil war with burgeoning democratic institutions and a vibrant civil society, but is plagued by violence, corruption, and impunity. The country has made important strides in recognizing Lesbian, Gay, Bisexual, and Transgender (LGBT) rights, most notably through Presidential Decree 56. The decree, issued in 2010, prohibits discrimination based on sexual orientation and gender identity in the public sector and creates a Directorate for Sexual Diversity within the Secretariat for Social Inclusion.¹ However, to create meaningful change for LGBT Salvadorans, stronger legal protections are needed (1) to identify and to ensure accountability for violence and hate-motivated crimes perpetrated by individual and state actors; (2) to combat private sector discrimination, particularly in employment and education; and (3) to enforce standards and sanction public sector employees regarding equal and fair treatment for LGBT individuals, particularly in the areas of criminal justice and health care.

This report is an assessment of the current human rights situation of LGBT community members in El Salvador. The report documents the priority issues identified by community members, examines the applicable human rights norms and standards, reviews current efforts to address these problems, and offers recommendations for law and policy reform. This evaluation is based on analysis of relevant international and national laws and policies, published documentation of abuses against LGBT individuals in El Salvador, and twenty seven individual and group interviews conducted in El Salvador and by telephone with dozens of stakeholders between February 2011 and November 2011, including government officials, advocates, and LGBT community members.

VIOLENCE AND IMPUNITY

Epidemic levels of violent crime and alarming rates of impunity are the backdrop against which LGBT individuals experience violence and harassment. Attacks against community members are perpetrated by private actors, particularly gangs, but also by members of the police. The failure of the criminal justice system to recognize and investigate LGBT hate crimes leaves LGBT individuals vulnerable to attack and without redress. In particular, transgender individuals have been the target of brutal murders that show clear sign of animus. Most of these cases are not investigated and none have resulted in a successful prosecution.

DISCRIMINATION IN HEALTH CARE

El Salvador has steadily strengthened its health care system to address HIV/AIDS but epidemic levels continue to plague vulnerable communities. Among these communities are men who have sex with men, with a prevalence rate of HIV infection of 17 percent (the highest in Central America) and the transgender community, with a prevalence rate of 23.7 percent. Salvadoran civil society organizations have taken the lead in coordinating prevention campaigns, testing, and treatment. The Ministry of Health is slowly making advances, most notably for the LGBT community. Ministerial Decree 202, issued in 2009, prohibits discrimination against LGBT individuals in the health sector. A 2001 HIV Law offers some protections to people living with HIV/AIDS (PLWHA), although legislation to increase such safeguards has been drafted and is currently pending. The proposed law would strengthen legal protections for PLWHA, extend responsibility for the realization of rights among various government ministries, and increase access to testing. Currently, the provision of health care

both for PLWHA and the LGBT community remains fraught with problems, including harassment at the entrances of health clinics, discrimination by health care professionals, and uneven access to treatment.

DISCRIMINATION IN EDUCATION AND EMPLOYMENT

LGBT individuals face discrimination in gaining entry to higher education and securing employment. They are also subjected to discrimination during the course of employment. In particular, transgender individuals report difficulties because they are unable to change their name and gender on their national identity documents, which do not match their physical appearance. Many educational institutions and employers require that transgender individuals modify their appearance so that it coincides with their identity document, or reject them outright on that basis. Many employers in the private sector also unlawfully require HIV testing as a prerequisite for employment or for continued employment. While decrees exist to protect individuals from discrimination in the public sector, no laws exist to protect the rights of LGBT individuals in the private sector. The Public Defender's Office (PGR) is able to bring claims for employment discrimination against private sector employers but has never filed a claim on behalf of LGBT individuals and only two representing PLWHA.

El Salvador stands at a crossroads and is poised to be a leader in the Central American region on LGBT rights. Legislative reform, administrative accountability, and public awareness campaigns are all needed to make the ideal of equality a reality for LGBT Salvadorans.

Summary Recommendations

LEGISLATIVE REFORM

To the President and the Legislative Assembly:

- » Amend Article 3 of the Constitution to include LGBT individuals as a protected class on the grounds of gender identity and sexual orientation;
- » Pass anti-discrimination legislation explicitly protecting LGBT individuals from all forms of discrimination in the public and private sector;
- » Pass legislation providing for the legal recognition of the right to identity, and to permit individuals to change their name and gender on official identity documents (DUI) without any requirement of medical intervention; and
- » Immediately pass and implement the proposed HIV Law.

INSTITUTIONAL ACTION

To the National Civilian Police (PNC) and the Office of the Attorney General:

- » Immediately open an investigation of the targeted murders of members of the LGBT community, including the homicides of the summer of 2009;
- » Expand and deepen training of police officers on their human rights obligations and duty to adhere to Presidential Decree 56; and
- » Institute a zero tolerance policy for members of the police who commit assault and other rights violations.

To the Human Rights Ombudsman (PDDH)

- » Increase the staffing and resources of the HIV Unit to receive and investigate complaints on behalf of PLWHA.

To the Public Defender's Office (PGR):

- » Expand the capacity of the Worker's Rights Defense Unit to represent PLWHA through the assignment of staff focused on claims against employers who discriminate based on HIV status, as well as those who require HIV testing or seek to ascertain the HIV status of their employees.

To the Ministry of Health:

- » Increase access to comprehensive and continuous care for PLWHA; and
- » Ensure that private security personnel are appropriately trained on non-discrimination and sanctioned for restricting access to care, harassing patients, or violating confidentiality standards.

TRAINING & AWARENESS

To the Human Rights Ombudsman (PDDH):

- » Implement a comprehensive training plan in coordination with the Sexual Diversity Directorate for police and all government employees regarding Presidential Decree 56 and the duty to fulfill its mandate.

To the Public Defender's Office (PGR):

- » Increase awareness within the Public Defender's Office regarding the LGBT community and PLWHA in order for personnel to identify and respond to specific forms of discrimination facing these communities.

To the Ministry of Health:

- » Educate health staff on the needs of LGBT patients and PLWHA and how to provide appropriate and comprehensive medical care to these communities.

To the Ministry of Education:

- » Initiate trainings for educators and administrators about the LGBT community and PLWHA and reinforce the obligation to provide a safe learning environment for students, regardless of their sexual orientation, gender identity, or HIV status, or that of their family members.

Notes: Executive Summary

¹ Decreto No. 56 [Decree 56], Diario Oficial (DO), No. 86, Tomo 387, May 12 2010, <http://xa.yimg.com/kq/groups/22079676/1118999878/name/Decreto+contra+la+discriminación+por+identidad+y+orientación.pdf> [last visited May 17 2012].

Glossary of Terms

In order to ensure a consistent understanding of how identity groups and their members are referenced in this report, the following is a brief explanation of relevant terms.¹

Sexual Diversity is a phrase used in Latin America to describe a full range of sexualities and gender identities, including LGBT (lesbian, gay, bisexual, or transgender).

Sexual Orientation refers to the emotional and sexual attraction one feels to another based on the gender of the other individual. Terms used to describe specific sexual orientation identities include bisexual, gay, homosexual, or lesbian.

MSM (men who have sex with men) refers to men who may or may not self-identify as gay or bisexual but who engage in sex acts with other men.

Homophobia is fear of and prejudice toward people who identify as LGBT.

Biological Sex refers to the classification of a person's body at birth as male or female² based on biological factors.

Gender Identity refers to an individual's internal sense of being male or female, or something in between or other than male and female. Biological sex may or may not have any bearing on a person's gender identity.

Gender Expression refers to the external characteristics and behaviors that are socially classified as "masculine" or "feminine." Biological sex may or may not have any bearing on a person's gender expression.

Transgender is used in the report as an overarching term to encompass individuals who are **transsexual**, **travesti**, and **transgender**. Individuals who identify as **transgender** or **trans** experience their gender identity differently than the biological sex they were assigned at birth.

Transsexual refers to an individual who has undergone or is in the process of undergoing a physical transition through medical interventions in order that his or her physical sex corresponds to the person's gender identity.

Travesti is a term used in Latin America to describe someone designated as "male" at birth and whose gender identity is female; a *travesti* may or may not decide to alter her body.

Transphobia is fear of and prejudice toward people who are transgender.

PLWHA refers to people living with HIV/AIDS.

Notes: Glossary of Terms

¹ In developing this glossary of terms, the author relied on definitions from the Transgender, Gender Variant, and Intersex Justice Project and from the report *Not Worth a Penny - Human Rights Abuses against Transgender People in Honduras*, Human Rights Watch (May 2009), http://www.hrw.org/sites/default/files/reports/honduras0509web_0.pdf [last visited May 17, 2012].

² Intersex is a term to describe a person born with some combination of anatomical and chromosomal characteristics that are not reflective of the medical definitions of biologically male or biologically female.

Introduction

El Salvador, the smallest and most densely populated Central American country, experienced a bloody civil war from 1980 until 1992. Since the government and guerrilla forces formally ended the 12-year conflict through a UN-brokered peace agreement¹ the country has seen its democratic institutions solidify in the intervening years. Nevertheless, the conflict continues to haunt Salvadoran society with a pervasive legacy of violence, corruption, and impunity.²

It is against this backdrop that members of the country's lesbian, gay, bisexual, and transgender (LGBT) community struggle for recognition and full enjoyment of their rights. While the challenges of LGBT Salvadorans reflect the range of problems that all Salvadorans face as they strive to fulfill basic needs and access opportunities for a better future, LGBT community members also confront a deep stigmatization that renders them both invisible and targets for abuse and discrimination. These violations largely go unaddressed.

The Salvadoran government has begun to recognize the human rights concerns of the LGBT community and community members have made great strides in realizing their rights within the current legal structure and advocating for reform. Nevertheless, there are few legal protections afforded LGBT individuals and those that exist are weak and frequently unenforced.

The purpose of this report is to present a human rights assessment of the status and treatment of LGBT individuals in El Salvador. The report identifies the most urgent issues as reported by community members, analyzes the applicable human rights norms and standards, and identifies barriers to the fulfillment of basic human rights. With these concerns in focus, the report also highlights current efforts to address these problems and offers recommendations to prevent abuses as well as strengthen mechanisms of redress.

The LGBT community in El Salvador is comprised of a diverse set of individuals and communities and this report seeks to reflect the range of perspectives and experiences of these communities. However, this report does not exhaust the scope and nature of the human rights vulnerabilities of the LGBT community and its members. Nevertheless, the report provides a foundation upon which further work can and should be undertaken.

This report is based on an analysis of relevant international and national laws and policies, published documentation of abuses against LGBT individuals in El Salvador, as well as twenty-seven interviews with dozens of stakeholders. In February 2011, representatives of the International Human Rights Law Clinic (Clinic) conducted interviews with members of seventeen civil society organizations. At that time the Clinic also met with self-identified members of the LGBT community and conducted individual and small group interviews. All interviews were conducted in Spanish. In addition, interviews were conducted with ten government representatives from six government departments including the Director of Sexual Diversity, the Ombudsman for the Defense of Human Rights, the Director of the HIV Unit within the Office of the Ombudsman, representatives of the Ministry of Health's HIV/AIDS program, the Human Rights Division of the National Civilian Police, and the Office of the Public Defender.

Notes: Introduction

¹ The Commission on the Truth for El Salvador, "From Madness to Hope: the War in El Salvador: Report of the Commission on the Truth for El Salvador" (1993) at 4, <http://www.usip.org/publications/truth-commission-el-salvador> [last visited May 17, 2012].

² Joaquín M. Chávez, *An Anatomy of Violence in El Salvador*, in North American Congress on Latin America (NACLA) Report on the Americas, May/June 2004, vol. 37, issue 6.

International and Regional Legal Frameworks Protecting LGBT Rights

Recent developments in human rights law at the international and regional levels have strengthened norms to address the human rights of LGBT individuals.

The Yogyakarta Principles represent the first comprehensive articulation of how international human rights standards apply to protect sexual orientation and gender identity.¹ A group of distinguished jurists, academics, former United Nations officials, and other human rights experts drafted the Principles, which were released in March 2007. The Principles affirm the obligations of state as well as non-state actors to respect and fulfill the rights enshrined in the instrument.² Since their release, the Yogyakarta Principles have been employed in submissions to the UN Human Rights Council as part of the Universal Periodic Review (the process by which a state's compliance with its treaty obligations is reviewed),³ and by various states that recognize the Principles as a guideline for their domestic policies.⁴

More recently, in June 2011, the United Nations Human Rights Council passed an historic resolution on human rights, sexual orientation, and gender identity.⁵ The resolution expressed concern over acts of violence and discrimination targeting individuals based on their sexual orientation and gender identity⁶ and requested that the UN High Commissioner for Human Rights undertake a study documenting discriminatory laws and practices and analyzing how "international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity."⁷

At the regional level, the Organization of American States (OAS), the inter-governmental regional body of the Americas, has increased its attention to violence and discrimination against

LGBT individuals. In June 2011, the OAS passed a Resolution urging states to adopt policies to combat discrimination against individuals because of their sexual orientation and gender identity.⁸ Additionally, the Resolution condemns acts of violence against LGBT individuals and urges states to ensure that such violations are investigated and those responsible are brought to justice.⁹ In November 2011, the Inter-American Commission on Human Rights (IACHR or Commission), one of two autonomous human rights bodies of the OAS, committed itself to the creation of a Unit on the Rights of Lesbian, Gay, Bisexual, Trans, and Intersex Persons, to strengthen the Commission's capacity to protect the rights of these communities.¹⁰

El Salvador has ratified most major international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR),¹¹ the International Covenant on Economic, Social and Cultural Rights (ICECSR),¹² the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹³ the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),¹⁴ and the Convention on the Rights of the Child (CRC).¹⁵ At the regional level, El Salvador is a state party to the American Convention on Human Rights,¹⁶ the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"),¹⁷ the Inter-American Convention to Prevent and Punish Torture,¹⁸ and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women ("Convention of Belem Do Para").¹⁹ The country's constitution recognizes the supremacy of international conventions over national law.²⁰

El Salvador is therefore bound by key international and regional human rights treaties to respect, protect, and fulfill fundamental rights by refraining from abuses, implementing effective measures to prevent abuses, and providing for mechanisms of redress where violations do occur. Although no treaty explicitly addresses the rights of sexual minorities in its text, treaty-monitoring bodies

have interpreted several of these instruments to include protections against discrimination based on sexual orientation and gender identity. What results is a patchwork of protections for the LGBT community.

Below is a summary of international and regional human rights legal protections applicable to LGBT individuals in El Salvador. Grouped thematically, relevant human rights protections and their sources are identified and an analysis of their applicability to the LGBT context is outlined.

Equal Protection of the Law and Non-Discrimination

The right to equal protection of the law and non-discrimination is enshrined in Articles 2 and 26 of the ICCPR.²¹ The Human Rights Committee (Committee) – the body of independent experts that interprets and applies the ICCPR – found the Convention to prohibit discrimination on the basis of sexual orientation.²² Other UN human rights treaty bodies have also noted that discrimination on account of sexual orientation is prohibited under the terms of the human rights treaties which they interpret and monitor, respectively.²³

The Committee has criticized the failure of states to effectively train law enforcement on the rights of sexual minorities,²⁴ the failure to combat employment-related discrimination against these communities,²⁵ the lack of investigation into crimes against LGBT individuals,²⁶ and the criminalization of same-sex relations.²⁷ In its 2003 Concluding Observations to El Salvador, the Committee identified that the state used domestic criminal laws²⁸ “to discriminate against people on account of their sexual orientation,” and recommended that El Salvador provide adequate protection against discrimination on this basis.²⁹

At the regional level, the American Convention on Human Rights (American Convention) contains anti-discrimination provisions similar to those contained in the ICCPR, recognizing that all persons are equal before the law, and fundamental rights are to be respected without discrimination

based on *sex or any other social condition* (emphasis added).³⁰ In the landmark case *Atala Riffo and daughters v. Chile*, challenging a legal order that revoked a lesbian mother’s custody of her children due to her sexual orientation, the Inter-American Court of Human Rights found that, while sexual orientation and gender identity do not appear in the text of the non-discrimination clause of the American Convention, both are protected under the “other social condition” provision of the treaty such that Chile had violated the petitioner’s right to non-discrimination and equal treatment under the law.³¹ The Court further found that “the alleged lack of a consensus domestically in some countries for the full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to perpetuate and reproduce the discrimination that these minorities have suffered historically and structurally.”³²

Right to Privacy

The right to privacy is protected by the ICCPR and guarantees that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.”³³ This concept of privacy includes private adult consensual activity.³⁴ The American Convention similarly guarantees the right against arbitrary and abusive interference into an individual’s private life.³⁵ In the *Atala* case, the Inter-American Court recognized that private life is a broad concept which includes both an individual’s self-perception and the right to form relationships with other persons, including a sex life, and is protected under the American Convention from arbitrary interference by the state and third parties.³⁶

Right to Life, Liberty, and Security

The right to life, liberty, and security of person is enshrined in the ICCPR and the American Convention.³⁷ The ICCPR guarantees that no individual will be subjected to arbitrary arrest or detention, or arbitrarily deprived of his or her life.³⁸ In reviewing El Salvador’s compliance with the treaty,

the Human Rights Committee expressed concern regarding the number of individuals attacked and killed as a result of their sexual orientation, and the lack of investigations into these acts.³⁹ The Committee recommended that El Salvador “provide effective protection against violence... based on sexual orientation.”⁴⁰ Additionally, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions also urged the government of El Salvador to investigate and “take the necessary steps to protect members of sexual minorities from violence and extrajudicial killings.”⁴¹

The OAS recently condemned “acts of violence and human rights violations committed against persons because of their sexual orientation and gender identity,” and encouraged states “to take all necessary measures to ensure that acts of violence... are not committed against persons because of their sexual orientation.”⁴²

Protection against Torture, Inhuman, and Degrading Treatment

The protection against torture, inhuman and degrading treatment is enunciated in the ICCPR⁴³ and obligates states to protect individuals from mistreatment inflicted by those acting in an official as well as a private capacity.⁴⁴ Under the UN torture convention, states must take legislative, administrative, and judicial action to prevent torture, as well as criminalize acts of torture and investigate these acts.⁴⁵ Article 13 of the CAT requires states to protect witnesses and complainants against incitement or intimidation as a result of filing a complaint or providing evidence of violations of the treaty.⁴⁶ The Committee against Torture, the body of experts that interprets and monitors the treaty, recently expressed concern over the torture of individuals on account of their sexual orientation, and has recommended that states take effective action in addressing complaints of threats and attacks of sexual minorities and activists.⁴⁷ At the regional level, the Inter-American Convention to Prevent and Punish Torture similarly obligates states to “take effective measures to prevent and punish torture.”⁴⁸

Right to Work

The ICESCR obligates the government to take appropriate steps to safeguard the right of every individual to work, “which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.”⁴⁹ Discrimination in employment based on health status (including HIV/AIDS) and sexual orientation is prohibited.⁵⁰ The International Labour Organization’s Discrimination Convention⁵¹ calls on states to “seek the co-operation of employers’ and workers’ organisations” to combat workplace discrimination, enact legislation, and repeal statutory provisions that facilitate discrimination.⁵² The Protocol of San Salvador, a protocol to the American Convention addressing economic, social, and cultural rights, guarantees that, with regards to employment, the state shall not discriminate for “any kind of reasons related to...sex...or any social condition.”⁵³

Right to the Highest Attainable Standard of Health

“The right of everyone to the enjoyment of the highest attainable standard of physical and mental health” is enshrined in the ICESCR⁵⁴ – a right the corresponding treaty body determined is guaranteed without discrimination based on “*health status (including HIV/AIDS), sexual orientation and civil, political, social or other status*” (emphasis added).⁵⁵ States must take adequate steps to prevent, treat, and control diseases, as well as to “assure to all medical service and medical attention in the event of sickness.”⁵⁶ The treaty monitoring committee in 2006 recommended that El Salvador guarantee “essential health services for the entire population, in particular for vulnerable groups, by increasing the budget allocated for such purposes.”⁵⁷

The UN Committee on the Rights of the Child, the body that monitors the CRC, in elaborating on adolescent health, explicitly found that the treaty prohibits discrimination based on sexual orientation and HIV status, recognizing that discrimination renders youth more vulnerable to violence and exploitation.⁵⁸ The Committee on the Elimina-

tion of Discrimination against Women, the body which monitors implementation of CEDAW, has stated that the prevention and treatment of HIV/AIDS is integral to fulfilling the Convention's right to health. In its General Recommendation No. 15, the CEDAW committee calls on states to develop programs to combat the particular vulnerabilities women face with respect to HIV and to ensure active participation of women in health care.⁵⁹ General Recommendation No. 24 urges states to ensure access to education and health care, including reproductive health care, for all women, including adolescents.⁶⁰ At the regional level, under the Protocol of San Salvador, the right to health is "understood to mean the enjoyment of the highest level of physical, mental and social well-being."⁶¹

Right to Education

The right to education is enshrined in the ICESCR and specifically requires that states provide compulsory primary education, make secondary education generally available, and provide higher education that is "equally accessible to all."⁶² The CRC also guarantees the right to access education⁶³ and the treaty monitoring body of the treaty has found this to mean that children should be able to study in an environment free from discrimination, including discrimination based on HIV status and sexual orientation.⁶⁴ The Protocol of San Salvador echoes the right to education and points to it as a means for all members of society to "achieve a decent existence."⁶⁵

Right to Freedom of Expression, Association, and Information

The right to freedom of expression, association, and information is enshrined in the ICCPR.⁶⁶ The UN Declaration on Human Rights Defenders further clarified that the right to freedom of information ensures that "[e]veryone has the right, individually and in association with others, to develop and discuss new human rights ideas and principles and to advocate their acceptance."⁶⁷ The Human Rights Committee found that attacks on

an individual's freedom of expression – including "arbitrary arrest, torture, threats to life, and killing" – were incompatible with the principles enunciated by the ICCPR.⁶⁸ The UN Special Rapporteur on the situation of human rights defenders has called on states to address stigmatization and attacks against individuals working for the rights of lesbian, gay, bisexual, and transgender persons, as well as violence against women and domestic violence, and to remedy these issues.⁶⁹ In an earlier report, the Special Representative of the Secretary-General on the situation of human rights defenders noted that El Salvador has a commitment under the Declaration on Human Rights Defenders to address violations against human rights organizations, including threats and violence against the country's long-standing LGBT and HIV advocacy organization, Asociación Entre Amigos.⁷⁰

At the regional level, the IACHR similarly expressed concern about the increasing violence and systemic discrimination against those working on LGBT rights issues. The Commission noted that many human rights defenders are portrayed as destabilizing the state, and conveyed its concern about "the effects that such statements may have on the safety" of these individuals.⁷¹ The OAS urges state parties to the American Convention to ensure the adequate protection of defenders who work on issues concerning sexual orientation and gender identity.⁷²

Notes: International and Regional Legal Frameworks Protecting LGBT Rights

1 The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2007), http://www.yogyakartaprinciples.org/principles_en.pdf [last visited May 17, 2012].

