



# **The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in NICARAGUA**

## **A Shadow Report**

Submitted to the Human Rights Committee by:

Global Rights

Grupo Safo

International Gay and Lesbian Human Rights Commission (IGLHRC)

International Human Rights Clinic, Human Rights Program, Harvard Law  
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Red de LatinoAmerica y el Caribe de Personas Trans (Red LacTrans)

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## Introduction

The International Human Rights Clinic, Human Rights Program of Harvard Law School, Global Rights, the International Gay and Lesbian Human Rights Commission (IGLHRC), the Nicaragua branch of the Red de LatinoAmerica y el Caribe de Personas Trans and Grupo Safo, a Managua-based lesbian, gay, bisexual, and transgender (LGBT) advocacy group, have worked together to produce this report on the status of LGBT individuals in Nicaragua.<sup>1</sup> The purpose of this report is to provide an evaluation of Nicaragua's compliance with the International Covenant on Civil and Political Rights (ICCPR) and to complement ongoing advocacy of greater protection and promotion of LGBT persons in Nicaragua.

Nicaragua ratified the ICCPR on March 12, 1980 and submitted its third periodic state report to the Human Rights Committee in June 2007 (document dated October 19, 2007). The Human Rights Committee will evaluate this report and consider Nicaragua's compliance with the ICCPR on October 13-31, 2008. Shadow reports submitted by non-governmental organizations may serve as an additional source of information for UN committee members.

## Executive Summary

Article 27 of the Nicaraguan Constitution states that all people are equal before the law and are subject to equal protection under the law.<sup>2</sup> It denounces discrimination based on birth, nationality, political belief, race, sex, language, religion, opinion, origin, economic position, or social condition.<sup>3</sup> Though this non-discrimination clause includes discrimination based on sex, it does not include discrimination based on sexual orientation and gender identity. LGBT individuals in Nicaragua experience violations of their human rights due to their sexual orientation and gender identity.

Article 204 of the Nicaragua Penal Code codified the discriminatory culture for LGBT individuals in Nicaragua. It stated:

Anyone who induces, promotes, propagandizes or practices in scandalous form sexual intercourse between persons of the same-sex commits the crime of sodomy and shall incur 1 to 3 years imprisonment.<sup>4</sup>

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<sup>1</sup> This report was drafted by Michelle Galdos (3L HLS), under the supervision of Mindy Jane Roseman (J.D., Ph.D. HLS) with significant assistance from Sam Montiel of Grupo Safo and Silvia Martinez of the Nicaraguan branch of RedLac Trans; special thanks to Stefano Fabeni (J.D., LL.M.), Director of the LGBTI Initiative of Global Rights; Marcelo Ferreyra, Coordinator for Latin America and the Caribbean of the International Gay and Lesbian Human Rights Commission, and those who contributed on condition of anonymity.

<sup>2</sup> Constitución Política de la República de Nicaragua art. 27 (translated).

<sup>3</sup> *Id.*

<sup>4</sup> Amnesty International, *Love, Hate, and the Law: Decriminalizing Homosexuality* (2008, POL 30/003/2008), available at <http://www.amnestyusa.org/document.php?id=ENGPOL300032008>.

Nicaragua repealed Article 204 at the end of 2007, when the new criminal code was approved, and the repeal took effect July 2008.<sup>5</sup> Though decriminalizing sodomy is an advancement for human rights in Nicaragua, individuals and communities still face widespread discrimination and human rights violations based on their sexual orientation and gender identity. The third periodic report of Nicaragua fails to mention this forms of discrimination.<sup>6</sup> This report traces the numerous human rights violations LGBT individuals have suffered in the past few years even though the Nicaraguan government has the duty to protect them from these violations under the ICCPR.

This shadow report was made possible through the work of numerous Nicaraguan activists and NGOs, who shared information and reports with us.

## **Substantive Violations of the Convention**

### **Articles 2(1) and 26 (Non-discrimination) and Article 3 (Gender Equality)**

The ICCPR defines non-discrimination standards by which state signatories should abide in Articles 2(1) and 26. Article 2(1) states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>7</sup>

General Comment 31 to Article 2 holds state parties accountable for actions of private parties that encroach on ICCPR rights if the state has not provided measures to protect individuals from this encroachment.<sup>8</sup> Article 26 further qualifies the nature of the state's protection from discrimination, stating:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>9</sup>

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<sup>5</sup> Amnesty International, *supra* note 3.

<sup>6</sup> Third Period Report submitted by Nicaragua to the Human Rights Committee, U.N. Doc. CCPR/C/NIC/3, October 19, 2007.

<sup>7</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A, 999 U.N.T.S. 171, art. 2 (Dec. 16, 1966) [hereinafter ICCPR].

<sup>8</sup> General Comment 31 to Article 2 of the ICCPR.

<sup>9</sup> ICCPR, *supra* note 7, art. 2.

The Human Rights Committee explicitly recognized the ICCPR's inclusion of sexual orientation in its 1994 decision *Toonen v. Australia*.<sup>10</sup> In *Toonen*, the Committee applied Articles 2(1) and 26 to find discrimination based on sexual orientation.<sup>11</sup> Individuals experience societal discrimination in Nicaragua based on their sexual orientation, gender identity and expression. A flagrant example of this occurred in a September 14, 2007 National Assembly debate. This was publicized on television, and two Deputies, Wilfredo Navarro and Freddy Torres used homophobic language.<sup>12</sup> This language, coming from representatives of the Assembly, is evidence of the failure of the state to condemn and fight homophobia, even in the public sphere. Also, the current First Lady also publicly stated that homosexuals should not have the right to marry because traditional marriage is between a man and a woman.<sup>13</sup> The LGBT community should be protected from such public displays of homophobia.

In 2006, a 45 year old lesbian was forced to move out of her house and into a shelter due to her sexual orientation.<sup>14</sup> In this case, the lesbian's mother had given her the house 25 years earlier but never transferred the title to her.<sup>15</sup> When the mother found out that her daughter was a lesbian, she forced her daughter to leave the house and put it on the market to sell.<sup>16</sup> This is another example of the stigma placed on homosexuals in Nicaragua and the societal discrimination they suffer because of their sexual orientation.

In such a social and political context, failure of the state to enact anti-discrimination legislation and to punish hate crimes may be considered a violation of articles 2 and 26 of the ICCPR.

### Workplace Discrimination

Individuals in Nicaragua face workplace discrimination both due to their sexual orientation, gender identity and perception that they are more likely to be HIV-infected.<sup>17</sup> The 1996 Labor Code does not address discrimination based on sexual orientation and gender identity at the workplace.<sup>18</sup>

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<sup>10</sup> *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994).

<sup>11</sup> *Id.*

<sup>12</sup> U.S. State Department Report on Human Rights Practices in Nicaragua 2008 (Mar. 11, 2007) [hereinafter State Department Report on Nicaragua], available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100647.htm>.

<sup>13</sup> Mario Vasquez, *Rosario Murillo no adminte la diversidad sexual*, Aug. 14, 2008, available at <http://espacionica.es.tl/El-proyecto.htm>.

<sup>14</sup> *Id.* at 5.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Ley No. 185 of October 30, 1996 [Código del Trabajo] (Nic.), available at [http://www.asamblea.gob.ni/index.php?option=com\\_wrapper&Itemid=153](http://www.asamblea.gob.ni/index.php?option=com_wrapper&Itemid=153). The Code does guarantee workers equal pay for the same job without discrimination based on political affiliations, religion, race, or any other classification compatible with maintaining human dignity. However, sexual orientation is not explicitly added to this list.

In 2001, a Javier Antonio Berrios was turned away from a job as a school photographer for graduation ceremonies after declaring his homosexuality.<sup>19</sup> Berrios had a good relationship with the school before this declaration; it frequently let him enter to take photographs of students in their recreational activities. However, after learning of his sexual orientation, the school chose instead to employ a corporation that charged a higher fee than what Berrios was charging as an individual and had him escorted out of the school by security.<sup>20</sup>

A lesbian woman was fired in 2006 from her job after her family reported her sexual orientation to her employer.<sup>21</sup>

In 2007, there were allegations that a garment factory fired several workers due to their sexual orientation.<sup>22</sup> There were further allegations that the management at this garment factory tolerated workplace violence against workers based on their sexual orientation.<sup>23</sup>

These episodes of discriminatory treatments, in absence of measures by the state to combat discrimination on grounds of sexual orientation and gender identity, suggests a violation of the ICCPR.

#### Discrimination due to HIV/AIDS

According to a 2008 USAID report, 26% of all people living with HIV/AIDS are men who have sex with men.<sup>24</sup> Moreover, though 9% of men who have sex with men have HIV/AIDS, the current Nicaraguan prevention program does not specifically target this population and its unique needs.<sup>25</sup>

The existence for 16 years of criminal legislation punishing same-sex sexual behaviors as well as “propaganda” has represented a significant obstacle in ensuring HIV/AIDS prevention and access to treatment for sexual minorities.