2 *Id.*

3 Michael Flaherty, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles*, 8 Hum. Rts. L. Rev. 207, 240 (2008).

4 *Id.* at 243.

5 General Assembly of the Human Rights Council, Agenda item

- 8, Human rights, sexual orientation and gender identity, Jun. 15, 2011, A/HRC/17/L.9/Rev.1 at para. 1-2.
- 6 *Id.*
- 7 *Id.*
- 8 OAS Resolution AG/RES. 2653 “Human Rights, Sexual Orientation, and Gender Identity,” Jun. 7, 2011. *See also* OAS Resolution AG/RES. 2600 “Human Rights, Sexual Orientation, and Gender Identity,” Jun. 8, 2010.
- 9 *Id.*
- 10 “IACHR Creates Unit on the Rights of Lesbian, Gay, Bisexual, Trans, and Intersex Persons,” Press Release, Inter-American Commission on Human Rights, Nov. 11, 2011, <http://www.cidh.oas.org/Comunicados/English/2011/115-11eng.htm> [last visited May 17, 2012].
- 11 International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. El Salvador ratified the ICCPR on Nov. 30, 1979.
- 12 International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. El Salvador ratified the ICESCR on Nov. 30, 1979.
- 13 Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]. El Salvador ratified CEDAW on Aug. 19, 1981.
- 14 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]. El Salvador ratified CAT on Jun. 17, 1996.
- 15 Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]. El Salvador ratified the CRC on Jul. 10, 1990.
- 16 American Convention on Human Rights [hereinafter American Convention], Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143. El Salvador ratified the American Convention on Jun. 20, 1978.
- 17 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights [hereinafter Protocol of San Salvador], Nov. 17, 1988, O.A.S.T.S. No. 69. El Salvador ratified the Protocol of San Salvador ratified on May 4, 1995.
- 18 Inter-American Convention to Prevent and Punish Torture [hereinafter Inter-American Convention to Prevent and Punish Torture], Sept. 12, 1985, O.A.S.T.S. No. 67. El Salvador ratified the Inter-American Convention to Prevent and Punish Torture on Oct. 17, 1994.
- 19 Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women [hereinafter Convention of Belem Do Para], Jun. 9, 1994, 33 I.L.M. 1534. El Salvador ratified Convention of Belem Do Para on Nov. 13, 1995.
- 20 Constitución de la República de El Salvador [Const.], as amended, Oct. 2, 2003, Art. 144, Decreto No. 38, Diario Oficial de la República de El Salvador [DO], No. 191, Tomo 361, Oct. 15, 2003.
- 21 ICCPR, *supra* note 11, Art. 2, para 1; Art. 26.
- 22 *Toonen v Australia* (488/1992), CCPR/C/50/D/488/1992 (1994); 1-3 IHRR 97 (1994) at para. 8.7 (the U.N. Human Rights Committee, in response to a complaint regarding a Tasmanian “sodomy law” which criminalized adult homosexual conduct, determined that the ICCPR’s “reference to ‘sex’ in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation”).
- 23 Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in economic, social and cultural rights, E/C.12/GC/20, Jul. 2, 2009 at para. 32; Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 28: The core obligations of states parties under Art. 2 of the Convention, CEDAW/C/2010/47/GC.2, Oct. 19, 2010, at para. 18 (stating that discrimination against women based on sex is linked with sexual orientation and gender identity, and urged states to prohibit such intersecting forms of discrimination); and Committee on the Rights of the Child, General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child, CRC/GC/2003/4, Jul. 1, 2003 at para. 6. (stating that “adolescents’ sexual orientation and health status (including HIV/AIDS and mental health”) are not grounds for discrimination in accordance with Article 2 of the Convention on the Rights of the Child).
- 24 Concluding Observations of the Human Rights Committee: Poland, CCPR/CO/82/POL (2004) at para. 18.
- 25 Concluding Observations of the Human Rights Committee: the United States of America, CCPR/C/USA/CO/3/Rev.1 (2006) at para. 25 (also discussing allegations of pervasive violent crime perpetrated against sexual minorities, including by law enforcement)
- 26 Concluding Observations of the Human Rights Committee: El Salvador, CCPR/CO/78/SLV (2003) at para 16.
- 27 Concluding Observations of the Human Rights Committee: Egypt, CCPR/CO/76/EGY (2002) at para. 19.
- 28 In civil law countries, contravention orders are considered minor offenses, similar to that of a misdemeanor in common law countries.
- 29 Concluding Observations of the Human Rights Committee: El Salvador, *supra* note 26, para 16.
- 30 American Convention, *supra* note 16, art. 1; art. 24.
- 31 *Atala Riffo and Daughters v. Chile Case*, Inter-Am. Ct. H.R., (ser. C) No. 239 (Feb. 24, 2012) at paras 83-4.
- 32 *Id.* at para 92.
- 33 ICCPR, *supra* note 11, art. 17.
- 34 *Toonen v. Australia*, *supra* note 22, at para. 8.2. (finding that a sodomy law criminalizing adult homosexual conduct violated Article 17 of the ICCPR and that “it is undisputed that adult consensual sexual activity in private is covered by the concept of ‘privacy’”).
- 35 American Convention, *supra* note 16, art. 11.
- 36 *Atala Riffo and daughters v. Chile Case*, *supra* note 31 at paras. 161-62.
- 37 ICCPR, *supra* note 11, art. 6; art. 9; American Convention, *supra* note 16, art. 4.

- 38 ICCPR, *supra* note 11, art. 6; art. 9.
- 39 Concluding Observations of the Human Rights Committee: El Salvador, *supra* note 26, para 16.
- 40 *Id.*
- 41 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Jan. 11, 2001, E/CN.4/2001/9, at para. 49.
- 42 OAS Resolution AG/RES. 2600“Human Rights, Sexual Orientation, and Gender Identity,” Jun. 8, 2010.
- 43 ICCPR, *supra* note 11, art. 7.
- 44 UN Human Rights Committee, General Comment No. 20: Replaces General Comment 7 concerning prohibition of torture and cruel treatment or punishment, Mar. 10, 1992 at para. 2.
- 45 CAT, *supra* note 14, art. 12 & art. 13.
- 46 *Id.* art. 13.
- 47 Concluding Observations of the Committee Against Torture: Italy, CAT/C/ITA/CO/4 (2007) at para. 23; Concluding Observations of the Committee Against Torture: Argentina, CAT/C/CR/33/1 (2004) at para. 6(g); Concluding Observations of the Committee Against Torture: Venezuela, CAT/C/CR/29/2 (2002) at para. 10 (d).
- 48 Inter-American Convention to Prevent and Punish Torture, *supra* note 18, art. 6, para. 1.
- 49 ICESCR, *supra* note 12, art. 6.
- 50 Committee on Economic, Social and Cultural Rights, General Comment No. 18: The Right to Work, ICESCR, E/C.12/GC/18, Feb. 6, 2006 at para. 12(b)(i); *see also* ICESCR, *supra* note 12, art. 6.
- 51 Discrimination (Employment and Occupation) Convention, International Labour Organization, No. 111 (1958), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_85_en.pdf (last visited May 18, 2012). El Salvador ratified the Discrimination Convention on Jun. 15, 1995.
- 52 *Id.* at art. 3(a) – (c).
- 53 Protocol of San Salvador, *supra* note 17, art. 3.
- 54 ICESCR, *supra* note 12, art. 12.
- 55 Committee on Economic, Social and Cultural Rights, General Comment No. 14: Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights, E/C.12/2000/4, Aug. 11, 2000, para 18.
- 56 *Id.* para 17.
- 57 Concluding Observations of the Committee on Economic, Social and Cultural Rights: El Salvador, E/C.12/SLV/CO/2 (2007) at para. 43.
- 58 Committee on the Rights of the Child, General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child, CRC/GC/2003/4, Jul. 1, 2003, at para 6.
- 59 Committee on the Elimination of Discrimination against Women, General recommendation No. 15: Avoidance of discrimination against women in national strategies for the prevention and control of acquired immunodeficiency syndrome (AIDS), A/45/38 1990 (1990).
- 60 Committee on the Elimination of Discrimination against Women, General recommendation No. 24: Women and health A/54/38/Rev.1 part I (1999).
- 61 Protocol of San Salvador, *supra* note 17, art. 10.
- 62 ICESCR, *supra* note 12, art. 13.
- 63 CRC, *supra* note 15, art. 28.
- 64 *Id.* at art. 2 (“state parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination or any kind, irrespective of the child’s or her parent’s or legal guardian’s...sex...or other status.”; *see also*, Convention on the Right of the Child General Comment 4, para. 6 (“State parties have the obligation to ensure that all human beings below 18 enjoy all the rights set forth in the Convention without discrimination....These grounds also cover adolescents’ sexual orientation and health status (including HIV/AIDS and mental health”).
- 65 Protocol of San Salvador, *supra* note 17, art. 13.
- 66 ICCPR, *supra* note 11, art. 19.2
- 67 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms General Assembly Resolution A/RES/53/144, art. 7 (non-binding declaration which articulates existing rights and applies them to the situation of human rights defenders).
- 68 Human Rights Committee, General Comment No. 34: Article 19: Freedom of opinion and expression, CCPR/C/GC 34, Sept. 12, 2011, at para. 23.
- 69 Report of the Special Rapporteur on the situation of human rights defenders, UN General Assembly, A/65/223, Aug. 4, 2010, at para. 16.
- 70 Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Mar. 27, 2007, A/HRC/4/37/Add.1 at paras. 255, 258.
- 71 “IACHR Concludes in 140th Period of Sessions.” Press Release, Inter-American Commission on Human Rights, Nov. 5, 2010, <http://www.cidh.org/comunicados/english/2010/109-10eng.htm> [last visited Nov. 20, 2011].
- 72 OAS Resolution AG/RES. 2600“Human Rights, Sexual Orientation, and Gender Identity,” Jun. 8, 2010.

Systemic Violence and the LGBT Community

An Enduring Legacy of Violence

The civil war which ravaged the country from 1980-1992 claimed the lives of an estimated 75,000 Salvadorans. In the subsequent nineteen years, another 74,000 Salvadorans have been murdered.¹ In 2009, El Salvador's murder rate was seven times that of the World Health Organization's definition of an epidemic.² There were an estimated seventy-one murders for every 100,000 inhabitants,³ a rate more than twice the average for the region.⁴ In a 2010 poll, seventy-one percent of Salvadorans indicated they had been a victim of assault or a crime within the past year.⁵

Another important aspect of the violence plaguing El Salvador is that the country has one of the highest rates of murder against women (sometimes referred to as femicide or gender-motivated killings) in the world.⁶ Violence against women has been identified as the leading cause of death among Salvadoran women between the ages of fifteen and forty-four.⁷ Despite the high murder rates of women, only ten percent of reported cases result in a conviction.⁸

In this context of epidemic violence, impunity is the norm. In the majority of the country's 4,300 homicide cases in 2009, no one was arrested or convicted.⁹ The Attorney General's office estimated that among those cases that are prosecuted there is a 7.4 percent conviction rate.¹⁰ Negligence, resource constraints, and corruption exacerbate the problem of impunity.¹¹ Government officials have publicly acknowledged the perception among Salvadorans that offenses typically go unpunished by the justice system.¹²

Within this context of violence and impunity, El Salvador's LGBT community is vulnerable to abuse. Members of the Salvadoran LGBT community report that they live under constant threat and in a state of fear.¹³

““ They are murdering us and our government is not doing anything but picking up the bodies.”

Karla Stephanie Avelar,
COMCAVIS-Trans

Violence Against the LGBT Community

VIOLENCE BY PRIVATE ACTORS

In February 2011, Rianna, a transgender woman, was gang raped and killed.¹⁴ There was no mention of her murder in the Salvadoran press and no one has been held accountable for her death.¹⁵ Asociación Entre Amigos, the leading LGBT advocacy organization in the country, reported eleven murders of LGBT individuals in 2008, twenty-three in 2009, and ten in 2010.¹⁶ In many of these cases the bodies of the victims revealed signs of torture, including dismemberment, stabbings, beatings, and multiple gunshots.¹⁷

The rapid development of Salvadoran criminal gangs has been a significant factor in the high incidence of violence in El Salvador during the post-war period. There was an average of eleven murders reported each day in 2010¹⁸ and law enforcement officials attributed half of all homicides to gang violence.¹⁹ Salvadoran gangs have evolved into sophisticated organized crime networks, capable of terrorizing entire communities and manipulating the justice system.²⁰ Anti-gang policies, in turn, have generated their own set of human rights concerns resulting from the unprecedented grant of power to the national police and the erosion of fundamental legal protections.²¹

Criminal gangs have been linked to violence against LGBT individuals. Fransheska, a transgender activist and sex worker, was shot four times in 2006 after she refused to pay *renta*, a fee extracted by gangs for use of certain areas of the streets.²² LGBT activists report that an inability or unwillingness to pay *renta* results in violence for sex workers and their families.²³ A 2010 Anti-Gang Law²⁴ made it a criminal offense to belong to a gang or contribute to gang finances, including paying extortion fees,²⁵ punishable by up to six years in prison.²⁶ The law has had the unintended effect of leaving private citizens vulnerable to violence if they fail to comply with gang demands and yet subject to criminal sanctions if they succumb to gang extortion.²⁷ One human

rights report found that gangs often required new recruits to attack members of the LGBT community as part of their initiation process.²⁸ Members of the LGBT community believe they are a particularly easy target for violence because perpetrators know police are less likely to investigate crimes against LGBT individuals.²⁹

But violence against the community can come from any sector of society. Jose, a gay man, reported being beaten by a classmate as a result of his sexual orientation.³⁰ Daisy, a transgender woman, reported being taken away by men in a car after which she was beaten and raped before her captors left her on the street.³¹

CASE STUDY: "BLOODY JUNE"

In June 2009, El Salvador experienced an unprecedented wave of targeted violence against the LGBT community.

On June 9, Tania and Katerina, two transgender women and sex workers were kidnapped in San Salvador.³² The next morning, Katerina's body was found face down in a muddy ditch; she had been strangled and beaten.³³ Tania was still missing.³⁴ When friends called Tania's cell phone an unknown voice threatened: "She is going to die, it is what she deserves."³⁵ Seven days later her partially dismembered body was found.³⁶ She was seventeen years old.³⁷

Also that summer, the body of a twenty-five year old gay man was found in a plastic bag, his hands had been dismembered and his body bore other signs of torture. On June 30, an eighteen year old gay man was found shot, evidence indicated that he had been held captive and tortured for several hours before being killed. A transgender woman, Betzayda, was found in July at the bottom of a ravine; authorities say the cause of death was a gunshot wound.³⁸

This series of murders has come to be known as 'Bloody June' and followed a heated political debate in the Legislative Assembly regarding a constitutional ban of same-sex marriage.³⁹ Conservative parties had presented a bill pro-

posing an amendment to the Constitution to preemptively ban marriage between same-sex partners and prohibit same-sex couples from adopting children.⁴⁰ The bill ultimately failed, in part due to opposition led by civil society groups,⁴¹ but the backlash appears to have been directed against the LGBT community.

No one has been convicted of any of the murders from Bloody June.⁴²

POLICE AS PERPETRATORS

The record of human rights abuses carried out by law enforcement agents adds to the complexity of El Salvador's violent legacy. The National Civilian Police (Policía Nacional Civil, also referred to as PNC), the nation's primary police force, is an armed, civilian police organization created as a condition of the 1992 Peace Accords.⁴³ With an estimated 16,889 PNC officers, the PNC operates nationwide.⁴⁴

The PNC Office of the Inspector General received 2,230 complaints of alleged police misconduct in 2009.⁴⁵ That same year, it further found the national police responsible for 545 reported cases of violence, including "unlawful killings, attempted unlawful killings, assaults and other offenses causing bodily harm."⁴⁶ As one transgender activist observed:

The relationship between the police and [the transgender community] is complete chaos. Abuse of authority, abuse of human rights, violent abuse, sexual violence... . In the police, there are people who assault us, who insult us, who rape us, who harass us, who extort us, and everything. Why? Because for them, we are delinquents and have no rights. Simple and straightforward, we have no rights.⁴⁷

Some larger cities, including the capitol of San Salvador, also have Metropolitan Police Forces (Cuerpos de Agentes Metropolitanos, also referred to as CAM). The CAM force in San Salvador is estimated to have around 600 officers.⁴⁸ One individual who self-identified as a gay transvestite, noted that the CAM was no different than the

PNC, often targeting the *travesti* community in particular.⁴⁹

LGBT activists reported that police sexually assault and rape members of the LGBT community.⁵⁰ Another local NGO that tracks such incidents stated that corrupt police officers force members of the LGBT community to engage in sex acts using manipulative tactics and threats of violence.⁵¹ A young gay man, Carlos, reported how a PNC officer pulled him over as he was driving with friends, and made derogatory remarks about their sexual orientation.⁵² The officer proceeded to search the car and demanded money.⁵³ When Carlos refused, the officer threatened to arrest him, and then stated: "If you give me oral sex, I will let you go."⁵⁴ In another reported instance, police officers harassed a gay man at a restaurant and proceeded to drive him to a rural field where they raped and beat him.⁵⁵ A report released by LGBT advocates in El Salvador documented a case where eight PNC officers approached and interrogated a gay man, then forced him into a patrol car and took him to another location where they raped him.⁵⁶

Such abuses have also reportedly occurred inside law enforcement facilities. An advocate stated that the PNC has placed transgender and lesbian women in the same cell as male detainees who have raped the women in the cell.⁵⁷ Moreover, NGOs have received reports of officers from both the PNC and CAM raping and abusing lesbians and transgender women in prison.⁵⁸

As with much of the violence directed at the LGBT community, the most severe abuses by the authorities were reportedly directed against transgender women.⁵⁹ Transgender women are particularly vulnerable given their visibility and the high incidence of sex work among the transgender community. (See *Education and Employment Section*) Advocates interviewed stated that a cycle of criminalization has developed whereby transgender identity and sex work are conflated. As a result, they explained that transgender individuals are targeted based on their sexual identity and perceived activities as sex workers. Abuses carried out against transgender individuals are then justified on this basis, and the associated stigma helps to ensure impunity for the

perpetrators.⁶⁰ One transgender activist reflected:

*One cannot generalize. This is what our police, our health care personnel, our CAM agents do to us. They all generalize that because one person uses drugs, all of us use drugs, that because one person has HIV, we all have HIV, because one person is a thief, all of us are thieves.*⁶¹

The UN Human Rights Committee, during its review of El Salvador's compliance with the International Covenant on Civil and Political Rights (ICCPR) in 2003, pointed specifically to the use of San Salvador's Municipal Contravention Ordinance, which prohibits solicitation of sex, acts which damage morals and good customs, and crimes against decency involving nudity, to discriminate against the LGBT community.⁶² Nevertheless, advocates stated the pattern continued with reports of CAM agents harassing transgender sex workers, forcing them to pay bribes, and physically assaulting them using the Ordinance as a pretext, often in public parks.⁶³ A report prepared by Salvadoran advocates included an account of five police officers raping and beating Marlene, a transgender woman, and then leaving her on the street.⁶⁴ In another report, Rosa, a transgender woman, refused to engage in sexual acts with a police officer and was forced into a car where the officer beat and raped her.⁶⁵

Beyond physical violations, activists reported that sexual minorities have been subject to arbitrary arrest and detention based on their appearance, even in instances in which no crime has been committed.⁶⁶ For example, a transgender woman recounted how she was pulled off a bus by a police officer who searched her purse.⁶⁷ When she objected to the search, the police officer called her a man and subjected her to a body search.⁶⁸

SOCIAL PORTRAYALS OF LGBT CRIME VICTIMS

LGBT activists stated that in news reports of violent crimes against members of the LGBT community the descriptions provided by the Salvadoran media have been sensationalist, either blaming victims for provoking hate crimes against them or failing entirely to acknowledge that the

crimes were motivated by the victim's sexual orientation or gender expression.⁶⁹ Like the police, advocates reported that the media often classified violence against the community as common crime rather than crimes motivated by animus – despite the frequently brutal nature of the violence. For example, in May 2011, the two primary Salvadoran dailies reported the murder of a man, who the papers noted was a *travesti*, who was attacked on a minibus.⁷⁰ In another instance, in September 2011, the media reported that the body of “Sandra,” identified as an “alleged homosexual,” was found stoned to death in a neighborhood subdivision.⁷¹ While both stories alluded to the LGBT identity of the victim, neither raised the possibility that the victims were targeted because of their sexual identity.

Salvadoran LGBT organizations track media portrayals of violence against community members on a regular basis and report that many instances of violence of which they are directly aware through contacts in the community are simply not covered by mainstream media.⁷² During the summer of 2009, when the transgender community experienced an unprecedented wave of violence, only one article was published in a major newspaper that detailed the violence, covering only two of the homicides.⁷³ In failing to report on the murder of members of the LGBT community, coupled with the failure of the police to investigate, the deaths of members of the LGBT community are not publicly condemned nor memorialized by society.

A Culture of Impunity

In 2003, the UN Human Rights Committee pointed to the impunity of perpetrators of violent crimes against members of the LGBT community in El Salvador and expressed concern about the Attorney General Office's failure to act on several LGBT murder cases.⁷⁴ Even after extensive media coverage of the criticism of the government's failure to hold perpetrators accountable for these crimes by the UN, the brutal murders of multiple transgender women in 2009 remain uninvestigated.⁷⁵ Karla, a transgender activist, described the lack of response on the part of the authorities:

*They are murdering us and our government is not doing anything but picking up the bodies and the cases are not resolved . . . there is no one serving a sentence for having killed a transgender community member . . . there is nothing, and we ask the Procuraduría [Attorney General], we ask the PDDH, we ask the police, and [they say] "no, we cannot do anything."*⁷⁶

LACK OF REPORTING

Victims of crime in El Salvador may submit a police report with the PNC. In instances in which a government employee is alleged to be responsible for the abuse, Salvadorans may file an administrative complaint (referred to in Spanish as a *denuncia*) either with the Ombudsman for the Defense of Human Rights [Procuraduría para la Defensa de los Derechos Humanos, also referred to as PDDH] or directly with the government agency involved. For cases against a PNC officer, the PDDH investigates and if there is a resolution in favor of the victim,⁷⁷ the information is sent to the Inspectoría of the PNC (the internal review unit) with a recommended response that a chief officer has discretion to implement.⁷⁸ A PNC officer found responsible for violations may face sanctions and a loss of pay.⁷⁹ However, some advocates reported that because these resolutions are merely recommendations and not binding, they do not often result in sanctions, creating a disincentive for the community to utilize the process.⁸⁰

The Directorate of Sexual Diversity, the office within the Secretariat of Social Inclusion in charge of LGBT issues, offered a similar assessment and reported that the number of complaints actually filed does not accurately reflect the full scope of abuses carried out against the LGBT community.⁸¹ Fear of being abused, harassed, or mocked during the process of filing a complaint were among the reasons cited by activists as preventing many victims from coming forward.⁸² Activists also stated that family members of victims are often reluctant to come forward to file complaints or corroborate claims of victims because they experience similar forms of harassment due to the stigma associated with being a relative of an LGBT individual.⁸³

Many LGBT community members reported that they are reluctant to file complaints because they simply do not trust the process,⁸⁴ believe it takes too long, and is ineffective.⁸⁵

Some community members described fear of possible retaliation, particularly in instances in which the crime involved gang violence, as an additional barrier to reporting crimes and rights violations.⁸⁶ Advocates reported that HIV positive individuals are particularly wary of possible backlash due to the stigma associated with their status.⁸⁷ Similarly, activists report that women underreport crimes due to gender discrimination; government authorities may harass female victims or do not take crimes reported by them seriously.⁸⁸

Finally, both the Director of Sexual Diversity and an official with the PDDH stated that many LGBT individuals do not know their rights or the process by which to report a crime or file a complaint; therefore, many violations simply go unreported and uninvestigated.⁸⁹

“ I went once to make a denuncia for mistreatment by the police but as we were leaving we turned around and saw them grab the papers and rip them up and throw them in the garbage.”