Widespread discrimination against people living with HIV/AIDS in Nicaragua exists due to social norms and a lack of education about the disease.<sup>26</sup> The Law for the Promotion, Protection, and Defense of Human Rights of People Living with HIV/AIDS (Law 238) went into effect in 1999. Though Law 238 created the Nicaraguan AIDS Commission (CONASIDA) to guide the national response to AIDS, CONASIDA lacks the budget capacity to support NGOs in their prevention and treatment programs.<sup>27</sup> Thus, many individuals with HIV/AIDS cannot access

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<sup>19</sup> Grupo Safo, *Informe Sombra*, 9 (Oct. 1, 2008).

<sup>20</sup> *Id.*

<sup>21</sup> Grupo Safo, *supra* note 19, at 4.

<sup>22</sup> State Department Report on Nicaragua.

<sup>23</sup> *Id.*

<sup>24</sup> USAID, *HIV/AIDS Health Profile 2008, Nicaragua* [hereinafter USAID Profile], available at [http://www.usaid.gov/our\\_work/global\\_health/aids/Countries/lac/nicaragua\\_profile.pdf](http://www.usaid.gov/our_work/global_health/aids/Countries/lac/nicaragua_profile.pdf).

<sup>25</sup> *Id.* at 22.

<sup>26</sup> State Department Report on Honduras, *supra* note 11.

<sup>27</sup> USAID Profile, *supra* note 24.

appropriate health care services and medicines. Health care providers and antiretroviral medicines are in inadequate supply.<sup>28</sup> In fact, only 16% of people living with HIV/AIDS receive antiretroviral treatment.<sup>29</sup> There is also a lack of access to diagnostic and maintenance tests to monitor those receiving treatment.<sup>30</sup>

Travesti sex workers with HIV/AIDS also suffer greatly due to discrimination based on their gender identity and expression.<sup>31</sup> They are denied access to antiretroviral treatment as well as condoms at health centers.<sup>32</sup> Furthermore, when it comes to access to health care and treatment, transgender people have been constantly considered homosexuals,<sup>33</sup> without regard for their gender identity and expression. Doctors, nurses, and other medical personnel habitually taunt them and make offensive comments about their gender identity, even in cases of severe illness. Travesti people know that by going to a hospital they will inevitably expose themselves to systematic violence, disinterested medical staff and poor care. For these reasons, they often refuse medical assistance; anything is better than subjecting themselves to such intense humiliation, even though lack of medical treatment might lead to death.

For all these reasons, the state must be held accountable for discrimination based on sexual orientation and gender identity in access to health care services.

### Discrimination in Access to Education

In early 2008, twelve individuals were prohibited from attending three different public schools because they were wearing women clothes.<sup>34</sup> The school said that they had to dress according to their gender in order to attend class.<sup>35</sup> This restriction represents a direct violation of Articles 2(1) and 26. The youths should not be barred from attending school due to the way they dress.

### Housing Discrimination

LGBT individuals are discriminated against in their applications for public housing because they do not qualify as a “family” under the Nicaraguan Public Housing

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<sup>28</sup> *Id.*

<sup>29</sup> Public Health Watch and Open Society Institute, *Civil Society Perspectives on HIV/AIDS Policy in Nicaragua, Senega, Ukraine, United States, and Vietnam*, 33 (2007), available at [http://www.soros.org/initiatives/health/focus/phw/articles\\_publications/publications/perspectives\\_20070626/civilsociety\\_20070626.pdf](http://www.soros.org/initiatives/health/focus/phw/articles_publications/publications/perspectives_20070626/civilsociety_20070626.pdf).

<sup>30</sup> *Id.* at 36.

<sup>31</sup> *See generally* Redlac Trans, *Survey report on the status of transgender workers in Nicaragua* (January 2008).

<sup>32</sup> *Id.* at 3-8.

<sup>33</sup> *Id.*

<sup>34</sup> *Colegios nicaragüenses denunciados por discriminación*, Ambiente G, Mar. 4, 2008, available at <http://www.ambienteg.com/2008/03/04-homosexuales-nicaraguenses-denuncian-a-tres-colegios> [hereinafter *Colegios*].

<sup>35</sup> *Id.*

Law.<sup>36</sup> This law gives priority in public housing to families, defining a family as a man, woman, and their mutual offspring.<sup>37</sup> The man and woman do not need to be married.<sup>38</sup> In *Young v. Australia* and *X v. Colombia* the Human Rights Committee established that when a state provides benefits to an unmarried opposite-sex couple while denying them to an unmarried same-sex couple, it violates Article 26 of the ICCPR.<sup>39</sup> Nicaragua's Public Housing law thus constitutes a violation of the ICCPR.

### Partnership rights

Nicaraguan adoption law requires either a marriage certificate or other proof of a stable union before an opposite sex couple can adopt a child.<sup>40</sup> Though it is very difficult for single individuals to adopt, they nonetheless are still permitted under Nicaraguan law.<sup>41</sup> However, neither single homosexual or transgender individuals nor same-sex couples are allowed to adopt children in Nicaragua. The denial of these adoptive rights suggests discrimination based on sexual orientation under article 26 of the ICCPR as defined in *Young*.

### **Article 6 (Right to Life)**

Article 6 of the ICCPR guarantees every human being an inherent right to life that should be protected by law.<sup>42</sup> It states that "No one shall be arbitrarily deprived of his life."<sup>43</sup> Nonetheless, despite the lack of systematic information, advocates report that individuals in Nicaragua are victims of extra-judicial killings due to their sexual orientation or gender identity.

### Hate Crimes

In 2000, Rosa Pavon was murdered by two men and a woman for dating a married woman.<sup>44</sup> One of the murderers was the woman's husband, and the crime was explicitly motivated by Pavon's sexual orientation.<sup>45</sup> The murderers were later prosecuted and held accountable. However, the lack of hate crime legislation shows that the state fails to prevent the occurrence of killings and other hate crimes motivated by the victim's sexual orientation or gender identity.

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<sup>36</sup> Reglamento para la administracion de viviendas of May 28, 1981 (Nic.), available at [http://www.asamblea.gob.ni/index.php?option=com\\_wrapper&Itemid=153](http://www.asamblea.gob.ni/index.php?option=com_wrapper&Itemid=153).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Young v. Australia*, Communication no. 941/2000, U.N. Doc CCPR/C/78/D/941/2000 (2003).

<sup>40</sup> Ley de Reforma y Adición al Decreto No. 862, Ley 614, of Feb. 21, 2007 (Nic.), available at [http://www.asamblea.gob.ni/index.php?option=com\\_wrapper&Itemid=153](http://www.asamblea.gob.ni/index.php?option=com_wrapper&Itemid=153).

<sup>41</sup> Email with Sam Montiel of Grupo Safo, Oct. 3, 2008.

<sup>42</sup> ICCPR, *supra* note 7, art. 6.

<sup>43</sup> *Id.*

<sup>44</sup> Edwin Somarriba, *Todos culpables por asesinato de lesbiana*, EL NUEVO DIARIO, June 29, 2000, available at <http://archivo.elnuevodiario.com.ni/2000/junio/29-junio-2000/sucesos/sucesos2.html>.

<sup>45</sup> *Id.*

In 2002, Denis Eduardo was stabbed to death by a man he had propositioned at a bar.<sup>46</sup> Though the murderer was arrested, the police investigation did not view the incident as a hate crime.<sup>47</sup> This lack of recognition of a homophobic hate crime also demonstrates the failure of law enforcement agencies to protect LGBT communities and individuals.

### **Article 7 (Freedom from Torture and Cruel, Inhuman and Degrading Treatment of Punishment)**

LGBT individuals in Nicaragua experience police brutality prohibited under Article 7 of the ICCPR. Article 7 states, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>48</sup> Nevertheless, the police harass and arbitrarily detain individuals because of their perceived gender identity and/or sexual orientation in Nicaragua. In particular, the sex workers in the travesti community experience habitual harassment and violence by both the police and the general public.<sup>49</sup>

In 2006, four homosexual youths out late at night were celebrating a soccer game in a public park.<sup>50</sup> Two policemen approached them and told them to leave the park.<sup>51</sup> When the youths refused to cooperate, the policemen overstepped their authority by punching one in the neck and chest and kicking the other onto the ground.<sup>52</sup> The youths were then thrown into a police car and taken to the police station.<sup>53</sup> This excessive use of force by the police represented a violation of the youths’ Article 7 right to freedom from cruel punishment. Furthermore, the youths were detained for two hours before being released. Though they tried to file a complaint that night, they were refused. They returned to the station the next day to file a complaint, but the police failed to follow up.