Fransheska Stacy Reyes, ASTRANS

LACK OF INVESTIGATION & VINDICATION

When LGBT individuals did file complaints, there was a perception among some in the community that authorities did not conduct any formal follow-up. Activists reported that officials processing complaints from LGBT individuals made statements to victims that they were responsible for the incident.⁹⁰ One individual noted: “Nothing ever happens. They enter the denuncia and it just stays there. That is why people say: ‘Why am I going to continue with such a long process, gain enmities and enemies, if [the authorities] do not do anything?’”⁹¹

Filing a complaint was reportedly even more difficult in situations in which PNC or CAM officers were the alleged perpetrators of the violations.⁹² Advocates explained that bringing such a complaint directly to the PNC was considered wholly ineffective as it was believed “there is no credibility in those institutions” and officers simply cover for one another.⁹³ Karla, a transgender activist, recounted going to the PNC to file a complaint against a police officer for rape.⁹⁴ The officer resisted taking her statement, claiming it was impossible that this type of violation occurred.⁹⁵ Similarly, Fransheska, a transgender woman, recalls filing a complaint with the PNC for mistreatment by the police, and after completing the paperwork “as we were leaving we turned around and saw them grab the papers and rip them up and throw them in the garbage.”⁹⁶ Another transgender woman reported that she was detained by CAM officers, abused and locked in a chicken cage; the formal complaint she filed went uninvestigated and the officers involved were not sanctioned.⁹⁷

Moreover, accounts of police responses to reports of crimes committed against LGBT individuals indicated that these crimes were taken less seriously. Several transgender women reported that when calling with an emergency the PNC operator hung up on them, something they attributed to the fact that they had given a female name but were speaking with a more masculine voice.⁹⁸ Similarly, activists reported instances in which police officers were direct witnesses to a crime committed against a member of the LGBT community and the officers did not intervene to stop the crime. For example, a transgender woman recounted how gang members robbed her at gunpoint in front of nearby police officers; the officers did nothing to prevent the crime, to assist her, or to investigate.⁹⁹

A lack of response to lodged complaints, coupled with a fear of retaliation, reinforces victim silence according to a transgender advocate.¹⁰⁰

LACK OF RECOGNITION

Lack of data was another impediment to the effective administration of justice identified by activists. Representatives of community groups reported that cases of violence against LGBT victims were often registered as “crimes of passion” or “intent to rob” rather than as hate crimes, even where the crimes involved torture and brutality clearly based on animus towards the victim’s LGBT identity.¹⁰¹ An activist who was attacked in his home filed a complaint with the police; however, when he attempted to describe it as an LGBT hate crime, the PNC informed him there was no blank on the form to capture that information.¹⁰² Similarly, after a neighbor made death threats against him, a gay man decided to make a formal report to the PNC. The officer taking the complaint refused to write in the report that the victim was gay, that he lived with his partner, and that he considered the attacks an expression of homophobia.¹⁰³ The officer stated that he was unable to include the information because the law does not contemplate those circumstances.¹⁰⁴ This failure of the authorities to accept and investigate complaints of alleged abuses against LGBT individuals creates a gap in data about the scope of the problem and sends a

message to the community that the law does not protect LGBT individuals from targeted crimes.

“Remember that here we are very much imbued with a ‘machista’ culture and to remove that culture, there needs to be substantial education for many years. We have been immersed in the ‘machista culture’ for centuries. That will not just go away overnight.”

Ana Cristina Fernández, Sub-commissioner of the Human Rights Department, National Civilian Police (PNC)

Achievements and Remaining Challenges

In 2010 President Funes issued Presidential Decree 56, which prohibits discrimination against members of the LGBT community by public employees.¹⁰⁵ The Decree also created the National Directorate for Sexual Diversity within the office of the Secretary of Social Inclusion, with the goal of eradicating discrimination against LGBT individuals, promoting inclusive public policies, ensuring equal treatment in the provision of services, and increasing awareness and sensitivity about the LGBT community.¹⁰⁶ According to its first Director, the office serves as a vehicle within government to promote rights protections for LGBT individuals.¹⁰⁷

While Decree 56 was significant in its recognition of LGBT rights and its call for public employees to refrain from discrimination, advocates claimed it has not been widely acknowledged or enforced.¹⁰⁸ One advocate described the gap between the decree and its implementation this way: “The police do not even know about the Decree [56], they do not know it exists... . I can invent 80,000 laws...but if I do not make them known, who is going to know about those laws? No one.”¹⁰⁹

According to the Director of the Directorate for Sexual Diversity, many government offices have yet to revise their procedures, internal policies, or manuals to reflect Decree 56 and its implications.¹¹⁰ Moreover, at the time of our visit, the Directorate had a single staff person with limited resources and was focused on how to educate government officials about the decree and the obligations it creates.¹¹¹ As a result, the state has not implemented a public education program to inform LGBT individuals of their rights under the decree.¹¹²

Importantly, the Human Rights Department within the PNC has recognized that due to Decree 56 it has a greater responsibility to conduct more specific trainings about the LGBT community. When asked about discrimination against the LGBT community within the police force, the Sub-commissioner of the PNC’s Human Rights Department replied: “Yes there is, yes there is... . Remember that here we are very much imbued with a ‘machista’ culture and to remove that culture, there needs to be substantial education for many years. We have been immersed in the ‘machista culture’ for centuries. That will not just go away overnight.”¹¹³

This Department has been developing a set of workshops¹¹⁴ and civil society organizations have been involved with some of the trainings to ensure that they provide accurate information about the community.¹¹⁵ However, given the ongoing reports of abuse against the LGBT community there appears to be an urgent need for training of the PNC, particularly among street officers. Representatives of the International Human Rights Law Clinic observed one such training conducted by members of Asociación Entre Amigos to supervisory-level PNC officers, the focus of which was on general awareness about the LGBT community.¹¹⁶ Those in attendance were charged with training their subordinates. This was the first time many police supervisors were being introduced to material about the LGBT community and additional training for supervisors likely will be necessary to ensure adequate supervision and training of police patrolling the streets who are likely to be the first responders to abuses of LGBT individuals.¹¹⁷

Importantly, the PDDH established a permanent forum on LGBT human rights in May 2012.¹¹⁸ The forum, comprised of LGBT organizations and advocates and facilitated by the PDDH, will serve as a platform for initiatives to increase legal protections, combat discrimination and violence, and increase access to justice.¹¹⁹ The forum offers an unprecedented opportunity to integrate the concerns of the LGBT community into the work of the Ombudsman and coordinate the efforts of civil society and the government to advance LGBT human rights.

Representatives of civil society organizations reported their efforts to bolster and cultivate the use of complaints to address abuses. Some community organizations accompanied individuals through the process of filing complaints and monitored and assisted with follow-up.¹²⁰ There have been some favorable outcomes resulting from the use of complaints. Mónica, a transgender woman who was harassed by a PNC officer on a bus, filed a complaint that was decided in her favor.¹²¹

Finally, a 2010 law which went into effect in January 2012, the Special Integral Law for a Life Free of Violence for Women, has criminalized certain crimes against women that were not previously covered in the Penal Code, including femicide, psychological abuse, and other forms of violence against women.¹²² Utilizing an innovative gender-based violence prevention perspective that broadens protections beyond domestic violence,¹²³ the law is binding on both public and private actors.¹²⁴

Despite these new laws, there is no legislation that explicitly protects the LGBT community and many existing laws are not enforced. There is an urgent need to strengthen legal protections for the LGBT community.

Notes: Systemic Violence and the LGBT Community

- 1 “El Salvador: tantos homicidios como en la guerra civil,” [“El Salvador: as many homicides as during the civil war”] El País, Oct. 10, 2011, http://internacional.elpais.com/internacional/2011/10/10/actualidad/1318205483_980280.html [last visited May 17, 2012].
- 2 “Los derechos humanos en el 2009” [“Human Rights in 2009”], Instituto de Derechos Humanos de la Universidad Centroamericana (2009) at 19 [hereinafter Human Rights in 2009] <http://www.uca.edu.sv/publica/idhuca/propuestas.html> [last visited May 17, 2012].
- 3 “Homicidios en Centroamérica” [“Homicides in Central America”], La Prensa Gráfica, Mar. 2011, <http://multimedia.laprensagrafica.com/pdf/2011/03/20110322-PDF-Informe-0311-Homicidios-en-Centroamerica.pdf> [last visited May 17, 2012].
- 4 *Crime and Violence in Central America: A Development Challenge*, The World Bank Sustainable Development Department and Poverty Reduction and Economic Management Unit Latin America and the Caribbean Region, (2011) at 1 (“The homicide rate for Central America as a whole is 35.4 per 100,000 inhabitants.”) http://siteresources.worldbank.org/INTLAC/Resources/FINAL_VOLUME_I_ENGLISH_CrimeAndViolence.pdf [last visited May 17, 2012].
- 5 *The Administration of President Mauricio Funes: A One-Year Assessment*, Woodrow Wilson Center Latin American Program (March 2011) at 2, http://www.wilsoncenter.org/sites/default/files/Funes_One_Year.pdf [last visited May 17, 2012].
- 6 Oxfam America, *One Step Forward in Campaign to End Violence Against Women – El Salvador’s Legislative Assembly Passes New Law Regarding Violence Against Women*, Dec. 15, 2010, <http://www.oxfamamerica.org/articles/one-step-forward-in-campaign-to-end-violence-against-women> [last visited May 17, 2012].
- 7 Gobierno de España, Ministerio de Asuntos Exteriores y de Cooperación, *El Salvador: Aprobada la Ley especial integral para una vida libre de violencia para las mujeres*, Dec. 2, 2010, http://www.aacid.es/es/noticias/2010/12_Diciembre/2010_12_Ley_mujeres_ElSalvador.html [last visited May 18, 2012].
- 8 *Id.* “La impunidad en la que quedan estos delitos resulta llamativa, sólo el 10% de los casos obtienen una sentencia condenatoria.” [The impunity with which these crimes remain is striking, only 10% of cases get a conviction].
- 9 Human Rights in 2009, *surpa* note 2, “Así lo evidencian los más de 4,300 homicidios ocurridos, en la mayoría de los cuales no se encuentran ni son castigados sus responsables; la cadena institucional...adolece de inercia y negligencia, incapacidad y acomodamiento. Esas fallas se confabulan a favor de la impunidad y en contra de la sociedad.” [This is evidenced by the more than 4,300 homicides committed, in the majority of which those responsible are neither found nor punished; the institutional chain... suffers from inertia and negligence, incompetence and convenience. These failures conspire in favor of impunity and against society.]

- 10** *No Place to Hide: Gang, State, and Clandestine Violence in El Salvador*, International Human Rights Clinic, Harvard Law School, 2007, at 65 [hereinafter *No Place to Hide*] [http://www.law.harvard.edu/programs/hrp/documents/FinalElSalvadorReport\(3-6-07\).pdf](http://www.law.harvard.edu/programs/hrp/documents/FinalElSalvadorReport(3-6-07).pdf) [last visited May 17, 2012].
- 11** *Id.*
- 12** Antonio Soriano, *Gobierno revisa leyes contra la delincuencia [Government reforms laws against delinquency]*, *El Mundo*, April 12, 2011, <http://www.elmundo.com.sv/politica/9247-gobierno-revisa-leyes-contra-la-delincuencia.html> [last visited May 17, 2012].
- 13** Roundtable with Entre Amigos Advocates, in San Salvador, El Sal. (Feb. 23, 2011) [hereinafter Roundtable with Entre Amigos Advocates].
- 14** Interview with Karla Stephanie Avelar Orellana (with Sayuri and Alejandra), Director, COMCAVIS-TRANS, in San Salvador, El Salv. (Feb. 22, 2011) [hereinafter Interview with COMCAVIS-TRANS].
- 15** *Id.*
- 16** See Harvard Law School, *The Violation of the Rights of Lesbian, Gay, Bisexual, and Transgender Persons in El Salvador* (2010) at 8 [hereinafter Harvard LGBT Shadow Report] http://www2.ohchr.org/english/bodies/hrc/docs/ngo/LGBT_Shadow_Report_El_Salvador_HRC100.pdf [last visited May 17, 2012]. See also Interview with COMCAVIS-TRANS, *supra* note 14.
- 17** See Harvard LGBT Shadow Report *supra* note 16. See also William Hernandez, Founder and Director of Asociación Entre Amigos, public talk given at U.C. Berkeley School of Law, Oct. 25, 2010 [hereinafter Hernandez speech]; Interview with COMCAVIS-TRANS, *supra* note 14.
- 18** *El Salvador Crime and Safety Report*, U.S. Department of State Bureau of Diplomatic Security, Mar. 2011, at 2, <https://www.osac.gov/Pages/ContentReportPDF.aspx?cid=10561> [last visited May 17, 2012].
- 19** “El Salvador: Political, Economic, and Social Conditions and U.S. Relations,” Congressional Research Service, Jan. 2011 at 5, http://digital.library.unt.edu/ark:/67531/metadc31447/m1/1/high_res_d/RS21655_2011Jan03.pdf [last visited May 17, 2012].
- 20** Affidavit of [redacted], In re: Juan Alvarez, U.S. Immigration Court, Arlington, VA, 2009 <http://www.unhcr.org/refworld/pdfid/4b5708f42.pdf> [last visited May 17, 2012].
- 21** The first *mano dura* (iron fist) policy granted the PNC authority to initiate judicial proceedings against suspected gang members, enabling it to sidestep procedural protections in the Office of the Prosecutor. Domestic and international organizations argued that these provisions violated El Salvador’s Constitution, several international treaties and norms, and basic principles of criminal law. Police forces arrested scores of individuals, predominantly tattooed youth, charging them with gang membership. Nevertheless, citing gross violations—including the criminalization of gang membership and the trial of juveniles as adults—of both the Salvadoran Constitution and international human rights instruments binding in El Salvador, several judges refused to apply the provision rendering gang membership a crime. As a consequence, these judges released most of those captured in the mass arrests by the PNC.
- On April 1, 2004, the Supreme Court declared the legislation unconstitutional. The next two iterations of the anti-gang legislation did not fully cure the constitutional deficiencies and the current 2010 anti-gangs legislation is still a vehicle through which the police can perpetuate human rights abuses. See Decreto [Decree] No. 158/2003, Ley Anti-Maras [Anti-Gangs Act] [hereinafter LAM I] (2003), at art. 30, <http://www.glin.gov/view.action?glinID=93702>; See, e.g., IDHUCA, Análisis del IDHUCA Sobre la “Ley Anti Maras” y Propuesta de Reformas, San Salvador, El Salvador [IDHUCA Analysis on the “Anti-Gang Law” and Proposed Reforms], 6 (2003), <http://www.uca.edu.sv/publica/idhuca/leymaras.pdf> [last visited May 17, 2012]; Amnesty Int’L, El Salvador: Open Letter on the Anti-Maras Act 6 (2003), www.amnesty.org/en/library/info/AMR29/009/2003/en [last visited May 17, 2012]; see also Office of the High Commissioner for Human Rights, Committee on the Rights of the Child, Concluding Observations: El Salvador, paras. 67-68, U.N. Doc. CRC/C/15/Add.232 (June 30, 2004); see, e.g., Daniel Valencia, El delito de ser marero [The crime of being a gang member], *El Faro*, Nov. 8, 2003, http://www.elfaro.net/secciones/noticias/20030811/noticias1_20030811.asp# [last visited May 18, 2012]; Alberto López, Jueces sólo procesan 87 pandilleros [Judges only process 87 gang members], *El Diario de Hoy*, Oct. 25, 2003, <http://www.elsalvador.com/noticias/2003/10/25/nacional/nacio2.html> [last visited May 18, 2012]; see, e.g., Luis Enrique Salazar Flores, Leyes Anti Maras: Los reverses de la Justicia Penal Juvenil en El Salvador [Anti-Gang Laws: The setbacks of the Juvenile Justice System in El Salvador], http://www.iidh.ed.cr/comunidades/ombudsnet/docs/docsomb_pac/el%20salvador,%20leyes%20anti%20maras.htm [last visited May 18, 2012]; see also Wilfredo Salamanca, Las fallas del primer plan [The failures of the first plan], *El Diario de Hoy*, Aug. 31, 2004, <http://www.elsalvador.com/noticias/2004/08/31/nacional/nac17.asp> [last visited May 18, 2012].
- 22** Interview with Fransheska Stacy Reyes, Coordinator, AS-TRANS, in San Salvador, El Salv. (Feb. 23, 2011) [hereinafter Interview with ASTRANS].
- 23** *Id.*
- 24** “The New Anti-Gang Law Took Effect This Week,” *Voices from El Salvador*, Sept. 23, 2010, <http://voiceselsalvador.wordpress.com/2010/09/23/the-new-anti-gang-law-took-affect-this-week/> [last visited May 17, 2012].
- 25** Diálogo, *El Salvador Passes Anti-‘Mara’ Bill*, Sept. 13, 2010, http://www.dialogo-americas.com/en_GB/articles/rmisa/features/regional_news/2010/09/13/feature-01 [last visited May 17, 2012]; Julian Miglierini, BBC News, El Salvador, *El Salvador Fears Mexico Drug Cartel Violence Overflow*, Dec. 22, 2010, <http://www.bbc.co.uk/news/world-latin-america-12023116> [last visited May 17, 2012].
- 26** Ley de proscripción de maras, pandillas, agrupaciones, y organizaciones de naturaleza criminal [Law prohibiting gangs, groups and organizations of a criminal nature], art. 3, DO, No. 169, Tomo 388, 9 de Enero del 2010, http://www.asamblea.gob.sv/eparamento/indice-legislativo/buscador-de-documentos-legislativos/ley-de-proscripcion-de-maras-pandillas-agrupaciones-asociaciones-y-organizaciones-de-naturaleza-criminal/at_download/archivo_documento_legislativo. [last visited May 18, 2012].

- 27 “The New Anti-Gang Law Took Effect This Week,” Voices from El Salvador, Sept. 23, 2010, <http://voiceselsalvador.wordpress.com/2010/09/23/the-new-anti-gang-law-took-affect-this-week/> [last visited May 18, 2012].
- 28 Harvard LGBT Shadow Report, *supra* note 16.
- 29 *Id.*
- 30 Marielos Olivo, *Diagnostico para la construcción de políticas públicas inclusivas, diversas y respetuosas de los derechos humanos de las personas con orientación e identidad sexual diversa* [Diagnostic for the construction of inclusive and diverse public policies respectful of the human rights of persons with a diverse sexual orientation and identity], Coordinación LGBT. El Salvador 2007, at 16 [hereinafter Diagnostico por Coordinación LGBT].
- 31 *Id.*
- 32 Andrea Ayala, *Sistematización de Hechos de agresión a la comunidad de Lesbianas, Gays, Bisexuales y Trans de El Salvador*, Alianza por la Diversidad Sexual LGBT (2009), [hereinafter Sistematización por la Alianza] <http://www.portalsida.org/repos/Sistematización%20hechos%20de%20agresión%20LGBTdoc%20final.pdf> [last visited May 17, 2012].
- 33 *Id.* at 15.
- 34 *Id.* at 16.
- 35 *Id.*
- 36 *Id.* (“ella va a morir, es lo que merece”)
- 37 *Id.* at 15.
- 38 *Id.* at 14-17.
- 39 Interview with COMCAVIS-TRANS, *supra* note 14; *see also* Interview with ASTRANS, *supra* note 22.
- 40 Harvard LGBT Shadow Report, *supra* note 16 at 5, (Christian Democrat Party, with the support of the Partido de Conciliación Nacional (National Conciliation Party) and Alianza Republicana Nacionalista (Nationalist Republic Alliance, ARENA).
- 41 William Hernandez Speech, *supra* note 17.
- 42 *Id.*
- 43 *See* Peace Agreement (Chapultepec), *The United Nations and El Salvador 1990-1995*, United Nations Blue Books Series, vol. IV (New York: United Nations, Dept. of Public Information, 1995), 193-230, Peace Agreements Digital Collection: El Salvador, United States Institute of Peace Library, <http://www.usip.org/publications/peace-agreements-el-salvador> [last visited May 17, 2012]; Policía Nacional Civil, Historia Policía Nacional Civil, <http://www.pnc.gob.sv/conocenos/historia.php> [last visited May 17, 2012]; *see also* Stuart Cullen & William H. McDonald, Encyclopedia of Law Enforcement, *The Republic of El Salvador: The National Civil Police (PNC)* (2002), http://www.referenceworld.com/sage/law/index_39.html [last visited May 17, 2012]. The PNC became fully operational late in 1994, replacing all national government law enforcement agencies, including the National Police, an element of the Salvadoran armed forces, the Treasury Police, and both civilian defense forces and paramilitary organizations.
- 44 *Seguridad Pública y Privada: El Salvador* [Public and Private Security: El Salvador], Organization of American States, Department of Public Security, at 16, [hereinafter *Seguridad Pública y Privada*]
- <http://www.oas.org/dsp/documentos/Publicaciones/Seg%20Publi-%20EI%20Salvador.pdf> [last visited May 17, 2012].
- 45 U.S. Department of State, 2009 *Human Rights Report: El Salvador*, [hereinafter DOS Human Rights Report] <http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136112.htm> (Of the reported complaints, a mere forty-seven cases were referred to special investigation units, another 1,181 officers received sanctions)
- 46 *Id.*
- 47 Interview with COMCAVIS-TRANS, *supra* note 14. [“La relación entre policía y trans es un caos total. Abuso de autoridad, abusos de derechos humanos, abusos de violencia, violaciones sexuales...bueno, de la policía podemos decir oprobios...en la policía hay personas que nos agreden, nos insulten, nos violen, nos acosen, nos extorsionen, y todo. Por que? Porque para ellos, nosotros somos delincuentes y no tenemos derechos. Simple y sencillamente no tenemos derechos.”]
- 48 *Seguridad Pública y Privada*, *supra* note 44 at 14.
- 49 Roundtable with Entre Amigos Advocates *supra* note 13.
- 50 Interview with COMCAVIS-TRANS, *supra* note 14.
- 51 Interview with Orquideas Del Mar, in San Salvador, El Salv. (Feb. 25, 2011) [hereinafter Interview with Orquideas Del Mar].
- 52 LGBT Community Roundtable, in San Salvador, El Salv. (Feb. 22, 2011) [hereinafter LGBT Community Roundtable].
- 53 *Id.*
- 54 *Id.*
- 55 Tony Grew “Gay refugees face prejudice across the world,” Pink News: Europe’s Largest Gay News Service, Apr. 15, 2008. The man was HIV positive and when the police officers who raped him discovered they had been infected they called his sister threatening to kill him. <http://www.pinknews.co.uk/news/articles/2005-7403.html/> [last visited May 18, 2012].
- 56 Diagnostico por Coordinación LGBT, *supra* note 30 at 17.
- 57 Interview with Ana Cisneros, Independent LGBT Activist, (Sept. 21, 2011) [hereinafter Interview with Ana Cisneros] “Hay mujeres que les han metido en la misma carcelería cuando han sido capturadas con hombres y han terminado violadas.” [“There are women who have been placed in the same cell when they are detained with men and they end up being raped.”]
- 58 *Id.*; *see also* Harvard LGBT Shadow Report, *supra* note 16 at 11.
- 59 *Id.*; *see also* Interview with ASTRANS, *supra* note 22.
- 60 Interview with COMCAVIS, *supra* note 14.
- 61 *Id.* [“No se puede generalizar...Eso es lo que hace nuestra policía, nuestro personal de salud, nuestros agentes de CAM...todos generalizan por que una usa drogas, todas usamos drogas, que una tiene VIH, todas tenemos VIH...porque una es ladrona, todas somos ladronas.”]
- 62 Concluding Observations of the Human Rights Committee regarding El Salvador, July 22, 2003, CCPR/CO/78/SLV at para 16. *See also* Ordenanza Contravencional Del Municipio de San Salvador [Municipal Contravention Ordinance of San Salvador], Nov. 17, 1999, Decreto No. 49, D.O. No. 171, Tomo 376, Sept. 17, 2007.

<http://www.csj.gob.sv/leyes.nsf/3bbd868cb40ce9d106256a8400764b33/fececc6696e533d8062568a2005f2513?OpenDocument> -

63 Interview with Guadalupe de Castañeda, Director, ICW El Salvador, in San Salvador, El Salv. (Feb. 25, 2011); Interview with ASTRANS, *supra* note 22; Interview with Orquideas Del Mar, *supra* note 51; and Interview with Alfredo Carvajal, Project Areas Coordinator, and Iris Garcia, HIV Project Coordinator, ASPs, in San Salvador, El Salv. (Feb. 25, 2011). *See also* Harvard LGBT Shadow Report, *supra* note 16 at 12.

64 Diagnostico por Coordinación LGBT *supra* note 30 at 16.

65 *Id.* at 17.

66 Interview with COMCAVIS-TRANS, *supra* note 14; *see also* Interview with ASTRANS, *supra* note 22; *see also* Interview with Dora Estela Rivera, Coordinador, Asociación Atlacatl Vivo Positivo, in San Salvador, El Salv. (Feb. 22, 2011); *see also* Interview with Orquideas Del Mar, *supra* note 51; *see also* LGBT Community Roundtable, *supra* note 52.

67 Harvard LGBT Shadow Report, *supra* note 16 at 13.

68 *Id.*

69 Roundtable with Entre Amigos Advocates, *supra* note 13.

70 Maynor Ruiz & Franklin Zelaya, *Reportan cinco homicidios en las últimas horas [Five homicides reported in the last hours]*, EL DIARIO DE HOY, May 20, 2011, http://www.elsalvador.com/mwedh/nota/nota_completa.asp?idCat=8613&idArt=5856747 [last visited May 17, 2012]; *See also* Ernesto Perez, *Mayo ya supera 230 muertes por violencia [May already surpasses 230 violent deaths]*, La Presna Grafica, May 20, 2011, <http://www.laprensagrafica.com/el-salvador/judicial/192779-asesinan-a-trasvesti-em-le-interior-de-un-microbus-en-mejicanos.html> [last visited May 17, 2012].

71 Diana Escalante, Insy Mendoza, & Jesus Corvera, “*Matan a dos primos al retirar dinero en Aguilares y asesinan a dos estudiantes*” [“Two cousins killed as they withdrew money in Aguilares and two students murdered”], El Diario de Hoy, Sept. 21, 2011, http://www.elsalvador.com/mwedh/nota/nota_completa.asp?idCat=47859&idArt=6217494 [last visited May 17, 2012], (“Mientras que un supuesto homosexual, identificado solo como “Sandra,” fue lapidado en la lotificación Platanares, en Zacatecoluca”). [“While an alleged homosexual, identified only as “Sandra,” was stoned in the subdivision Platanares in Zacatecoluca.”].

72 *Id.*

73 *Id.*

74 Concluding Observations of the Human Rights Committee regarding El Salvador, July 22, 2003, CCPR/CO/78/SLV at para 16.

75 Interview with COMCAVIS-TRANS, *supra* note 14.

76 *Id.* [“Nos están asesinando y nuestro gobierno no está haciendo nada más que levantamiento de cuerpos, pero resoluciones de los casos no hay. Hasta ahorita no hay nadie que está cumpliendo una condena por haber asesinado a una de compañera. No hay nada y le preguntamos a la procuraduría, le preguntamos a la PDDH, le preguntamos a la policía, y no, no podemos hacer nada.”]

77 Interview with Lic. Oscar Luna, Ombudsman, Office of the Ombudsman for the Defense of Human Rights (PDDH), in San

Salvador, El Salv. (Feb. 22, 2011). These complaints are received by the PDDH, which then classifies the complaint and determines whether there was a violation of the rights of the individual. It is then revised; there is a preliminary investigation, an official document prepared, an initial resolution admitting the complaint, a thorough investigation, the resolution is issued and sent, and then a monitoring phase to check if recommendations have been followed. *See also* Interview with Jaime Argueta, Director, HIV Department of PDDH, in San Salvador, El Salv. (Feb. 23, 2011) [hereinafter Interview with HIV Department of PDDH].

78 Interview with Ana Cristina Fernández, Sub-commissioner of the Human Rights Department, National Civilian Police (PNC), in San Salvador, El Salv. (Feb. 25, 2011) [hereinafter Interview with PNC Human Rights Department].

79 *Id.*

80 Interview with Juan Francisco Ortiz, General Director, Fundasida, in San Salvador, El Salv. (Feb. 23, 2011) [hereinafter Interview with Fundasida]; *see also* Interview with Barbara Romero, Director of Sexual Diversity, Sexual Diversity Directorate under the Secretariat of Social Inclusion, in San Salvador, El Salv. (Feb. 22, 2011) [hereinafter Interview with Director of Sexual Diversity].

81 Interview with Director of Sexual Diversity, *supra* note 80.

82 *See* Interview with Alba América Girola Zelaya, Directora Ejecutiva, CEMUJER, in San Salvador, El Salv. (Feb. 21, 2011) [hereinafter Interview with CEMUJER]; *see also*, Roundtable with Entre Amigos Advocates *supra* note 13; *see also* Interview with ASTRANS, *supra* note 22.

83 Roundtable with Entre Amigos Advocates, *supra* note 13.

84 Interview with Deysi Mejia, Coordinator of the Program of Pastoral Accompaniment, Fundación Contrasida, in San Salvador, El Salv. (Feb. 24, 2011) [hereinafter Interview with Fundación Contrasida].

85 *See Id.*; *see also*, Interview with Eliseo Zavala, Facilitator in the Prevention of HIV, and Mauricio Sanchez, Sub-Coordinator, Red-Sal, in San Salvador, El Salv. (Feb. 24, 2011) [hereinafter Interview with Red-Sal].

86 Interview with ASTRANS, *supra* note 22.

87 Interview with CEMUJER, *supra* note 82.

88 LGBT Community Roundtable, *supra* note 52; *See also*, Interview with Fundación Contrasida, *supra* note 84.

89 Interview with Director of Sexual Diversity, *supra* note 80; Interview with HIV Department of PDDH, *supra* note 77.

90 *See* Interview with Fundación Contrasida, *supra* note 84; Interview with Red-Sal, *supra* note 85; Interview with COMCAVIS-TRANS, *supra* note 14.

91 LGBT Community Roundtable, *supra* note 52. [“Nada pasa. Se llegan para poner la denuncia y no hacen nada. Entonces la gente dice, ‘pare que voy a seguir yo con este proceso, que es un proceso tan largo, meterme con enemistades y enemigos, si realmente no hacen nada?’”]

92 Interview with Director of Sexual Diversity, *supra* note 80; ‘Denuncias’ filed with the police can either be ‘external’ regarding private actors or ‘internal’ regarding violations by the PNC. The

- police commander on guard receives the complaint, and then a formal procedure begins where the document is passed to the Sub-commander to verify the case, then to the sub-chief and then it is assigned to either the 'internal' or 'external' office within the Department of Protection. From here, there is an investigation and then a resolution either that human rights were violated or were not. See also Interview with PNC Human Rights Department, *supra* note 78.
- 93** Interview with Fundasida, *supra* note 80 "Se supone que hay un sistema de denuncias pero como es un sistema, ellos mismos se cubren... No hay credibilidad en las instituciones. Muchas personas prefieren venir a una NGO u otra institución que no es de la misma. Debería de ver un fortalecimiento de la sociedad civil porque al final es mas accesible para la gente." ["There is supposedly a system of complaints, but since it is a system, those same people are in charge of it. There is no credibility in these institutions. Many people prefer to go to an NGO or to another institution [that is not attached to the complaint.] There should be a strengthening of civil society because in the end, that is more accessible for people."]; See also Interview with ASTRANS, *supra* note 22.
- 94** Interview with COMCAVIS-TRANS, *supra* note 14.
- 95** *Id.*
- 96** Interview with ASTRANS, *supra* note 22. ["Fui a poner una denuncia por maltrato por la PNC, pero cuando nosotras dimos vuelta vimos que agarraron los papeles y los rompieron y los echaron en la basura."]
- 97** Interview with COMCAVIS-TRANS, *supra* note 14.
- 98** Interview with COMCAVIS-TRANS, *supra* note 14.
- 99** Interview with ASTRANS, *supra* note 22.
- 100** *Id.*
- 101** Interview with ASTRANS, *supra* note 22; Interview with Joaquin Cáceres, Interview with Entre Amigo Advocates, *supra* note 13.
- 102** Interview with Director of Sexual Diversity, *supra* note 80.
- 103** Harvard LGBT Shadow Report, *supra* note 16 at 10.
- 104** *Id.*
- 105** Decreto No. 56 [Decree 56], DO, No. 86, Tomo 387, May 12 2010, <http://xa.yimg.com/kq/groups/22079676/1118999878/name/Decreto+contra+la+discriminación+por+identidad+y+orientación.pdf> [last visited May 18, 2012].
- 106** Interview with Director of Sexual Diversity, *supra* note 80, see also web site of Secretary of Social Inclusion, Sexual Diversity Directorate http://inclusion-social.presidencia.gob.sv/index.php?option=com_content&view=article&id=59 [last visited May 17, 2012].
- 107** *Id.*
- 108** Interview with COMCAVIS-TRANS, *supra* note 14.
- 109** *Id.* ["El Decreto nuestra policía ni lo conoce, no sabe que existe... Yo puedo inventar 80,000 leyes... pero si yo no las divulgo, quien se va a dar cuenta de esas leyes? Nadie."]
- 110** Interview with Director of Sexual Diversity, *supra* note 80.
- 111** *Id.*
- 112** Interview with COMCAVIS-TRANS, *supra* note 14.
- 113** Interview with PNC Human Rights Department, *supra* note 78. ["Sí hay. Sí hay, acuérdesese que aquí estamos bien, bien imbuidos en una cultura 'machista' y para quitar la cultura se necesita bastante educación, por bastantes años. Tenemos siglos de estar inmersos en la cultura machista. Eso no se va de la noche a la mañana."]
- 114** *Id.*
- 115** Interview with ASTRANS *supra* note 22; Interview with Entre Amigo Advocates, *supra* note 13.
- 116** Entre Amigos training to PNC Officers from the Human Rights Division (Feb. 21, 2011) (audio on file with the authors).
- 117** *Id.*
- 118** Procuraduría para la Defensa de los Derechos Humanos (PDDH) [Ombudsman for the Defense of Human Rights], "PDDH lanza Mesa Permanente sobre Derechos Humanos de la Población LGBTI" ["PDDH launches Permanent Forum of Human Rights of the LGBT People"] May 17, 2012 <http://www.pddh.gob.sv/menupress/menunoti/316-pddh-lanza-mesa-permanente-sobre-derechos-humanos-de-la-poblacion-lgbti> [last visited May 21, 2012].
- 119** *Id.*
- 120** Interview with Mónica Hernández, Leader of Unión Arcoíris, ASPIDH-Unión Arcoíris, in San Salvador, El Salv. (Feb. 24, 2011).
- 121** *Id.*
- 122** ORMUSA, *Indicadores de Violencia [Indicators of Violence]*, <http://observatoriodeviolencia.ormusa.org/femicidios.php> [last visited May 17, 2012]; República de El Salvador, Asamblea Legislativa, Noticias, *Apoyo unánime a la Ley Especial Integral para una Vida Libre de Violencia para las Mujeres* [Unanimous support for Special Integrated Law for a Life Free of Violence for Women], <http://www.asamblea.gob.sv/noticias/archivo-de-noticias/apoyo-unanime-a-la-ley-especial-integral-para-una-vida-libre-de-violencia-para-las-mujeres> [last visited May 17, 2012]; República de El Salvador, Asamblea Legislativa, Noticias, *Aprueban ley especial para una vida libre de violencia* [Special law for a life free of violence approved], <http://www.asamblea.gob.sv/noticias/archivo-de-noticias/aprueban-ley-especial-para-una-vida-libre-de-violencia> [last visited May 17, 2012]; El Salvador Lex, Comunidad Jurídica, *Ley especial para una vida libre violencia para las mujeres*, http://elsalvadorlex.org/index.php?option=com_jdownloads&task=view.download&cid=923&Itemid=64 [last visited May 17, 2012]. Femicide is defined as death motivated by hatred or contempt for women. Aggravated femicide can include murder by a public or municipal official or by a family member of the victim.
- 123** Oxfam America, *One Step Forward in Campaign to End Violence Against Women – El Salvador's Legislative Assembly Passes New Law Regarding Violence Against Women*, Dec 15, 2010, <http://www.oxfamamerica.org/articles/one-step-forward-in-campaign-to-end-violence-against-women> [last visited May 17, 2012].
- 124** *Id.*

Discrimination against LGBT Individuals and PLWHA in Health Care

Discrimination against LGBT Individuals

The Salvadoran Constitution guarantees citizens the right to life.¹ A direct consequence of this guarantee is the right to health, which affirmatively obligates the state to provide adequate health care.² The Constitution further prohibits discrimination based on sex and holds all persons equal before the law.³ In addition, the Salvadoran health code prohibits discrimination in health care based on nationality, religion, race, political creed, or social status.⁴

While there are no domestic laws that directly address discrimination based on sexual orientation or gender identity with respect to health care in the private sector, two nonbinding executive decrees prohibit such discrimination in the public sector. In March 2009, the Ministry of Health signed Ministerial Decree 202, which states that all public health services must facilitate and promote the eradication of discrimination based on sexual orientation.⁵ Decree 202 expressly prohibits discrimination based on sexual orientation by personnel working in public health care⁶ and calls for reporting regarding steps taken to reduce homophobia and discrimination in the health sector.⁷ Additionally, Presidential Decree 56 bans discrimination based on sexual orientation and gender identity in government, including the health sector.⁸ Both decrees provide important protections, but only govern discrimination in the public sector.

OBSTACLES TO ACCESS TO HEALTH CARE

Discrimination in the health care system often begins at the door of a clinic or hospital. LGBT individuals reported discriminatory practices by security guards at the entrance of both public and private health institutions.⁹ Far outnumber-

““ We know that many times, the health personnel... are the ones violating human rights.”

Licda. Zulma de Alfonso,
National Program for
STIs/HIV/AIDS, Ministry of Health

ing the ranks of the national police force, an estimated 21,959 to 40,000¹⁰ private security guards employed by some 274 private security companies currently operate in El Salvador.¹¹ This largely unregulated, economically powerful, armed private sector wields enormous control over day-to-day life in the country while being largely exempt from government oversight.¹²

These private security guards, many of whom have received minimal training, are heavily armed.¹³ One LGBT advocacy group reported that security guards routinely harassed and intimidated patients from the LGBT community, particularly people who are transgender.¹⁴ Guards denied some individuals access to health care facilities and the harassment made others reluctant to seek medical treatment.¹⁵ As one transgender woman reported: “I do not even want to go to the hospital because I am discriminated against from the entrance.”¹⁶ Tired of the harassment by the security guards, she began to enter the hospital through the staff entrance in order to avoid the guards at the public entrance.¹⁷

““ *In hospitals we need doctors that don't discriminate...because their duty is to cure, no matter who it is.*”

Participant in LGBT Community Roundtable

Once inside a health care facility, numerous advocates indicated that LGBT individuals regularly face discrimination from health care staff.¹⁸ An official with the Ministry of Health's National HIV/AIDS Program acknowledged that “many times the health personnel...are the ones violating human rights.”¹⁹ Members of the community explained how, once they identified themselves as an LGBT individual, they were often forced to wait long periods of time before receiving treatment, or were simply denied service altogether.²⁰ The director of a national HIV/AIDS nonprofit, reported that previously, when clients identified

themselves as homosexual on a form to receive Anti-Retroviral Drugs (ARVs),²¹ they were placed on the waiting list for medications while people who identified themselves as heterosexual were not.²² In response, an advocacy group filed a complaint on behalf of more than one hundred affected individuals with the Ministry of Health and the problem was remedied.²³ Given this context, many members of the LGBT community prefer to conceal their identity.²⁴ As one advocate explained: “You have to hide everything, everything, everything.”²⁵

Members of the LGBT community reported instances of direct discrimination and the use of derogatory language by health care staff.²⁶ A nurse providing medicines for a sexually transmitted infection (STI) to a lesbian woman, reportedly advised the patient to repent for her sins.²⁷

Discrimination in access to health care is particularly acute for transgender individuals due to their visibility. Unable to legally change their names or sex on national identity documents (DUI) to reflect their gender identity,²⁸ transgender persons report being referred to by the name and sex on their DUI, rather than the name and sex with which they identify, by health care staff.²⁹ One advocacy group reported instances in which health care staff refused to honor requests by transgender individuals to be called by the name with which they identify.³⁰ The discrepancy between the photo on the DUI and their appearance also drew attention to their transgender identity. Once identified as a transgender individual, activists reported that these patients were often left to wait for long periods³¹ or were completely denied care.³² Even in instances in which health care personnel attended to an individual, the conduct of health care staff was reported to be stigmatizing and violated the patient's right to privacy. As one transgender man commented: “When you go to the health units, they look at you and, in front of everyone, they say out loud, ‘Mrs. Fernandez come.’ Once I get up everyone stares and automatically points and they start stigmatizing. Or they leave you to the last turn.”³³

DISCRIMINATION IN THE PROVISION OF HEALTH CARE

Community groups report there is a lack of awareness among health care staff regarding the health needs of the LGBT community.³⁴ Transgender individuals reported a lack of access to certain kinds of specialized health care. For example, transgender women reported being laughed at when they asked for appointments with endocrinologists or gynecologists, and were denied access to those health care providers.³⁵

Members of the LGBT community, particularly transgender individuals, face a double burden because of the high prevalence of HIV/AIDS in the community,³⁶ leading to an assumption that all LGBT individuals are also HIV positive.³⁷ One advocate described the perception that society “connects homosexuality with HIV as if they were intrinsic.”³⁸ Thus, many members of the LGBT community experience the same barriers and prejudices as people living with HIV/AIDS (PLWHA) even when they are not positive.³⁹

Finally, advocates reported that health care staff who *do* provide services in a respectful and sensitive manner to LGBT community members often find themselves facing discrimination from colleagues. One activist explained it this way:

[W]hen there is a security guard or a doctor that gives good services to the gay community, people begin to criticize them. They say, for example, ‘the reason you give good service in the hospital to a trans person is because you want to have sex with her. If you treat a gay person well, it is because you are gay. Or you know him from some other place.’ Therefore, those persons who are doing a good job in their work stop giving good service because they do not want to be discriminated in the same manner that we are discriminated. So they begin acting in the same way as the other people.⁴⁰

Discrimination against People Living with HIV/AIDS in Health Care

An estimated 0.8 percent of adults, ages 15 to 49, in El Salvador are living with HIV/AIDS,⁴¹ which is comparable to the global prevalence rate.⁴² However the number of Salvadorans living with HIV/AIDS has risen by roughly ten percent “each year since 2004, and the ratio of women to men has increased, particularly in rural areas.”⁴³

While the rate of Salvadorans living with HIV has increased overall, much of the rising epidemic is concentrated among men who have sex with men (referred to as MSM, see Glossary) and individuals who are transgender.⁴⁴ At 17 percent, according to UNAIDS, El Salvador has the highest HIV prevalence rates among MSM in all of Central America.⁴⁵ A study from 2007 revealed that infection levels among MSM in El Salvador were twenty-two times higher than among the general population.⁴⁶

Several sources suggest that the transgender population has the highest HIV prevalence rate in the country – approximately 23.7 percent according to one nationwide study.⁴⁷ However, the data often fail to capture accurate information for this population and the data on transgender women are frequently included in the category of MSM, making it difficult to distinguish statistics for the transgender population. Furthermore, there have been few studies that include transgender-specific epidemiological data in the region.⁴⁸

An important consideration underlying these figures is that, as transgender advocates noted, many transgender women were involved in sex work, often as a result of the lack of economic opportunities available to them.⁴⁹ (See *Employment Section*) HIV prevalence is more than three times higher among sex workers than in the general population, at 3.6 percent.⁵⁰ Moreover, stigma and discrimination against MSM and transgender persons may lead to considerable under-reporting of infections in these populations.

In 2001, El Salvador passed legislation to protect the rights of patients and guarantee access to treatment for PLWHA.⁵¹ The 2001 HIV Law prohibits discrimination based on an individual's HIV/AIDS status and requires access to care regardless of whether or not the patient is able to pay.⁵² The 2001 law, like the 1993 law it superseded, does not include a provision imposing criminal sanctions for HIV transmission.⁵³ El Salvador is the only country in Central America that does not criminalize HIV transmission, in keeping with international human rights standards.⁵⁴

Despite the legal protections afforded by the 2001 HIV Law and the government decrees, significant problems of discrimination remain.

ACCESS TO HIV TREATMENT

El Salvador has two parallel health care systems based on income and participation in the labor market.⁵⁵ The Ministry of Health administers the nation's largest health system which covers 75 percent of the population, including the unemployed and the indigent.⁵⁶ The Salvadoran Social Security Institute (Instituto Salvadoreño de Seguro Social, also referred to as ISSS), a semi-autonomous health care system financed by employers and employees, with its own hospitals and health clinics,⁵⁷ is available to Salvadorans with formal employment and pensioners and covers approximately 21 percent of the population.⁵⁸

The bifurcated health care system reportedly resulted in serious discrepancies between the public and private systems. Importantly, because ISSS was considered a private health care system, it was not subject to Ministry of Health policies and the anti-discrimination and reporting requirements of Decrees 56 and 202.⁵⁹ This fragmentation also emerged in differences in approved medications prescribed within each system, including ARVs.⁶⁰ HIV/AIDS advocates reported that this has been highly problematic for PLWHA who switched from one system to the other, and as a result, have had to interrupt their treatment and begin a regimen of new medicines.⁶¹ Moreover, despite the fact that the ISSS is better funded⁶² and has far fewer patients than the public health

system,⁶³ advocacy groups reported more problems and less accountability in the ISSS.⁶⁴

There are several problems with access to treatment in both health care systems. First, while ARVs were generally available in El Salvador, NGOs reported instances of inadequate supply and unequal distribution.⁶⁵ Groups have documented accounts of prescription bottles being split between patients when there were not sufficient supplies of ARVs.⁶⁶ This was especially problematic because some hospitals subsequently refused to refill the prescription once the half portion of the bottle was finished.⁶⁷ To cope with dwindling supplies of ARVs, advocates reported that doctors sometimes tell patients they can safely go a few days or weeks without taking any medication.⁶⁸ Both of these methods result in a significant disruption of ARV treatment plans, despite the consensus in the medical community that consistency is critical for the effectiveness of treatment and prevention of drug resistance.⁶⁹

Additionally, advocates described a shortage of reactants to perform CD4 Tests,⁷⁰ which are vital for monitoring the treatment of HIV.⁷¹ Advocates also reported a general lack of second generation HIV medications,⁷² and noted that those that were available were expensive.⁷³ As a result, PLWHA reportedly had to seek medicines outside of the Salvadoran health system, primarily from the UN Global Fund.⁷⁴

Access to treatment is particularly difficult for individuals in rural areas, according to advocates, as ARV distribution is poor outside of the large cities. One group reported that some PLWHA outside of urban areas had to travel by bus for one or two hours, or on foot over long distances in order to access hospitals that had ARVs.⁷⁵ For those living in rural areas, interruption of ARV treatment was a problem due to the quantity and timeliness of the delivery of the medications.⁷⁶

CASE STUDY: INTER-AMERICAN COMMISSION AND ACCESS TO MEDICATION

In 1999, Jorge Odir Miranda Cortez, current Executive Director of the national HIV/AIDS nonprofit Asociación Atlacatl Vivo Positivo, and thirty-six other PLWHA filed a lawsuit before the Salvadoran Supreme Court against the Salvadoran Social Security Institute (ISSS) demanding access to antiretroviral treatment.⁷⁷ At the time of the suit, the Salvadoran HIV Law was silent on the issue of providing antiretroviral treatment.⁷⁸ The Salvadoran Supreme Court did not issue a decision in the case for over a year. In 2000, as a result of this delay, advocates filed the case before the Inter-American Commission on Human Rights, which issued precautionary measures and warned the government that the matter could proceed to the Inter-American Court of Human Rights.⁷⁹ The ISSS agreed to provide ARVs, but there was a long delay in procuring the medications.⁸⁰ Only twenty-six of the thirty-six original claimants survived to benefit from the decision.

Even in areas in which there was stable access to ARVs, one NGO working with PLWHA reported that patients confronted the lack of integrated health care services.⁸¹ Treatments for opportunistic infections⁸² and nutritional supplements, although vital to the well-being of PLWHA, were not widely available through the Ministry of Health, and advocates reported PLWHA had to pay for such treatments in private pharmacies.⁸³ More generally, private pharmacies did not provide generic drugs which advocates reported resulted in a significant portion of the PLWHA population being unable to afford treatment.⁸⁴ Although the Ministry of Health recently had taken steps to fill the need for integrated health care,⁸⁵ NGOs had helped to meet the needs of patients by providing such care to PLWHA, including access to vitamins and treatment for opportunistic infections.⁸⁶

DISCRIMINATION IN HEALTH CARE FOR PLWHA

In addition to ensuring access to treatment, the 2001 HIV Law seeks to protect PLWHA from discrimination⁸⁷ and the Salvadoran Constitution prohibits arbitrary interference with privacy.⁸⁸ Despite these legal provisions, activists reported that discrimination and lack of confidentiality were still prevalent in the provision of health care. Advocates pointed to the fact that appointment cards for HIV-related treatment were marked “HIV” which led to harassment by security guards when patients entered clinics and hospitals.⁸⁹ One woman explained: “What interest is it of the guard what I am going to do in the hospital? [H]e is not a doctor...he has nothing to do with the health sector.”⁹⁰

In a 2010 Ministry of Health study, only 53 percent of PLWHA surveyed believed their medical records related to their HIV status were completely confidential and nearly 11 percent believed a medical professional had disclosed their HIV status to another person without their consent.⁹¹ PLWHA have been separated in the waiting rooms of health clinics, according to advocates, and their files marked to identify them as HIV positive.⁹² Additionally, some PLWHA have reported that health care staff whispered and pointed at HIV positive patients.⁹³

One NGO, Fundación Contrasida, reported that many health care professionals without HIV expertise refuse to treat PLWHA due to a fear of infection.⁹⁴ The 2010 Ministry of Health study found that 8.4 percent of PLWHA reported being denied medical services by a health care professional due to their HIV status.⁹⁵ According to representatives of NGOs, this was particularly common for those who sought non-HIV-related health care services, such as dental care or surgery from specialists in practice areas in which medical staff had not been trained and lacked information and sensitivity regarding HIV issues.⁹⁶ One woman recounted how she disclosed her HIV status when she went to get a molar cut and was told she could not receive treatment at the facility.⁹⁷ Many PLWHA reported being left in the waiting room for long periods of time, or that they were

the last to be treated even if they were the first to arrive.⁹⁸ An HIV positive woman described how she had a 7 a.m. dental appointment, but she was never attended to, while others who arrived after she did received services.⁹⁹ Several NGOs reported barriers to comprehensive care for PLWHA, especially in the areas of internal medicine, surgery, emergency care, dermatology, and other services outside of HIV treatment.¹⁰⁰

DISCRIMINATION IN REPRODUCTIVE HEALTH CARE FOR PLWHA

Serious forms of discrimination confront PLWHA regarding their reproductive rights. The Ministry of Health study found that 25 percent of PLWHA interviewed reported being counseled by health care staff to not have children due to their diagnosis.¹⁰¹ This same study found that 7.6 percent of all PLWHA interviewed were coerced by a health professional to undergo sterilization; among HIV positive women the rate was 14.4 percent.¹⁰² HIV advocacy organizations confirmed reports of women being either coerced¹⁰³ or forced to undergo sterilization.¹⁰⁴ In particular, organizations reported health care workers pressuring HIV positive mothers to consent to sterilization by urging them to not pass on the infection to another person.¹⁰⁵

“*For the LGBT community, marriage is not a priority. It is useless to get married if we're going to die of AIDS.*”

William Hernandez of Entre Amigos regarding the gay marriage movement

DISCRIMINATION AFTER DEATH

While the Joint United Nations Programme on HIV/AIDS (UNAIDS) has issued a protocol finding that the denial or restriction of services to persons who died of AIDS-related complications constitutes discrimination,¹⁰⁶ advocates in El Salvador reported that disparate treatment of the deceased continues.¹⁰⁷ A Ministry of Public Health and Social Assistance guide stated that individuals

who die of highly infectious diseases (specifically AIDS, hepatitis B, and rabies) ideally should be cremated or alternatively buried at least one meter underground.¹⁰⁸ The guide further recommended burial take place within twenty-four hours of death and that social and religious activities near the body be avoided.¹⁰⁹ In order to pick up a body for burial, advocates reported that funeral homes charged additional fees for special handling and require that bodies be placed in coffins that were hermetically sealed, which cost up to US \$5,000.¹¹⁰

Because state authorities have instructed hospitals to hold bodies no more than twenty-four hours at which point any unclaimed bodies were to be buried,¹¹¹ families that did not have the resources to pay these costs or the time to make necessary arrangements were not able to receive the body of their loved ones for burial.¹¹² Even when bodies were claimed, many were buried quickly and without ceremony. One advocate at an HIV organization recounted the story of a man whose body was picked up from a hospital at 5 o'clock and by 6 o'clock his corpse was buried with no clothes and no ceremony.¹¹³

PREVENTION AND TESTING

Recent reports indicate that six people are infected with HIV every day in El Salvador.¹¹⁴ Although sexual education was taught in the public school system, the curriculum typically focused on abstinence.¹¹⁵ While there have been several attempts to introduce a sexual education curriculum that discuss safer sex practices, advocates reported that schools generally have not introduced such programs¹¹⁶ and education in public schools about sexual orientation and gender identity was nearly non-existent.¹¹⁷ A representative of one NGO attributed the failure to adopt a more comprehensive approach to sex and reproductive rights education to the influence of the Catholic Church and other religious groups in Salvadoran society, which adopt a conservative stance on these topics.¹¹⁸ Moreover, due to a combination of pressure from the Church and government bureaucracy,¹¹⁹ advocates reported a general lack of access to condoms¹²⁰ and noted that local NGOs provided the majority of the condoms distributed to the public.

Finally, HIV testing was not widely available in El Salvador, presenting another obstacle to prevention efforts. The 2010 Ministry of Health study found that 42.4 percent of PLWHA interviewed indicated they were first tested due to symptoms.¹²¹ According to another report, at least 70 percent of infections remain undiagnosed until the individual presented with symptoms, “by which time treatment may be less effective.”¹²² Advocates reported that individuals were reluctant to get tested because they feared discrimination and stigma if diagnosed. Also, the current law restricts access to HIV testing for youth who are not accompanied by an adult,¹²³ which advocates described as problematic as it has discouraged youth from getting tested.¹²⁴

Achievements and Remaining Challenges

Though El Salvador faces many challenges in access to health care for the LGBT community and PLWHA, it has already taken some important steps forward in combating these issues and with further advances can serve as a model in Central America.

POLICY RESPONSE

El Salvador has a number of broad constitutional and civil rights laws, which when combined, provide protections to LGBT individuals and PLWHA in accessing health services.¹²⁵ In addition, Presidential Decree No. 56¹²⁶ and Ministerial Decree No. 202 expressly prohibit discrimination based on sexual orientation in the public sector.¹²⁷ The 2001 HIV Law prohibits discrimination based on a person’s HIV/AIDS status,¹²⁸ and ensures access to care.¹²⁹ New HIV legislation, which was drafted by a coalition of experts and advocates and is intended to address the inadequacies of the 2001 law, is currently pending.¹³⁰

INSTITUTIONAL RESPONSE

To help combat the HIV epidemic, the Ministry of Health established the National Program STIs/HIV/AIDS in the late 1980s to oversee relevant

health policies and assess their effectiveness.¹³¹ Advocates generally reported that the Ministry of Health had been effective in working with advocates and PLWHA.¹³² In addition, the Ministry of Health is working to increase its capacity to receive and respond to patient reports of mistreatment and discrimination.¹³³

The Ministry of Health had also worked closely with various ministries and civil society groups through the National Commission Against AIDS (Comisión Nacional Contra el SIDA, also referred to as CONASIDA), a multi-sectoral national HIV/AIDS coordination mechanism established in 1993.¹³⁴ Advocates generally reported that CONASIDA has been more active and effective recently than in the past,¹³⁵ but indicated that neither the business sector representative nor the ISSS representative in CONASIDA actively participated in the group.¹³⁶

In recent years, national strategies to prevent and control HIV/AIDS in the country have been developed. The first strategic plan, covering the years 2005-2010, focused on improving the coordination and participation of all civil sectors, strengthening prevention measures, increasing comprehensive care for PLWHA, and reducing discrimination.¹³⁷ An updated national plan was finalized in March 2011¹³⁸ and focuses on prevention, early diagnosis in priority populations, access to comprehensive care, greater sexual and reproductive health care, as well as increased sexual education.¹³⁹ Unlike its predecessor, the updated plan identifies vulnerable populations and provides strategies targeted toward each group.¹⁴⁰

Governmental and nongovernmental authorities have recently coordinated numerous activities to implement the plan. The government opened a Comprehensive Care Clinic for STI, HIV, AIDS in Sonsonate, a regional capital, to provide patient services in the areas of gynecology, pediatrics, and sexual and reproductive education.¹⁴¹ In May 2011, the government hosted its first training on comprehensive care for MSM and sex workers for government health officials and civil society health advocates.¹⁴² In June 2011, government and civil society launched a National HIV Testing Day

during which 89,238 Salvadorans were tested.¹⁴³

The Ombudsman for the Defense of Human Rights (Procuraduría para la Defensa de los Derechos Humanos, also referred to as PDDH) is taking an increasingly active role in the national strategy. In October 2010, the PDDH established a new division focused on HIV issues, with the goal of streamlining a process for victims to report discrimination and abuse resulting from their HIV status.¹⁴⁴

CIVIL SOCIETY RESPONSE

Civil society has been described as the driving force behind most advances in the area of HIV/AIDS awareness and treatment in the country.¹⁴⁵ Since the early 1990s, advocates and NGOs in El Salvador have worked to defend the human rights for LGBT individuals and PLWHA,¹⁴⁶ including coordinating a national response to the rise of HIV/AIDS and advancing responsive health policies.¹⁴⁷

The first health clinic for PLWHA in the country, Fundasida, was founded in 1992¹⁴⁸ and since then, NGOs have established additional health care clinics, support groups for families and PLWHA, education and outreach programs, information hotlines, and other resources.¹⁴⁹ Civil society organizations were the first institutions in the country to provide services to individuals regardless of their sexual orientation¹⁵⁰ and have been instrumental in developing resources for transgender women and sex workers,¹⁵¹ often providing life-saving services to members of these marginalized communities.

Some NGOs have also established programs to accompany PLWHA to hospitals, tour the facilities with them, and explain how the health care system works.¹⁵² These programs are important to ensure access to needed treatment due to discrimination against this population.¹⁵³ As one advocate stated: “The people from the public health ministry, we don’t know why, but they are scared of us, so when one of us goes with [our clients to the hospital], suddenly the attention is very good.”¹⁵⁴

Civil society has also taken the lead in placing the issue of HIV/AIDS on the political agenda

and addressing HIV/AIDS as a human rights concern.¹⁵⁵ NGOs have begun to assist victims of discrimination and other rights violations in filing formal complaints,¹⁵⁶ although civil society groups are still strengthening capacity in this area of work.¹⁵⁷ While members of the LGBT community have been reluctant to file such complaints due to a lack of trust in the government and fears of backlash,¹⁵⁸ there have been a few notable success stories.¹⁵⁹ With added resources and education, there appears to be potential for future growth and development of services in this area.

Notes: Discrimination against LGBT Individuals and PLWHA in Health Care

1 See Constitución de la República de El Salvador [Constitution of the Republic of El Salvador], *as amended*, 2 de Octubre de 2003, art. 2, Decreto No. 38, Diario Oficial de la República de El Salvador [DO], No. 191, Tomo 361, 15 de Octubre de 2003 [hereinafter Constitution of the Republic], <http://www.asamblea.gob.sv/eparamento/indice-legislativo/buscador-de-documentos-legislativos/constitucion-de-la-republica> [last visited May 17, 2012].

2 *Id.* at arts. 1, 65

3 *Id.* at art. 3.

4 Código de Salud [Health Code], *as amended*, Mar. 6, 2008, art. 33, Decreto Legislativo No. 561, DO, No. 76, Tomo 379, Apr. 25, 2008.

5 Acuerdo No. 202 [Agreement 202], Mar. 5, 2009, art. 1, DO, No. 66, Tomo 383, Apr. 14, 2009 [hereinafter Ministerial Decree 202]; *see also* Joint United Nations Programme on HIV/AIDS (UNAIDS), *El Salvador: Ministerial Decree to Reduce Homophobia in Health Services*, Apr. 3, 2009, <http://www.unaids.org/en/Resources/PressCentre/Featurestories/2009/April/20090403MinisterialDecreeSalvador> [last visited May 17, 2012].

6 *Id.* at art. 2.

7 *Id.* at pmb. VII & art. 3.

8 Decreto No. 56 [Decree 56], May 4, 2010, DO, No. 86, Tomo 387, May 12, 2012 [hereinafter Presidential Decree 56] <http://www.diariooficial.gob.sv/diarios/do-2010/mayo/12-05-2010.pdf> [last visited May 17, 2012].

9 Interview with Karla Stephanie Avelar Orellana (with Sayuri and Alejandra), Director, COMCAVIS-TRANS, in San Salvador, El Salv. (Feb. 22, 2011) [hereinafter Interview with COMCAVIS-TRANS].

10 El Salvador Update – February 2011, Center for Democracy in the Americas (Mar. 3, 2011) [hereinafter El Salvador Update]

<http://www.democracynamericas.org/around-the-region-blog/el-salvador-update/> [last visited May 17, 2012]; Jaime Lopez, *\$600 millones invierte la empresa privada en costos adicionales de seguridad* [\$600 million invested by private business in additional security costs], *El Diario de Hoy*, July 8, 2011, [hereinafter Lopez], http://www.elsalvador.com/mwedh/nota/nota_completa.asp?idCat=6358&idArt=5990419 [last visited May 17, 2012].

11 El Salvador Update, *supra* note 10. Government contracts account for a significant portion of the recent increase in these numbers. See *The Small Arms Survey 2011: States of Security*, Graduate Institute of International and Development Studies, <http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2011/en/Small-Arms-Survey-2011-Chapter-04-EN.pdf> [last visited May 17, 2012] The private security industry is estimated to account for between 10 to 11 percent of the country's gross domestic product (GDP). Lopez, *supra* note 10 (This estimate is according to the American Chamber of Commerce of El Salvador and the National Association of Private Enterprise (ANEP) private security.)

12 *Id.* Of the 274 private security companies, only 150-160 submit the required reports regarding their personnel and weapons. See also Fernando Romero & Tania Membreño, *PDDH pide a Policía cerrar seguridad privada ilegal* [PDDH asks police to close illegal private security], *La Prensa Gráfica*, Mar. 12, 2011 [hereinafter Romero & Membreño] (While private security firms are required to register with the government, the PNC has endorsed firms who hire personnel without prior mental or physical screening or evaluation, which has led to the suggestion that the system be suspended or dismantled.), <http://www.laprensagrafica.com/el-salvador/judicial/177733--pddh-pide-a-policia-cerrar-seguridad-privada-ilegal.html> [last visited May 17, 2012].

13 See, Nicolas Florquin, *A Booming Business: Private Security and Small Arms*, 113 (2011), <http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2011/en/Small-Arms-Survey-2011-Chapter-04-EN.pdf> [last visited May 17, 2012]; see also Romero & Membreño, *supra* note 12 (explaining that the Office of the Human Rights Ombudsman (PDDH) recommended the National Civil Police (PNC) to temporarily suspend the use of private securities until private security guards obtain the proper training and evaluation).

14 Interview with COMCAVIS-TRANS, *supra* note 9.

15 *Id.*

16 *Id.* ["No quiero ir ni al hospital porque desde la entrada yo soy discriminada"]

17 *Id.*

18 See Interview with Eliseo Zavala, Facilitator in the Prevention of HIV, and Mauricio Sanchez, Sub-Coordinator, Red-Sal, in San Salvador, El Salv. (Feb. 24, 2011); Interview with COMCAVIS-TRANS, *supra* note 9; Interview with Alfredo Carvajal, Project Areas Coordinator, and Iris Garcia, HIV Project Coordinator, ASPS, in San Salvador, El Salv. (Feb. 25, 2011) (stating that there is a lot of mistreatment of LGBT individuals by doctors); Roundtable with Entre Amigos Advocates, in San Salvador, El Salv. (Feb. 23, 2011) ("in hospitals we need doctors that don't discriminate... because their duty is to cure, no matter who it is"); Interview with Deysi Mejia, Coordinator of the Program of Pastoral Accompa-

niment, Fundación Contrasida, in San Salvador, El Salv. (Feb. 24, 2011); Interview with Fransheska Stacy Reyes, Coordinator, AS-TRANS, in San Salvador, El Salv. (Feb. 23, 2011); Interview with Licda. Dora Estela Rivera, Coordinator, Asociación Atlacatl Vivo Positivo, in San Salvador, El Salv. (Feb. 22, 2011) (stating that there is discrimination in the areas of internal medicine, surgery, and emergency); Interview with Isabel Payes, Dir., Coordinadora Nacional de la Mujer Salvadoreña (CONAMUS), in San Salvador, El Salv. (Feb. 24, 2011) (stating that PLWHA are separated in consultations and receive poor attention by professionals and that sex workers, MSM, and those in the transgender community are treated even worse in hospitals); Interview with Guadalupe de Castañeda, Director, ICW El Salvador, in San Salvador, El Salv. (Feb. 25, 2011).

19 Interview with Ministry of Health officials Licda. Zulma de Alfonso with the National Program for STIs/HIV/AIDS, Licda. Rocío Costte, Psychologist with the National Program on STIs/HIV/AIDS Program's Area on Sexual Diversity, and Licdo. Jhony Milton, Attorney with the Legal Unit of the Ministry of Health, in San Salvador, El Salv. (Feb. 24, 2012) [hereinafter Interview with Ministry of Health] ("Sabemos que muchas veces es el personal de salud... que violentan los derechos.")

20 LGBT Community Roundtable, in San Salvador, El Salv. (Feb. 22, 2011) (a transgender woman explained that she was denied treatment at a hospital because she was wearing makeup); see also Interview with Isabel Payes, Dir., Coordinadora Nacional de la Mujer Salvadoreña (CONAMUS), in San Salvador, El Salv. (Feb. 24, 2011).

21 Antiretroviral Therapy, World Health Organization (2011), <http://www.who.int/hiv/topics/treatment/en/> [last visited May 17, 2012] ("Standard antiretroviral therapy (ART) consists of the use of at least three antiretroviral (ARVs) drugs to maximally suppress the HIV virus and stop the progression of HIV disease. Huge reductions have been seen in rates of death and suffering when use is made of a potent antiretroviral regimen.")

22 Interview with Juan Francisco Ortiz, General Director, Fundasida, in San Salvador, El Salv. (Feb. 23, 2011) [hereinafter Interview with Fundasida] (In response to the discrimination, Fundasida filed a complaint on behalf of more than one hundred affected individuals with the Ministry of Health and threatened to hold a press conference. As a result of this civil society pressure, some improvements were made.)

23 *Id.*

24 Interview with Eliseo Zavala, Facilitator in the Prevention of HIV, and Mauricio Sanchez, Sub-Coordinator, Red-Sal, in San Salvador, El Salv. (Feb. 24, 2011) [hereinafter Interview with Red-Sal].

25 *Id.* ["Tienes que guardar todo, todo, todo"].

26 Interview with Fransheska Stacy Reyes, Coordinator, AS-TRANS, in San Salvador, El Salv. (Feb. 23, 2011) [hereinafter Interview with ASTRANS].

27 Ana Cisneros, on behalf of Alianza por la Diversidad Sexual LGBT [Alliance for Sexual Diversity], Speech given during the launch of the Minimum Platform on Sexual Diversity, in San Salvador, El Salv. (May 13, 2010), <http://www.scribd.com/doc/31452844/Discurso-Ana-Cisneros-13-de-mayo-2010-Foro-Inclusion-Social-y-Diversidad-Sexual> [last visited May 18, 2012];

see also Interview with Ana Cisneros, Independent LGBT Activist (Sept. 21, 2011).

28 Interview with ASTRANS, *supra* note 26. See also Interview with COMCAVIS-TRANS, *supra* note 9; Interview with Mónica Hernandez, Leader, ASPIDH-Union Arcoiris, in San Salvador, El Sal. (Feb. 24, 2011); Interview with Ana Cisneros, Independent LGBT Activist (Sept. 21, 2011).

29 Interview with COMCAVIS-TRANS, *supra* note 9.

30 *Id.*

31 Interview with Isabel Payes, Dir., Coordinadora Nacional de la Mujer Salvadoreña (CONAMUS), in San Salvador, El Sal. (Feb. 24, 2011) [hereinafter Interview with CONAMUS].

32 Interview with COMCAVIS-TRANS, *supra* note 9; LGBT Community Roundtable, in San Salvador, El Salv. (Feb. 22, 2011).

33 LGBT Community Roundtable, in San Salvador, El Salv. (Feb. 22, 2011) [hereinafter LGBT Community Roundtable] (the name “Mrs. Fernandez” is a pseudonym, and is not the informant’s legal name).

34 Roundtable with Entre Amigos Advocates, in San Salvador, El Sal. (Feb. 23, 2011).

35 Interview with COMCAVIS-TRANS, *supra* note 9.

36 Interview with Red-Sal, *supra* note 24; Interview with COMCAVIS-TRANS, *supra* note 9; LGBT Community Roundtable, *supra* note 33; Interview with Licda. Dora Estela Rivera, Coordinador, Asociación Atlacatl Vivo Positivo, in San Salvador, El Sal. (Feb. 22, 2011); see also Interview with Alba América Girola Zelaya, Directora Ejecutiva, CEMUJER, in San Salvador, El Salv. (Feb. 21, 2011) (discussing the double discrimination faced by women with HIV).

37 Interview with Ana Cisneros, Independent LGBT Activist, (Sept. 21, 2011).

38 Interview with Barbara Romero, Director of Sexual Diversity, Sexual Diversity Directorate under the Ministry of Social Inclusion, in San Salvador, El Salv. (Feb. 22, 2011).

39 Interview with ASTRANS, *supra* note 26; Interview with Mónica Hernandez, Leader, ASPIDH-Union Arcoiris, in San Salvador, El Sal. (Feb. 24, 2011); Interview with Licda. Dora Estela Rivera, Coordinador, Asociación Atlacatl Vivo Positivo, in San Salvador, El Sal. (Feb. 22, 2011).

40 LGBT Community Roundtable, *supra* note 33.

41 See UNAIDS, *UNAIDS Report on the Global AIDS Epidemic 2010* (2010) at 202; World Health Organization (WHO), UNAIDS & UNICEF, *Epidemiological Fact Sheet on HIV and AIDS: El Salvador 2008 Update 4* (Dec. 2008); see also USAID, *El Salvador: HIV/AIDS Health Profile* (Sept. 2010) (reporting statistics from UNAIDS).

42 UNAIDS, *UNAIDS Report on the Global AIDS Epidemic 2010* (2010) at 22.

43 International HIV/AIDS Alliance Secretariat & Asociación Atlacatl Vivo Positivo, *Alliance Country Study: El Salvador* (2010) [hereinafter *Alliance Country Study*], <http://www.aidsalliance.org/linkingorganisationdetails.aspx?id=30> [last visited May 17, 2012].

44 *Id.* It is important to note that some studies include transgen-

der women in statistics for MSM, while others do not, which may lead to some variation in data reporting. See, e.g., UNAIDS, *Policy Brief: HIV and Sex Between Men 1* (2006) (defining “sex between men” as involving “men who identify as homosexual, gay, bisexual, transgender or heterosexual”); see also International HIV/AIDS Alliance, *The Hidden HIV Epidemic: Transgender Women in Latin America and Asia – Compilation of Epidemiological Data 1* (2008) (reporting that the term MSM has been used to refer to all men who have sex with other men, regardless of sexual orientation, and that transgender women have also been grouped together in this category).

45 UNAIDS & World Health Organization (WHO), *AIDS Epidemic Update: December 2009* (2009) at 60; see also The Synergy Project, *Comprehensive Care and Support Services Assessment in Five Central American Countries 7* (Feb. 2003); Edgardo Javier Medina, José Toro-Alfonso, Ph.D & Omar Baños, *No Mas en el Tintero: Hombres Gay: Nuestras Vidas y el VIH en Centro América y el Caribe* [Gay Men: Our Lives and HIV in Central America and the Caribbean] at 16. Compare *Alliance Country Study*, *supra* note 43, at 1 (reporting that HIV prevalence among MSM in El Salvador is 25 percent), and *Epidemiological Fact Sheet on HIV and AIDS: El Salvador 2008 Update 4* (Dec. 2008) (reporting that HIV prevalence among MSM in El Salvador is 17.7 percent), with Ministerio de Salud, Programa Nacional de ITS/VIH SIDA, El Salvador [Minsitry of Health, National Program STIs/HIV/AIDS, El Salvador], *El Salvador: Encuesta Centroamericana de Vigilancia de Comportamiento Sexual y Prevalencia de VIH/ITS en Poblaciones Vulnerables* [El Salvador: Central American Survey Monitoring Sexual Behavior and HIV/STI Prevalence in Vulnerable Populations] at 15 (2010) (reporting that HIV prevalence among MSM, including trans women, in El Salvador in 2002 was 15.3 percent), and USAID, *El Salvador: HIV/AIDS Health Profile* (Sept. 2010) at 1 (reporting that HIV prevalence among MSM in El Salvador is 10.8 percent, but noting a UNAIDS report that prevalence among MSM in El Salvador is estimated at 17.6 percent).

46 USAID, *El Salvador: HIV/AIDS Health Profile* (Sept. 2010) [hereinafter USAID] at 1.

47 Ministerio de Salud, Programa Nacional de ITS/VIH SIDA, El Salvador Salvador [Minsitry of Health, National Program STIs/HIV/AIDS, El Salvador], *El Salvador: Encuesta Centroamericana de Vigilancia de Comportamiento Sexual y Prevalencia de VIH/ITS en Poblaciones Vulnerables* [El Salvador: Central American Survey Monitoring Sexual Behavior and HIV/STI Prevalence in Vulnerable Populations] at 57 (2010); *Alliance Country Study*, *supra* note 43, at 1; see also International HIV/AIDS Alliance, *The Hidden HIV Epidemic: Transgender Women in Latin America and Asia – Compilation of Epidemiological Data 4* (2008) (quoting a multi-centric study carried out in El Salvador in 2003 with the participation of gay, bisexual and heterosexual men, and transgender people that found “HIV prevalence rates among transgender people were 25.0 % as opposed to 23.8 % among gay men”).

48 Cf. International HIV/AIDS Alliance, *The Hidden HIV Epidemic: Transgender Women in Latin America and Asia – Compilation of Epidemiological Data 4* (2008) at 3-4 (quoting studies from El Salvador, Argentina, and Peru and noting that aside from those, no other studies with transgender specific epidemiological data have

been found in Latin America).

49 See Interview with ASTRANS, *supra* note 26; Interview with COMCAVIS-TRANS, *supra* note 9.

50 *Alliance Country Study*, *supra* note 43, at 1; cf. UNAIDS & World Health Organization (WHO), *AIDS Epidemic Update: December 2009* 60 (2009), at 60 (reporting that HIV prevalence among female sex workers in El Salvador, in 2007 was 3.2 percent), but see USAID, *supra* note 46, at 1 (reporting that HIV prevalence among female sex workers in El Salvador is 5.7 percent).

51 See *Ley de Prevención y Control de la Infección Provocada por el Virus de Inmunodeficiencia Humana* [Law for the Prevention and Control of the Infection Provoked by the Human Immunodeficiency Virus], Decreto No. 588 de la Asamblea Legislativa de la República de El Salvador, 2001 (El Sal.) [hereinafter 2001 HIV Law].

52 *Id.*

53 See Schuyler Frautschi, *Understanding HIV-Specific Laws in Central America*, 38.1 Int'l J. Legal Info. 43, 84 (Spr. 2010); see also 2001 HIV Law, *supra* note 51.

54 Frautschi *supra* note 53; see generally UNAIDS, *Policy Brief: Criminalization of HIV Transmission* (Aug. 2008).

55 World Health Organization, (WHO) *Country Cooperation Strategy at a Glance: El Salvador* (May 2010), [hereinafter *WHO Country Cooperation Strategy*], http://www.who.int/countryfocus/cooperation_strategy/ccsbrief_slv_en.pdf [last visited May 18, 2012].

56 *Id.*

57 Instituto Salvadoreño del Seguro Social (ISSS) [Salvadoran Social Security Institute], *Historia* [History] (Mar. 24, 2010), http://www.iss.gov.sv/index.php?option=com_content&view=article&id=49&Itemid=84 [last visited May 17, 2012].

58 WHO *Country Cooperation Strategy*, *supra* note 55; *Ley del Seguro Social* [Social Security Law], as amended, 1997, Decreto No. 1263; Instituto Salvadoreño del Seguro Social (ISSS) [Salvadoran Social Security Institute], *Anuario Estadístico 2010* [2010 Annual Report] at 10 (June 2011) http://www.iss.gov.sv/index.php?option=com_phocadownload&view=category&id=8:estadisticas&Itemid=115 [last visited May 18, 2012].

59 See generally Presidential Decree 56, *supra* note 8; Ministerial Decree 202, *supra* note 5.

60 Interview with Licda. Dora Estela Rivera, Coordinator, Asociación Atlacatl Vivo Positivo, in San Salvador, El Sal. (Feb. 22, 2011) [hereinafter Interview with Asociación Atlacatl Vivo Positivo].

61 Interview with Asociación Atlacatl Vivo Positivo, *supra* note 60; see also WHO, *Fast Facts About HIV Treatment*, 1 (Sept. 2009) [hereinafter WHO *Fast Facts about HIV*] http://www.unaids.org/en/media/unaids/contentassets/dataimport/pub/factsheet/2009/20090903_fastfacts_treatment_en.pdf [last visited May 17, 2012].

62 *El Salvador: Healthcare*, GlobalSurance (“the [public health care system] is severely underfunded in comparison to the ISSS.”), <http://www.globalsurance.com/resources/elsalvador/healthcare/> [last visited May 17, 2012]; John L. Fiedler, *The Privatization of*

Health Care in Three Latin American Social Security Systems, Health Policy and Planning, 1996, at 406, 408-09.

63 WHO *Country Cooperation Strategy*, *supra* note 55.

64 Interview with Alfredo Carvajal, Project Areas Coordinator, and Iris Garcia, HIV Project Coordinator, ASPS, in San Salvador, El Salv. (Feb. 25, 2011); Interview with CONAMUS, *supra* note 31; Interview with Deysi Mejia, Coordinator of the Program of Pastoral Accompaniment, Fundación Contrasida, in San Salvador, El Salv. (Feb. 24, 2011); Interview with Guadalupe de Castañeda, Director, ICW El Salvador, in San Salvador, El Salv. (Feb. 25, 2011); Interview with Red-Sal, *supra* note 24; see also Interview with Asociación Atlacatl Vivo Positivo, *supra* note 60.

65 Interview with Guadalupe de Castañeda, Director, ICW El Salvador, in San Salvador, El Salv. (Feb. 25, 2011); Interview with CONAMUS, *supra* note 31 (“Anyone who needs ARVs can get them, but there are still problems with interruptions. The central distribution center doesn’t get out the ARVs to the outlying areas where they are needed in a timely fashion”); Interview with Alfredo Carvajal, Project Areas Coordinator, and Iris Garcia, HIV Project Coordinator, ASPS, in San Salvador, El Salv. (Feb. 25, 2011); Interview with COMCAVIS-TRANS, *supra* note 9; Interview with Fundasida, *supra* note 22. But see Asociación Atlacatl Vivo Positivo, *supra* note 60 (stating that access to ARVs is generally less of a problem now, rather the problems are with different systems not having the same kinds of medication).

66 Interview with Red-Sal, *supra* note 24; Interview with CONAMUS, *supra* note 31.

67 Interview with CONAMUS, *supra* note 31 (CONAMUS filed a complaint about this and held a press conference. However, there was a backlash and the medical staff refused to give patients their medications in retaliation).

68 Interview with Guadalupe de Castañeda, Director, ICW El Salvador, in San Salvador, El Salv. (Feb. 25, 2011) [hereinafter Interview with ICW].

69 WHO *Fast Facts about HIV*, *supra* note 61. (“HIV is a very active virus that makes lots of copies of itself that then damage the body’s immune cells (CD4 cells). It is also a very clever virus that quickly adapts to whatever medicines are being taken as it tries to change itself through mutations so that these medicines no longer work. However...taking the medicines everyday at the right time and in the right way keeps the right levels of the medicines in the body which makes it very hard for the virus to become resistant to the medicines. Missing your medication can give the HIV a chance to become resistant to the ARV medicine.”)

70 Interview with COMCAVIS-TRANS, *supra* note 11; Interview with Asociación Atlacatl Vivo Positivo, *supra* note 60.

71 WHO *New Progress and Guidance on HIV Treatment*, (July 2010) (“The best method to determine when to start treatment is through CD4 testing, which measures the strength of the immune system”), <http://www.who.int/hiv/pub/arv/ARTfactsheet/en/> [last visited May 17, 2012].

72 See WHO, *HIV Drug Resistance Fact Sheet* (Apr. 2011) (“If patients develop HIV drug resistance to their first-line regimen, they stop responding to it effectively. In order to stay healthy, they

- need to receive a second-line regimen... . Keeping drug resistance at bay is therefore a key strategy to the success and sustainability of HIV treatment programmes”), http://www.who.int/hiv/facts/drug_resistance/en/ [last visited May 17, 2012].
- 73** Interview with CONAMUS, *supra* note 31.
- 74** Interview with CONAMUS, *supra* note 31; Interview with Red-Sal, *supra* note 24.
- 75** Interview with Alfredo Carvajal, Project Areas Coordinator, and Iris García, HIV Project Coordinator, ASPSP, in San Salvador, El Salv. (Feb. 25, 2011) [hereinafter Interview with ASPSP].
- 76** Interview with CONAMUS, *supra* note 31.
- 77** Frautschi *supra* note 53 at 73-74; *see also* Ena Rivas, *Crítica Situación de Pacientes con SIDA: Los Afectados Podrían Demandar al Estado ante la Corte Interamericana de Derechos Humanos* [Critical Situation for AIDS Patients: Those Affected Could Sue the State before the Inter-American Court of Human Rights], La Prensa Gráfica Online, Oct. 24, 2000, <http://archive.laprensa.com.sv/20001024/nacionales/nac12.asp> [last visited May 17, 2012].
- 78** Frautschi, *supra* note 53 at 73, 89.
- 79** *Id.* at 74, 89; *see also* Jorge Odir Miranda Cortez y Otros v. El Salvador, Caso 12.249, Informe No. 29/01, Inter-American Commission on Human Rights (2000).
- 80** Frautschi, *supra* note 53, at 73, 89. However, the Inter-American Commission on Human Rights’ most recent (2009) report on the case indicates that El Salvador is still in violation of the American Convention on Human Rights since its *amparo* procedure (for injunctive relief for individual constitutional protections) is not adequately simple, prompt, and effective in providing relief under the American Convention on Human Rights. *See* Inter-American Commission on Human Rights Report No. 29/09 on Case 12.249 Merits (Publication) regarding Jorge Odir Miranda Cortez et al v. El Salvador (Mar. 20, 2009), <http://www.cidh.oas.org/annualrep/2009eng/ElSalvador12249eng.htm> [last visited May 17, 2012].
- 81** Interview with ICW, *supra* note 68.
- 82** *See*, WHO, HIV/AIDS (July 2010) (Opportunistic infections are infections associated with severe immunodeficiency. They take advantage of weakened immune systems), <http://www.who.int/features/qa/71/en/> [last visited May 17, 2012].
- 83** Interview with ICW, *supra* note 68; Interview with CONAMUS, *supra* note 31; Interview with Fundasida, *supra* note 22; Interview with Deysi Mejía, Coordinator of the Program of Pastoral Accompaniment, Fundación Contrásida, in San Salvador, El Salv. (Feb. 24, 2011).
- 84** Interview with ASPSP *supra* note 75.
- 85** *See* Interview with ASPSP *supra* note 75; Interview with Deysi Mejía, Coordinator of the Program of Pastoral Accompaniment, Fundación Contrásida, in San Salvador, El Salv. (Feb. 24, 2011).
- 86** Interview with Deysi Mejía, Coordinator of the Program of Pastoral Accompaniment, Fundación Contrásida, in San Salvador, El Salv. (Feb. 24, 2011); Interview with CONAMUS, *supra* note 31.
- 87** *See* 2001 HIV Law, *supra* note 51 at arts. 2, 4-6.
- 88** *See* Constitution of the Republic, *supra* note 1, arts. 2, 20, & 24.
- 89** Interview with COMCAVIS-TRANS, *supra* note 9.
- 90** *Id.*
- 91** Ministerio de Salud Pública y Asistencia Social [Ministry of Public Health and Social Assistance], *Estudio de Estigma y Discriminación en Personas con VIH* [Study on Stigma and Discrimination of People with HIV], (Dec. 2010) [hereinafter Estudio de Estigma], at 38 http://www.ippfwhr.org/sites/default/files/Estudio_de_Estigma_y_Discriminacion_en_personas_con_VIH.pdf [last visited May 17, 2012].
- 92** Interview with CONAMUS, *supra* note 31.
- 93** Interview with ICW, *supra* note 68; *see also*, Interview with ASPSP *supra* note 75 (confidentiality is also a problem with health professionals).
- 94** Interview with Deysi Mejía, Coordinator of the Program of Pastoral Accompaniment, Fundación Contrásida, in San Salvador, El Salv. (Feb. 24, 2011) [hereinafter Interview with Fundación CONTRASIDA].
- 95** Estudio de Estigma, *supra* note 91 at 47.
- 96** *Id.* *See also* Interview with Fundasida, *supra* note 22; Interview with Red-Sal, *supra* note 24.
- 97** Interview with ICW, *supra* note 68.
- 98** Interview with CONTRASIDA, *supra* note 94; Interview with ICW, *supra* note 68.
- 99** *Id.*
- 100** Interview with Asociación Atlacatl Vivo Positivo, *supra* note 60; Interview with COMCAVIS-TRANS, *supra* note 9; Interview with Red-Sal, *supra* note 24.
- 101** Estudio de Estigma, *supra* note 91 at 48.
- 102** *Id.*
- 103** Interview with ICW, *supra* note 68.
- 104** Interview with Red-Sal, *supra* note 24.
- 105** Interview with ICW, *supra* note 68.
- 106** UNAIDS, “Protocol for the identification of discrimination against people living with HIV”, UNAIDS Best Practice Collection: Key Material, (2000) at 10 (identifies distinctions, exclusions, or restrictions in major areas of social life, among them public services, including funeral services, based on HIV/AIDS status as an indicator of discrimination).
- 107** Interview with Asociación Atlacatl Vivo Positivo, *supra* note 60; Interview with Jaime Argueta, Director, HIV Department, Office of the Ombudsman for the Defense of Human Rights (PDDH), in San Salvador, El Salv. (Feb. 23, 2011) [hereinafter Interview with HIV Department of PDDH].
- 108** *Guía de Medidas Universales de Bioseguridad* [Guide of Universal Measures for Biosafety], Ministerio de Salud Pública y Asistencia Social [Ministry of Public health and social assistance], at 57 [hereinafter Guía de Bioseguridad], http://www.vertic.org/media/National%20Legislation/El_Salvador/SV_Guia_de_Bioseguridad_VIH.pdf [last visited May 17, 2012].
- 109** *Id.* at 58.

- 110** Interview with Red-Sal, *supra* note 24.
- 111** Guía de Bioseguridad *supra* note 108 at 58.
- 112** *Background Note: El Salvador*, U.S Department of State, (Mar. 30, 2011) (considering El Salvador's per capita income is between \$3,431 and \$7,200 this cost is not feasible for the vast majority of Salvadorans), <http://www.state.gov/r/pa/ci/bgn/2033.htm> [last visited May 17, 2012].
- 113** Interview with Red-Sal, *supra* note 24.
- 114** "Seis casos nuevos de VIH-Sida al día" ["Six new cases of HIV-AIDS each day"], *El Mundo*. Aug. 22, 2011 <http://www.elmundo.com.sv/.../15736-seis-casos-nuevos-de-vih-sida-al-dia.html> [last visited May 17, 2012] (quoting Herbert Betancourt, Coordinator of UNAIDS El Salvador, "At this rate we will have 1,500 new cases per year, that is a tragedy").
- 115** Interview with CONAMUS, *supra* note 31.
- 116** Interview with Fundasida, *supra* note 22; Interview with Red-Sal, *supra* note 24.
- 117** Interview with Red-Sal, *supra* note 24.
- 118** Interview with Asociación Atlacatl Vivo Positivo, *supra* note 60.
- 119** Interview with Fundasida, *supra* note 22; Interview with Asociación Atlacatl Vivo Positivo, *supra* note 60.
- 120** Interview with Dr. Herbert Betancourt, County Officer, UNAIDS, in San Salvador, El Salv. (Feb. 23, 2011); Interview with ASPS *supra* note 75; Interview with Fundasida, *supra* note 22; Interview with Asociación Atlacatl Vivo Positivo, *supra* note 60.
- 121** Estudio de Estigma, *supra* note 91 at 54.
- 122** *Alliance Country Study*, *supra* note 43.
- 123** 2001 HIV Law, *supra* note 51, at art. 18.
- 124** See, e.g., Interview with Red-Sal, *supra* note 24; Interview with ASPS *supra* note 75.
- 125** See Constitution of the Republic, *supra* note 1 at arts. 1, 2, 35 & 65.
- 126** Presidential Decree 56, *supra* note 8.
- 127** Ministerial Decree 202, *supra* note 5 at art. 2.
- 128** In addition, a provision to allow compulsory testing of employees was removed from the HIV Law before passage in 2001. See Art. 16(d) removed from Decree No. 588 of Oct. 24, 2001, which would have allowed HIV testing in those cases contemplated in Art. 31(10) of the Labor Code; see also Reglamento Para la Investigación, Prevención y Control del Síndrome de Inmunodeficiencia Adquirida (SIDA) [Rules for Research, Prevention and Control of AIDS], Art. 20, Decreto No. 53 [Decree 53], DO, No. 230, Jul. 9 1993 (El Sal.); Alberto Lopez. *Impugnan ley del SIDA [Opposition to AIDS law]*, *El Diario de Hoy*, Dec. 1, 2001. Subsequently, El Salvador's Labor Code was amended in 2005 to expressly prohibit compulsory testing of employees and discrimination based on HIV status in the workplace. See Código de Trabajo [CT] [Labor Code], *as amended*, Mar. 26 2009, Art. 30(14)-(15), Decreto No. 15, *Diario Oficial de la República de El Salvador* [DO], No. 68, Tomo 383, Apr. 14, 2009 (El Sal.).
- 129** See 2001 HIV Law, *supra* note 51 at arts. 2, 4-6; USAID, Bureau for Global Health, *HIV/AIDS Country Profile: El Salvador* (Dec. 2004).
- 130** Ivonne Vasquez, *Cemujer Recibió Fondos Para Hacer Propuesta de Ley de Sida* [CEMUJER receives funds to draft proposal of HIV Law], *El diario de hoy*, Jun. 23, 2011 http://www.elsalvador.com/mwedh/nota/nota_completa.asp?idCat=6364&idArt=5950064 [last visited May 17, 2012] (specifically, the new law would require sex education in public and private school curricula, and permit youth to take an HIV test without parental consent).
- 131** See Ministerio de Salud [Ministry of Health], *Fortalecimiento de la Respuesta del Sistema de Salud al VIH, Sida y las ITS en El Salvador [Strengthening the Health System's Response to HIV, AIDS, and STI's in El Salvador]* (Apr. 19 to 30, 2010) (citing ONUSIDA/PNS, PAT, *Plan de Apoyo Técnico El Salvador* at 2 (Dec. 2008)).
- 132** See Interview with COMCAVIS-TRANS, *supra* note 9; Interview with CONAMUS, *supra* note 31; Interview with CONTRASIDA, *supra* note 94; Interview with Red-Sal, *supra* note 24.
- 133** Interview with Ministry of Health, *supra* note 19.
- 134** See Reglamento Para la Investigación, Prevención y Control del Síndrome de Inmunodeficiencia Adquirida (SIDA) [Regulations for Research, Prevention, and Control of Acquired Immune Deficiency Syndrome (AIDS)], May 25, 1993, Arts. 2-3, 6, Decreto No. 53 [Decree 53], DO, No. 230, Jul. 9, 1993 [hereinafter Decree 53]; 2001 HIV Law, *supra* note 51. When established in 1993, the commission included the Ministries of Health, Justice, Education, and the Interior; the Military Health Department; the Public Health Council; the Red Cross; and the Salvadoran Social Security Institute (ISSS). Subsequently, representatives from UNAIDS, and the business and NGO sector were later included.
- 135** Interview with Dr. Herbert Betancourt, County Officer, UNAIDS, in San Salvador, El Salv. (Feb. 23, 2011); Interview with Red-Sal, *supra* note 24; Interview with CONTRASIDA, *supra* note 94.
- 136** Interview with Dr. Herbert Betancourt, County Officer, UNAIDS, in San Salvador, El Salv. (Feb. 23, 2011) (the business representative does not attend the monthly meetings); see also Interview with CONAMUS, *supra* note 31; Interview with Red-Sal, *supra* note 24 (reports indicate that the private sector and ISSS refuse to participate in any stakeholder initiatives or policy work).
- 137** USAID & Ministerio de Salud de El Salvador, *El Salvador: Plan Estratégico Nacional en ITS, VIH y Sida 2005-2010 [El Salvador: National Strategic Plan for STI's, HIV, and AIDS 2005-2010]* (San Salvador, Sept. 2008) at 27-28.
- 138** CONASIDA and Ministerio de Salud [CONASIDA and Ministry of Health], *El Plan Estratégico Nacional Multisectorial de la Respuesta al VIH-Sida e ITS 2011-2015 [National Multi-Sector Strategic Plan for rge Response to HIV-AIDS and STI's 2011-2015]* (San Salvador, Mar. 2011), http://www.conasida.org.sv/index.php?option=com_wrapper&view=wrapper&Itemid=211 [last visited May 18, 2012].
- 139** *Id.* at 9.
- 140** *Id.* at 92-102. (such groups include men who have sex with men, transgender women, and gay men).
- 141** *Inauguran Clínica de Asistencia Integral de ITS VIH-SIDA en Sonsonate [Comprehensive Health Clinic for STI's, HIV-AIDS*

Inaugurated in Sonsonate], Ministry of Health, May 13, 2011, <http://www.salud.gob.sv/index.php/novedades/noticias/noticias-ciudadanosas/146-mayo-2011/899--13-05-2011-inauguran-clinica-de-asistencia-integral-de-its-vih-sida-en-sonsonate> [last visited May 17, 2012].

142 *Primera Jornada de Capacitación Para La Asistencia Integral a Hombres Que Tienen Sexo Con Hombres y Trabajadoras del Sexo [First Day of Training for Comprehensive Care for Men who have Sex with Men and Sex Workers]*, Ministry of Health, May 17, 2011, <http://www.salud.gob.sv/index.php/novedades/noticias/noticias-ciudadanosas/146-mayo-2011/905--17-05-2011-primera-jornada-de-capacitacion-para-la-asistencia-integral-a-hombres-que-tienen-sexo-con-hombres-y-trabajadoras-del-sexo> [last visited May 17, 2012].

143 *MINSAL Presenta Resultados Del Dia Nacional de La Prueba del VIH [Health Ministry Presents Results from National HIV Testing Day]*, Ministry of Health, Jul. 4, 2011, <http://www.salud.gob.sv/index.php/novedades/noticias/noticias-ciudadanosas/150-julio-2011/961--04-07-2011-minsal-presenta-resultados-del-dia-nacional-de-la-prueba-del-vih> [last visited May 17, 2012].

144 Interview with HIV Department of PDDH, *supra* note 107; see also Interview with Lic. Oscar Luna, Ombudsman, & Antonio Aguilar, Ombudsman of Economic, Social, and Cultural Rights Unit, Office of the Ombudsman for the Defense of Human Rights (PDDH), in San Salvador, El Sal. (Feb. 22, 2011).

145 Interview with Red-Sal, *supra* note 24.

146 See, e.g. Interview with Fundasida, *supra* note 22. William Hernandez, Founder and Director of Asociación Entre Amigos, public talk given at U.C. Berkeley School of Law, Oct. 25, 2010; Interview with Asociación Atlacatl Vivo Positivo, *supra* note 60.

147 See Interview with Ministry of Health, *supra* note 19; Interview with CONAMUS, *supra* note 31; William Hernandez, Founder and Director of Asociación Entre Amigos, public talk given at U.C. Berkeley School of Law, Oct. 25, 2010.

148 Interview with Fundasida, *supra* note 22.

149 See, e.g. Interview with CONTRASIDA, *supra* note 94; Interview with Fundasida, *supra* note 22; Interview with Red-Sal, *supra* note 24; William Hernandez, Founder and Director of Asociación Entre Amigos, public talk given at U.C. Berkeley School of Law, Oct. 25, 2010.

150 See William Hernandez, Founder and Director of Asociación Entre Amigos, public talk given at U.C. Berkeley School of Law, Oct. 25, 2010; Interview with Asociación Atlacatl Vivo Positivo, *supra* note 60 (noting that most of Atlacatl's clients are gay men); Interview with CONTRASIDA, *supra* note 94 (noting that 10 to 12 percent of their clients are LGBT individuals); Interview with Red-Sal, *supra* note 24 (explaining that approximately 90 percent of their clients are members of the LGBT community).

151 See Interview with COMCAVIS-TRANS, *supra* note 9 (first NGO to work specifically with HIV-positive transgender women in Latin America, founded in 2009); Interview with ASTRANS, *supra* note 26; Interview with Dr. Herbert Betancourt, County Officer, UNAIDS, in San Salvador, El Salv. (Feb. 23, 2011); see also Interview with CONAMUS, *supra* note 31 (noting that they do not have specific projects for LGBT community but coordinate ac-

tivities occasionally, especially with transgender groups); Interview with ICW, *supra* note 68 (explaining that ICW doesn't work directly with the LGBT Community, but they do work in partnership with the transgender and lesbian communities).

152 See, e.g., Interview with Asociación Atlacatl Vivo Positivo, *supra* note 60; Interview with CONTRASIDA, *supra* note 94; Interview with Mónica Hernandez, Leader, ASPIDH-Union Arcoiris, in San Salvador, El Sal. (Feb. 24, 2011); William Hernandez, Founder and Director of Asociación Entre Amigos, public talk given at U.C. Berkeley School of Law, Oct. 25, 2010.

153 See Interview with CONTRASIDA, *supra* note 94; William Hernandez, Founder and Director of Asociación Entre Amigos, public talk given at U.C. Berkeley School of Law, Oct. 25, 2010 [hereinafter Hernandez speech].

154 Hernandez speech, *supra* note 153.

155 See Interview with Asociación Atlacatl Vivo Positivo, *supra* note 60; Hernández, *supra* note 153.

156 See Interview with Asociación Atlacatl Vivo Positivo, *supra* note 60; Interview with CONTRASIDA, *supra* note 94; Interview with ICW, *supra* note 68; Interview with Mónica Hernandez, Leader, ASPIDH-Union Arcoiris, in San Salvador, El Sal. (Feb. 24, 2011).

157 See, e.g., Interview with Asociación Atlacatl Vivo Positivo, *supra* note 60 (explaining that Licda. Rivera is the only person working in the Legal Program, which began in 2003); Interview with Mónica Hernandez, Leader, ASPIDH-Union Arcoiris, in San Salvador, El Sal. (Feb. 24, 2011) (noting that Unión Arcoiris recently began taking complaints and noting the relatively low number of complaints received compared to violations in the community).

158 See Interview with Alba América Girola Zelaya, Directora Ejecutiva, CEMUJER, in San Salvador, El Salv. (Feb. 21, 2011); Interview with CONAMUS, *supra* note 31; LGBT Community Roundtable, *supra* note 33; Interview with CONTRASIDA, *supra* note 94; Interview with Orquídeas Del Mar, in San Salvador, El Salv. (Feb. 25, 2011).

159 See, e.g. Interview with Asociación Atlacatl Vivo Positivo, *supra* note 60 (discussing a complaint filed with the Ministry of Health on behalf of three different HIV positive clients who all complained about the same doctor from the Hospital Rosales in the same month, resulting in the doctor being suspended); Interview with CONTRASIDA, *supra* note 94 (discussing a complaint filed with the ISSS in 2007 on behalf of a female employee who was not receiving her medications, and reporting that she received her medications a few months later, though they only received a response to the complaint in 2011); Interview with Fundasida, *supra* note 22 (discussing how previously homosexual patients were put on a waiting list for ARVs, until Fundasida filed a complaint with the Ministry of Health and the situation subsequently improved); see also Interview with Asociación Atlacatl Vivo Positivo, *supra* note 60 (discussing a lawsuit brought by the Executive Director of Asociación Atlacatl and thirty-six other PLWHA against the ISSS for access to ARVs, which went before the Inter-American Commission on Human Rights and ultimately forced the ISSS to provide the ARVs).

Discrimination against LGBT Individuals and PLWHA in Education and Employment

In El Salvador, education is a gateway to employment. A 2010 UN report found that the incidence of poverty in El Salvador was directly related to education levels, with 57 percent of those who had received no education living in poverty.¹ Furthermore, with no alternative means of support, the report stated that in El Salvador: “being unemployed or underemployed is...synonymous with being in a situation of poverty.”²

“If you haven’t had access to education, you will have difficulty accessing the labor sector...it is a chain.”

Barbara Romero,
Director of Sexual Diversity

While many Salvadorans endure poverty resulting from a lack of education and employment opportunities, the situation is particularly acute for LGBT individuals. Members of the LGBT community face the same economic difficulties as non-LGBT Salvadorans but these challenges are compounded by discrimination and stigma. According to the Director of Sexual Diversity, a Directorate within the Secretariat of Social Inclusion, discrimination on the basis of sexual orientation, gender identity, or HIV status in education is but one link in a chain of discrimination that leads to a lack of employment opportunities for LGBT individuals.³

A Missing Foundation: Discrimination in Education

THE RIGHT TO EDUCATION IN EL SALVADOR

The constitutional right to education in El Salvador is partially realized through an average education level of 12 years (or the equivalent of a high school diploma)⁴ and an 84 percent adult literacy rate.⁵ While the Constitution protects the right to education regardless of “social, religious, racial or political differences,” it is silent as to other grounds of discrimination, including sexual orientation, gender identity, and gender expression.⁶ The 2001 HIV

Law guarantees equal access to education in both private and public institutions to persons living with HIV, although the law mandates the Ministry of Health as the government entity responsible for implementation and not other, more relevant departments of government.⁷

“ [d]ue to a lack of a DUI [Salvadoran ID document], we cannot do many things...I cannot study because my ID says I am a man.”

Mónica Hernandez,
ASPIDH-Arcoiris

DISCRIMINATION IN EDUCATION

In spite of constitutional protections guaranteeing access to education,⁸ the Director of Sexual Diversity stated that educational institutions, primary and secondary, continue to refuse students entry on the basis of their sexual orientation or gender identity.⁹ Although the focus of this report is higher education rather than primary education, the treatment of LGBT children in primary education deserves separate study.

The LGBT individuals most vulnerable to discrimination during the course of university study are those who are perceived as LGBT. Activists indicated that those individuals who are unable or unwilling “to pass” as straight or as someone with a traditional gender identity face the most egregious forms of discrimination and abuses. For example, one transgender woman reported being told by the dean of a school that she could only attend if she cut her hair and dressed in a masculine manner because the school refused to “make exceptions” for anyone.¹⁰ Another activist reported that lesbian women, particularly those who are more masculine in appearance, suffer from similar forms of exclusion and discrimination.¹¹ One medical student stated: “If we change our appearance, we are more accepted...if not they say ‘look here comes that *maricon*’ [derogatory term for a gay man]... ”¹² Sayuri, a transgender woman, attended college by

dressing as a man, which she described as a form of “significant discrimination.”¹³ Representatives of a civil society organization identified transgender discrimination as a pressing issue in higher education. They stated that rather than endure discriminatory treatment or the degrading experience of “passing,” many LGBT individuals abandon their studies.¹⁴

Another advocate reported that members of the transgender community are denied admission to universities and are ineligible for scholarships due to the discrepancy between the name and gender with which they identify and that which appears on their national identity document.¹⁵ According to one transgender woman, “due to a lack of a DUI [Salvadoran ID document], we cannot do many things...I cannot study because my ID says I am a man.”¹⁶

In violation of the 2001 HIV Law, the organization Asociación Atlacatl Vivo Positivo reported that educational institutions of all types excluded individuals on the basis of their HIV status.¹⁷ For example, this same group reported an incident in which a medical school forced a student to take an HIV test, and subsequently denied him admission on that basis.¹⁸

According to the Director of Sexual Diversity, because of the lack of a “culture of denouncing” rights violations, few students and parents report discriminatory exclusion.¹⁹ Against this background, parents of LGBT students often do not follow through with filing complaints regarding discrimination against their children because, due to social stigma, family members accept such exclusion as appropriate or simply unavoidable.²⁰

“ I have my right. Because I am a human, a Salvadoran, I have a right to work.”

Sayuri, a transgender activist with COMCAVIS Trans

Exclusion and Discrimination in Employment

LEGAL GUARANTEES TO EMPLOYMENT

The Salvadoran Constitution establishes the right to work²¹ and recognizes work as a “social function,” which enjoys the protection of the state.²² Article 37 of the Constitution further establishes that the state “shall promote the employment of all people with physical, mental or social limitations.”²³ The Salvadoran Labor Code sets standards for work hours and overtime²⁴ as well as specific protections for women.²⁵ In May 2010, the Legislative Assembly enacted a workplace safety law requiring employers to provide a violence-free workplace, and establishing fines for employers who violate the new law.²⁶

The 2001 HIV Law guarantees that PLWHA have the right to not be fired or be demoted in salary, allowances, or work conditions.²⁷ The penalty for violating the law is a fine equal to one month of the individual offender’s salary.²⁸ El Salvador’s Labor Code prohibits employers from requesting HIV tests either of job applicants or current employees.²⁹ Employers are forbidden from directly or indirectly distinguishing between employees due to HIV status, as well as from divulging an employee’s HIV status.³⁰

The Salvadoran labor force can be divided between formal and informal sectors. More than 1 million individuals are employed in the informal sector, accounting for more than one-third of the overall workforce.³¹ Of the female workforce, 55 percent are employed in the informal sector.³² El Salvador does not have a national minimum wage, but rather establishes minimum wages according to sector.³³ Worker protections, including minimum

wage, are reported to be more effectively enforced in the formal sector.³⁴

In 2010, El Salvador’s per capita gross national income was \$3,360.³⁵ Out of a population of more than 6 million, approximately 38.7 percent live below the poverty line.³⁶ Due to a lack of disaggregated data, it is difficult to estimate how many LGBT individuals live in poverty. Nevertheless, the Director of Sexual Diversity stated that “a vast majority” of members of the LGBT community in El Salvador lived below the poverty line.³⁷

IDENTITY-BASED EXCLUSION IN EMPLOYMENT

Members of the LGBT community reported facing obstacles in securing employment due to discrimination by employers, which exacerbated the poverty and marginalization of the community.³⁸

While Presidential Decree 56 prohibits employment discrimination based on sexual orientation and gender identity in the public sector, there is no specific legislative or constitutional protection in the private sector, and advocates reported that private employers freely discriminated against LGBT individuals.³⁹ Again, LGBT community members reported that when their sexual orientation and gender identity were not detected, they could at times avoid discrimination, but only by foregoing the expression of their identity. Concealing identity by “passing” comes at a high price⁴⁰ and the inability or unwillingness to “pass” often resulted in discrimination and abuse.⁴¹ Transgender women reported that even when they were able to obtain jobs, they were often told by employers that they had to change their appearance to look like “men” or risk termination.⁴²

A representative of one transgender NGO, ASPIDH-Union Arcoiris, explained that having a Salvadoran identity document is critical to navigate many aspects of Salvadoran society.⁴³ However, transgender individuals are not legally able to change their name and gender. According to a transgender advocate, transgender persons have requested to be photographed as they identify but were told by authorities that they were not allowed to do so.⁴⁴ This gap had a profound impact on their access to education and employment opportunities.

As expressed by one transgender woman:

*We transwomen have a hard time in the work force. I work as a nurse. It is very hard for me to find a job because my name does not coincide with my physical appearance. We do not have a law yet which permits us to legally change our name. We are very rejected. At least gay men can get a job, as long as they behave in a certain manner, but for us it is harder and we suffer a lot.*⁴⁵

Despite the fact that the national identity document contains a space for an alternative name, or an “also known as” identity, it is rarely used and transgender individuals reported they have not been permitted to use this feature.⁴⁶

Notably, in August 2011, a Salvadoran family court ordered the Family Registry to change an individual’s birth certificate to correspond with her identity as a woman after she underwent sex reassignment surgery in the United States.⁴⁷ While this is a positive legal development, transgender individuals who choose not to undergo medical procedures or do not have the financial means to do so, remain outside the scope of this legal precedent.

While some LGBT individuals may freely choose to enter sex work, members of one civil society group reported that many are driven to work in the sex industry because of a lack of employment opportunities resulting from discriminatory practices and legal restrictions.⁴⁸ In particular, advocates noted that the pervasive social stigma transgender individuals face resulted in low educational levels, high rates of unemployment, and a high incidence of sex work.⁴⁹

The Director of COMCAVIS-TRANS stated that sex work can leave transgender women vulnerable to violence.⁵⁰ Sex workers reported being harassed and beaten by Metropolitan Police Force (Cuerpos de Agentes Metropolitanos, also referred to as CAM) or National Civilian Police (Policía Nacional Civil, also referred to as PNC) officers⁵¹ and targeted by gang members for violence or extortion.⁵² (See *Violence Section*) Because the anti-gang legislation criminalizes any contribution to gangs, even if coerced, transgender sex workers

who are extorted may find that their livelihood is further criminalized.⁵³ Moreover, the overall economic context limits alternative sources of livelihood. One sex worker noted that sex workers are always told to “quit [sex work] and... do something else, but really in [El Salvador] there are no job opportunities with decent wages.”⁵⁴

DISCRIMINATION IN THE COURSE OF EMPLOYMENT

LGBT community members who were able to secure employment described patterns of discrimination in the workplace.⁵⁵ LGBT individuals reported having to hide their sexual orientation while at work, especially in the private sector,⁵⁶ or contend with insults and mistreatment. One factory supervisor noted that when employees and coworkers arrived for work, they would say to him “here comes the *maricón*” (derogatory term for gay male).⁵⁷ Alejandra, a transgender woman, was continually referred to as a “*sidoso*” (AIDS infected, taken from SIDA which is the acronym for AIDS in Spanish) during the course of her employment at a bakery and reported that she was ultimately fired because of her gender identity.⁵⁸

In addition, several LGBT individuals recounted being assigned more difficult tasks than their coworkers, such as lifting heavy containers and being assigned to undesirable shifts. One transgender woman recalled being told to count all of the merchandise in a large warehouse with high shelves,⁵⁹ and believed at the time “they were doing it to bother me, to discriminate against me.”⁶⁰ Given gender-based wage disparities, one report finds that lesbian women and transgender women are particularly impacted by this type of discrimination on the job in addition to the obstacles resulting from their sexual orientation and/or gender identity.⁶¹

Despite the prevalence of workplace discrimination, LGBT individuals reported that they were apprehensive about formally reporting discrimination because they believed they would be fired.⁶² Again, a lack of faith in the effectiveness of the legal system and fear of retaliation create disincentives to seeking redress.

HIV/AIDS TESTING BY EMPLOYERS

Discrimination on the basis of HIV status is still prevalent, with a 2010 study by the Salvadoran Ministry of Public Health and Social Assistance finding 31.4 percent of PLWHA in El Salvador experienced some form of discrimination due to their HIV status, including reports of denial of public services and loss of employment.⁶³ More specifically, the study estimated that one in five PLWHA has suffered some form of labor discrimination due to HIV status with 19 percent reporting the loss of employment due to the individual's HIV status.⁶⁴

Despite the 2001 HIV Law and Labor Code Article 30, which make it illegal for employers to require HIV testing from their employees, one NGO working with PLWHA reported that these practices were still prevalent.⁶⁵ Another group stated that the main violators were private companies,⁶⁶ which required HIV testing as a prerequisite to employment or as a condition of continued employment.⁶⁷ HIV advocacy groups reported that one fast food chain was known to systematically require HIV tests.⁶⁸ Another HIV advocacy group reported instances in which employers required domestic workers to be tested before being allowed to enter their employers' homes for work.⁶⁹

The NGO, Asociación Atlacatl Vivo Positivo also reported that some employers found ways around the legal proscriptions against testing through "hidden means" which implicate the right to privacy.⁷⁰ One HIV/AIDS advocate described employers obtaining test results directly from a health care provider when information was released to the employer rather than the employee.⁷¹ The same advocate noted that in *maquiladoras* [assembly factories] employees who requested time off for multiple medical appointments raised the suspicion of employers who then investigated the employees and, in some cases, ultimately fired the workers in question.⁷²

LIMITED LEGAL OPTIONS

The options for legal recourse available to those who have faced workplace discrimination on the basis of sexual orientation and gender identity are limited. This is primarily due to the lack of anti-discrimination laws and constitutional protections specifically aimed at LGBT individuals. The Public Defender's Office (Procuraduría General de la República, also referred to as PGR) provides free legal representation to criminal defendants as well as to low-income and vulnerable individuals in a variety of legal matters, including labor discrimination cases in both the private and public sector.⁷³ However, Deputy Ombudsman of Labor, Property, and Personal Rights of the PGR reported that the office had never pursued an employment discrimination claim based on sexual orientation or gender identity in court.⁷⁴ Furthermore, cases with the PGR can take anywhere from two months to two years to reach a resolution.⁷⁵ Given the lack of legal protections and the institutional barriers, LGBT individuals have little recourse when facing private sector workplace discrimination.

PLWHA also face weak legal protections due to the lack of enforcement of existing safeguards. While the current HIV Law does provide concrete legal protections, a study found that only 57.4 percent of PLWHA interviewed knew about the law.⁷⁶ Of those who were aware of it, 22.5 percent reported having their rights violated as a PLWHA, but only 12.4 percent took any steps to seek redress, primarily due to fear of stigma and intimidation, lack of confidence in the system, and lack of financial resources to do so.⁷⁷ According to the same PGR Deputy Ombudsman, the PGR has been involved in very few HIV-based discrimination cases and commented that in termination cases "it is difficult to prove motive."⁷⁸ This same official reported that there was no plan within the PGR to increase capacity or to develop this practice area.⁷⁹

Achievements and Remaining Challenges

Despite the 2001 HIV Law, Presidential Decree 56, Labor Code protections, and constitutional guarantees, LGBT individuals face serious discrimination that limits the full enjoyment of their educational and employment rights.

The issuance of Presidential Decree 56, which bans discrimination based on sexual orientation and gender identity in the public service, is a positive step, but only applies to the public sector.⁸⁰ This leaves private actors, including employers and educational institutions, beyond the reach of any legal protections for members of the LGBT community. One advocate described Decree 56 as “purely declaratory” in nature, with no practical effect on protecting LGBT rights.⁸¹

A proposed HIV Law, if passed, would require various ministries, including the Ministries of Education and Work, to share responsibility for the eradication of HIV discrimination.⁸² The proposed law also aims to guarantee the civil rights of workers with HIV, and encourages employers not to discriminate against employees based on sexual orientation but stops short of prohibiting such discrimination.⁸³

The Ombudsman for the Defense of Human Rights (Procuraduría para la Defensa de los Derechos Humanos, also referred to as PDDH), and in particular its HIV department, advances employment rights for PLWHA and LGBT individuals, but its capabilities to address employment discrimination are limited, given its focus on the public sector.⁸⁴ While the PGR litigates private employment discrimination claims, the PGR’s representation of PLWHA in employment discrimination cases has been minimal despite the 2001 HIV Law providing some legal basis for such claims.⁸⁵ Without a clear legal basis for LGBT-based claims, advocates reported that private sector discrimination against LGBT individuals continues unabated.⁸⁶ The lack of an enforcement mechanism to redress employment discrimination against LGBT individuals combines with the absence of a “culture of complaints” in both

the public and private sectors to limit the opportunities for LGBT individuals to vindicate their employment rights through both the PGR and PDDH.

Notes: Discrimination against LGBT Individuals and PLWHA in Education and Employment

1 United Nations Development Program, *Informe Sobre Desarrollo Humano El Salvador 2010*, Sección III: Cuando el bienestar se reduce [Report on Human Development El Salvador 2010, Section III: When well-being is reduced], (2010) at 194 [hereinafter UNDP Report], <http://www.pnud.org/sv/2007/idh/content/view/35/109/> [last visited May 17, 2012].

2 *Id.*

3 Interview with Barbara Romero, Director of Sexual Diversity, Sexual Diversity Directorate under the Secretariat of Social Inclusion, in San Salvador, El Salv. (Feb. 22, 2011) [hereinafter Interview with Director of Sexual Diversity].

4 The Ministry of Education [Ministerio de Educación] oversees a system of free education from grades one through nine, as well as free special education. The Communal Education Associations (ACE), the School Boards of Directors (CDE), and the Catholic Educational School Boards (CECE), UNESCO, World Data on Education 2010, 3 (2010), <http://unesdoc.unesco.org/images/0018/001890/189032s.pdf> [last visited May 17, 2012].

5 UNDP Report, *supra* note 1 at 3, 369.

6 Constitución de la República de El Salvador, as amended, 2 de Octubre de 2003, [hereinafter Constitution of the Republic] Art. 58 (“Ningún establecimiento de educación podrá negarse a admitir alumnos por motivos de la naturaleza de la unión de sus progenitores o guardadores, ni por diferencias sociales, religiosas, raciales o políticas.”) [“No educational facility can refuse to admit students for reasons of the nature of his parents or tutors’ union, nor for social, religious, racial or political differences.”], <http://www.asamblea.gob.sv/eparlamento/indice-legislativo/buscador-de-documentos-legislativos/constitucion-de-la-republica> [last visited May 17, 2012].

7 See Ley de Prevención y Control de la Infección Provocada por el Virus de Inmunodeficiencia Humana [Law for the Prevention and Control of the Infection Provoked by the Human Immunodeficiency Virus], Decreto No. 588 de la Asamblea Legislativa de la República de El Salvador, 2001 (El Salv.) at art. 5 [hereinafter 2001 HIV Law].

8 Constitution of the Republic, *supra* note 6.

9 Interview with Director of Sexual Diversity, *supra* note 3.

10 LGBT Community Roundtable, in San Salvador, El Salv. (Feb. 22, 2011) [hereinafter LGBT Community Roundtable].

11 See Interview with Ana Cisneros, independent LGBT activist,

(Sept. 21, 2011) [hereinafter Interview with Ana Cisneros].

12 LGBT Community Roundtable, *supra* note 10.

13 *Id.*

14 Interview with Karla Stephanie Avelar Orellana (with Sayuri and Alejandra), Directora, COMCAVIS-TRANS, in San Salvador, El Salv. (Feb. 22, 2011) (“Es difícil estudiar porque se pasa por un proceso de discriminación grandísimo.”) [“It is difficult to study because you go through a process of tremendous discrimination.”] [hereinafter Interview with COMCAVIS-TRANS].

15 Interview with Mónica Hernández, Leader of ASPIDH-Unión Arcoiris, in San Salvador, El Salv. (Feb. 24, 2011) [hereinafter Interview with ASPIDH-Unión Arcoiris].

16 *Id.* [“Por falta de un DUI no podemos hacer muchas cosas... no puedo estudiar porque mi document dice que soy un hombre.”]

17 Interview with Dora Estela Rivera, Coordinador, Asociación Atlacatl Vivo Positivo, in San Salvador, El Salv. (Feb. 22, 2011) [hereinafter Interview with Asociación Atlacatl Vivo Positivo].

18 *Id.*

19 Interview with Director of Sexual Diversity, *supra* note 3.

20 *Id.*

21 Constitution of the Republic, *supra* note 6 at art. 2.

22 *Id.* at art. 37.

23 *Id.*

24 Republic of El Salvador, Legis. Assemb., Código De Trabajo [Labor Code], art. 89, 92 [hereinafter Código de Trabajo] (maximum workweek of 44 hours, limited to no more than six days, and to no more than eight hours per day), <http://www.csj.gob.sv/leyes.nsf/86d954e1d83eee5786256d48006fd626/46004eae5770911c06256d05005d7c3f?OpenDocument> [last visited May 17, 2012].

25 *Id.* at art. 110.

26 Republic of El Salvador, Legis. Assemb., LEY GENERAL DE PREVENCIÓN DE RIESGOS EN LOS LUGARES DE TRABAJO [General Law for Risk Prevention in the Workplace], <http://www.asamblea.gob.sv/eparlamento/indice-legislativo/buscador-de-documentos-legislativos/ley-general-de-prevencion-de-riesgo-en-lugares-de-trabajo/> [last visited May 17, 2012].

27 2001 HIV Law, *supra* note 7.

28 *Id.*

29 Código De Trabajo, *supra* note 24, at art. 30.

30 *Id.*

31 Int'l Labor Org, *Statistical Update On Employment in the Informal Economy* (June 2011) at 4 (listing 1,242,000 Salvadorans employed in the informal sector), [http://laborsta.ilo.org/sti/DATA-FILES/20110610 Informal Economy.pdf](http://laborsta.ilo.org/sti/DATA-FILES/20110610%20Informal%20Economy.pdf) [last visited May 17, 2012].

32 U.S. Department of State, *2010 Human Rights Report: El Salvador*, 19 [hereinafter 2010 DOS Human Rights Report] <http://www.state.gov/documents/organization/160164.pdf> [last visited May 17, 2012].

33 Ministerio de Trabajo y Previsión Social [Ministry of Labor and Social Security], *Tarifas de Salarios Mínimos Vigentes a Par-*

tir del 26 de Mayo del 2011 [Minimum Wage Rates Effective as of May 26, 2011] (stating that the minimum agricultural wage is \$3.50 per day, while the minimum wage in the service industry is more than double that at \$7.47 per day), http://www.mtps.gob.sv/index.php?option=com_content&view=article&id=108:salario-minimo&catid=104:salario-minimo&Itemid=56 [last visited May 17, 2012].

34 2010 DOS Human Rights Report, *supra* note 32 at 31.

35 The World Bank, *El Salvador* (2010), <http://data.worldbank.org/country/el-salvador> [last visited May 17, 2012].

36 *Id.*

37 Interview with Director of Sexual Diversity, *supra* note 3.

38 See interview with Ana Cisneros, *supra* note 11; Interview with Director of Sexual Diversity, *supra* note 3.

39 Decreto No. 56 [Decree 56], DO, No. 86, Tomo 387, May 12, 2010, <http://xa.yimg.com/kq/groups/22079676/1118999878/name/Decreto+contra+la+discriminación+por+identidad+y+orientación.pdf> [last visited May 18, 2012]; Interview with Ana Cisneros, *supra* note 11; Interview with Director of Sexual Diversity, *supra* note 3.

40 See LGBT Community Roundtable, *supra* note 10.

41 See *id.*

42 *Id.*

43 Interview with ASPIDH-Unión Arcoiris, *supra* note 15 (“Si tuvieramos un documento de identidad con un nombre de mujer, podríamos acceder a un trabajo. Yo con trabajo tengo un sueldo. Por falta de un documento, no podemos hacer un montón de cosas.”) [“If we could have an identity document with a woman’s name, we would be able to find work. With work, I have income. Due to the lack of a document, we cannot do many things.”].

44 See Interview with COMCAVIS-TRANS, *supra* note 14.

45 LGBT Community Roundtable, *supra* note 10.

46 See Interview with ASPIDH-Unión Arcoiris, *supra* note 15; interview with COMCAVIS-TRANS, *supra* note 14.

47 See Carlos Montes, *Transexual*, La Prensa Grafica, Sept. 18, 2011, <http://www.laprensagrafica.com/el-salvador/departamentos/218446-transexual.html> [last visited May 17, 2012].

48 See Interview with COMCAVIS-TRANS, *supra* note 14.

49 *Id.*

50 *Id.*

51 Interview with Alfredo Carvajal, Project Areas Coordinator, and Iris Garcia, HIV Project Coordinator, ASPS, in San Salvador, El Salv. (Feb. 25, 2011) [hereinafter Interview with ASPS].

52 Interview with COMCAVIS-TRANS, *supra* note 14; Interview with Fransheska Stacy Reyes, Coordinator, ASTRANS, in San Salvador, El Salv. (Feb. 23, 2011).

53 Decreto No. 158 [Decree 158], Ley Anti-Maras [Anti-Gangs Act] (2003), at art. 30 <http://www.glin.gov.view.action?glinID=93702> [last visited May 17, 2012].

54 Interview with Guadalupe de Castañeda, Director, ICW El Salvador, in San Salvador, El Salv. (Feb. 25, 2011) (“Siempre dicen que deberían dejar el trabajo y deberían dedicarse a otra cosa, pero

- realmente en nuestro país no hay una alternativa para ingresos ‘decentes’ ... no hay oportunidades laborales con salarios dignos.”)
- 55** See LGBT Community Roundtable, *supra* note 10.
- 56** Interview with Juan Francisco Ortiz, Director General, Fundasida, in San Salvador, El Salv. (Feb. 23, 2011).
- 57** LGBT Community Roundtable, *supra* note 10.
- 58** Interview with COMCAVIS-TRANS, *supra* note 14.
- 59** Interview with LGBT Community Roundtable, *supra* note 10.
- 60** *Id.*
- 61** 2010 DOS Human Rights Report, *supra* note 32, at 19.
- 62** Marielos Olivo, *Diagnostico para la construcción de políticas públicas inclusivas, diversas y respetuosas de los derechos humanos de las personas con orientación e identidad sexual diversa* [Diagnostic for the construction of inclusive and diverse public policies respectful of the human rights of persons with a diverse sexual orientation and identity], Coordinación LGBT. El Salvador 2007.
- 63** Ministerio de Salud Publica y Asistencia Social [Ministry of Public Health and Social Assistance], *Estudio de Estigma y Discriminación en Personas con VIH* [Study of Stigma and Discrimination in Persons with HIV], 42 (Dec. 2010) [hereinafter Estudio de Estigma] http://www.ippfwhr.org/sites/default/files/Estudio_de_Estigma_y_Discriminacion_en_personas_con_VIH.pdf [last visited May 17, 2012].
- 64** *Id.* at 47.
- 65** Interview with ASPS, *supra* note 51.
- 66** Interview with Asociación Atlacatl Vivo Positivo, *supra* note 17.
- 67** See Interview with Isabel Payes, Director, Coordinadora Nacional de la Mujer Salvadoreña (CONAMUS) [National Coordinating Committee of Salvadoran Women], in San Salvador, El Sal. (Feb. 24, 2011).
- 68** *Id.*
- 69** Interview with Asociación Atlacatl Vivo Positivo, *supra* note 17.
- 70** *Id.*
- 71** Interview with Deysi Mejia, Coordinator of the Program of Pastoral Accompaniment, Fundación Contrasida, in San Salvador, El Salv. (Feb. 24, 2011).
- 72** *Id.*
- 73** Interview with German Emilio Muñoz Hernandez, Deputy Ombudsman of Labor, Prop., and Pers. Rights, Procuraduría General de la República (PGR), *supra* note 24, in San Salvador, El Salv. (Feb. 25, 2011) [hereinafter Interview with PGR Deputy Ombudsman]. See also Unidad de Defensa de los Derechos del Trabajador, Procuraduría General de la República (PGR) [hereinafter Unidad de Derechos del Trabajador], <http://www.pgr.gob.sv/cdl.html> [last visited May 18, 2012].
- 74** Interview with PGR Deputy Ombudsman, *supra* note 73 (As of February 2011, no trainings had taken place within the PGR on Decree 56 and there had been no coordination with the Sexual Diversity Directorate.)
- 75** Unidad de Derechos del Trabajador, *supra* note 73.
- 76** Estudio de Estigma, *supra* note 63 at 58.
- 77** *Id.* at 60.
- 78** Interview with PGR Deputy Ombudsman, *supra* note 73.
- 79** *Id.*
- 80** Decreto No. 56 [Decree 56], DO, No. 86, Tomo 387, 12 de Mayo de 2010, <http://xa.yimg.com/kq/groups/22079676/1118999878/name/Decreto+contra+la+discriminación+por+identidad+y+orientación.pdf> [last visited May 18, 2012].
- 81** Interview with Ana Cisneros, *supra* note 11.
- 82** Ivonne Vásquez, *Niños Se Harían La Prueba del VIH Sin El Permiso de Padres* [Children Could be Tested for HIV Without Parent Permission], *El Diario De Hoy*, June 23, 2011 http://www.elsalvador.com/mwedh/nota/nota_completa.asp?idCat=8613&idArt=5947267 [last visited May 17, 2012].
- 83** See *id.*
- 84** Interview with Lic. Oscar Luna, Ombudsman, & Antonio Aguilar, Ombudsman of Economic, Social, and Cultural Rights Unit, Office of the Ombudsman for the Defense of Human Rights (PDDH), in San Salvador, El Sal. (Feb. 22, 2011).
- 85** Interview with PGR Deputy Ombudsman, *supra* note 73.
- 86** See LGBT Community Roundtable, *supra* note 10.

Conclusion and Recommendations

In assessing the human rights situation of LGBT individuals in El Salvador, this report reflects the priority issues raised by affected community members and advocates. As part of an analysis of the current legal framework, advances as well as obstacles to the realization of human rights for LGBT individuals are identified. What follows are recommendations for action by the government to address the community-identified priority areas. While certain initiatives, such as Presidential Decree 56, represent a step toward recognizing the human rights of LGBT individuals, more work remains to achieve full and meaningful implementation of these protections. Where legal protections are absent, legislative reform, institutional action, and education and training are imperative to bring El Salvador into compliance with its international human rights obligations. The government is called upon to progressively implement these recommendations in close collaboration with LGBT civil society groups in order to respond to community needs and create durable solutions. El Salvador stands at the brink of opportunity to solidify the human rights of LGBT individuals, thus strengthening all of its institutions and distinguishing itself as a model in the region.

The following measures are recommended:

LEGISLATIVE REFORM

To the President and Legislative Assembly:

- » Amend Article 3 of the Constitution to include LGBT individuals as a protected class based on sexual orientation and gender identity to ensure the full enjoyment of all constitutional rights;
- » Pass anti-discrimination legislation explicitly protecting LGBT individuals from all forms of discrimination, including in education and employment, in both the public and private sector;
- » Pass legislation providing for the legal recognition of the right to identity and permitting individuals to change their name and gender on official identity documents (DUI) without any requirement of sexual reassignment surgery or other medical interventions. In the interim, allow transgender individuals to use the “also known as” option to include the name with which they identify on their DUI;
- » Amend the penal code through legislation that specifically protects the LGBT community against threats and violence and recognizes LGBT hate crimes; and
- » Pass and fully implement the proposed HIV Law.

INSTITUTIONAL ACTION

To the National Civilian Police and the Office of the Attorney General:

- » Immediately open an investigation of the murders of members of the LGBT community in a transparent process, including the homicides that took place during the summer of 2009;
- » Expand and deepen training of police officers on their human rights obligations and duty to adhere to Presidential Decree 56;

- » Collect disaggregated data on LGBT crime victims and establish a system for classifying those crimes which could be considered LGBT hate crimes, including protocols for police response to crime scenes and guidelines for the Attorney General's Office;
- » Institute a zero tolerance policy for members of law enforcement who commit physical or sexual assault and harass or discriminate against LGBT individuals and where violations occur impose severe sanctions;
- » Develop safeguards within the complaint process for members of the LGBT community who file reports of abuse against police officers and private parties; and
- » Apply the Special Integral Law for a Life Free of Violence for Women in cases involving transgender, lesbian, and bisexual women where appropriate.

To the Ombudsman for the Defense of Human Rights (PDDH):

- » Increase the staffing and resources of the HIV Unit to receive and investigate complaints on behalf of PLWHA; and
- » Continue to monitor compliance with Presidential Decree 56 and Ministerial Decree 202, and impose sanctions for violations.

To the Public Defender's Office (PGR):

- » Expand the capacity of the Worker's Rights Defense Unit to represent PLWHA through the assignment of staff focused on claims against employers who discriminate based on HIV status as well as those who require HIV testing or seek to ascertain the HIV status of their employees;
- » Provide confidential mechanisms for the reporting of illegal testing and safeguards against retaliation;

- » Begin to receive, investigate, and litigate claims against educational institutions that deny equal access to LGBT students or children of LGBT parents and students living with HIV/AIDS or children of PLWHA; and
- » Promote reporting by LGBT individuals and PLWHA of instances of discrimination in education, employment, family law, and other sectors.

To the Ministry of Health:

- » Increase access to integrated care for PLWHA, including treatment for opportunistic infections, access to vitamins, and treatment for other health issues;
- » Ensure that private security guards are appropriately trained on non-discrimination and sanctioned for restricting access to care, harassing patients, or violating confidentiality standards; and
- » Collaborate with the Salvadoran Social Security Institute (ISSS) to better coordinate treatment for PLWHA across the two health systems.

To the Ministry of Education:

- » Strengthen the complaint system and inform students and parents about their rights and how to bring claims against institutions and individuals that discriminate on the basis of gender identity, sexual orientation, or HIV status to ensure the fulfillment of the right to education.

TRAINING AND PUBLIC AWARENESS

To the Ombudsman for the Defense of Human Rights (PDDH):

- » Implement a comprehensive training plan in cooperation with the Sexual Diversity Directorate for all government employees, including police, regarding Presidential Decree 56 and their duties to fulfill its mandate; and
- » Increase public awareness about the Presidential Decree 56 and Ministerial Decree 202, the rights protections afforded to LGBT individuals and PLWHA through these and other mechanisms, and encourage the reporting of rights violations.

To the Public Defender's Office (PGR):

- » Launch a public information campaign about the illegality of HIV testing by employers in both the public and private sector; and
- » Increase awareness within the PGR regarding the LGBT community and PLWHA in order for personnel to identify and respond to specific forms of discrimination facing these communities.

To the Ministry of Health:

- » Expand training of all categories of health sector employees about the requirements of Ministerial Decree 202 and sanctions for violating its mandate;
- » Provide training regarding the health needs of LGBT individuals and PLWHA in order to improve the provision of health services and reduce the stigma afflicting those individuals and the professionals who treat them;
- » Continue to increase awareness among patients about their rights and promote reporting of violations; and

- » Increase access to sexual education, HIV testing and condoms, and implement other initiatives outlined in the National Strategic Multi-sector Plan to the Response of HIV/AIDS 2011-2015.

To the Ministry of Education:

- » Initiate an education campaign aimed at sensitizing educators and administrators and reinforcing the obligations of schools to provide equal education in a safe place for all students, regardless of their sexual orientation, gender identity, or HIV status or that of their family members.

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COVER PHOTO AP Photo/Luis Romero, "People use umbrellas to protect from rain with the colors of the gay movement during the gay pride parade in San Salvador" (2010).

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