In 2005, a 28 year old lesbian woman was expelled from the home she shared with her mother and sister due to her sexual orientation.<sup>54</sup> They denounced her to the Ministry of Family for a violation of Article 204 and broke into her room to confiscate pictures, cards, and gifts she had received as well as her daughter’s birth certificate and vaccination records to give to the Ministry.<sup>55</sup> They also attempted to kidnap her daughter.<sup>56</sup> The Ministry proceeded to launch an investigation into all

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<sup>46</sup> Karla Castillo, *Homocidio tras propuesta gay*, EL NUEVO DIARIO, Nov. 12, 2002, *available at* <http://archivo.elnuevodiario.com.ni/2002/noviembre/12-noviembre-2002/sucesos/sucesos1.html>.

<sup>47</sup> *Id.*

<sup>48</sup> ICCPR, *supra* note 7, art. 7.

<sup>49</sup> *See* Redlac Trans, *supra* note 31, at 8.

<sup>50</sup> Email from LGBT Amnesty International Argentina to Camp Mujer Amnesty International Argentina, dated May 5, 2006 [hereinafter Amnesty Email].

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> GrupoSafo, *supra* note 19, at 2.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

parts of her life, questioning each of her neighbors about her behavior.<sup>57</sup> It pressured her to give up her child, calling her a bad mother.<sup>58</sup> It also forced her to undergo numerous psychological tests.<sup>59</sup> The treatment to which the woman was subjected because of her sexual orientation contravenes the provisions of the ICCPR.

### **Article 9 (Right to Liberty and Security of Person)**

Article 9 states, “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.”<sup>60</sup> As mentioned in reference to Article 7, the homosexual youths were detained based on their refusal to leave a public park. Thus their right to liberty was denied. The fact that the police did not follow procedure and process their complaint of mistreatment and unfair detention also contributes to a violation of their right to liberty.

In 2001, two homosexual professors were incarcerated under Article 204 of the old criminal code for their sexual orientation after being seen romantically together by police.<sup>61</sup> During the same year, another homosexual couple was also subject to criminal prosecution for violation of Article 204.<sup>62</sup>

### **Article 13 (Right to Asylum)**

Article 13 states:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.<sup>63</sup>

In 2008, Nicaragua passed its first asylum law giving protection to refugees persecuted for reasons of race, religion, nationality, gender, political opinion, or social group.<sup>64</sup> The law does not contemplate granting asylum to individuals fleeing persecution based on sexual orientation or gender identity.

### **Article 14 (Right to a Fair Trial)**

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> ICCPR, *supra* note 7, art. 9.

<sup>61</sup> Grupo Safo, *supra* note 19, at 9.

<sup>62</sup> *Id.*

<sup>63</sup> ICCPR, *supra* note 7, art. 13.

<sup>64</sup> Ley de Protección de Refugiados, Ley 655, of June 3, 2008, *available at* [http://www.asamblea.gob.ni/index.php?option=com\\_wrapper&Itemid=153](http://www.asamblea.gob.ni/index.php?option=com_wrapper&Itemid=153).

Article 14 guarantees a right to fair hearings before courts and tribunals. Though the 2006 case of the lesbian who was turned into the Ministry of Family for her sexual orientation was closed before formal proceedings, the official in charge of the investigation while it was ongoing was the roommate of the lesbian woman's sister.<sup>65</sup> This relation suggests bias in the investigation, undermining the right to a fair trial guaranteed in ICCPR Article 14.

In 2003, a father accused a single mother of being a lesbian in a custody battle to gain custody of their son.<sup>66</sup> There is no evidence that the Nicaraguan government did anything to dispel this rumor. Thus, the stigma attached to sexual orientation and the absence of any real government effort to dispel the rumor constitutes an entire lack of due diligence in addressing discrimination.<sup>67</sup>

### **Article 17 (Right to Privacy)**

Article 17 of the ICCPR guarantees all individuals the right to privacy.<sup>68</sup> Currently, there is no law allowing travestis to change the designation of their sex on their birth certificate as well as their legal names in their documents, giving rise to Article 17 implications.<sup>69</sup> For transgender individuals, it is very difficult to have access to gender reassignment or other therapies in Nicaragua.<sup>70</sup> Most individuals who are willing to undergo genital reassignment surgery have to travel to other countries to have the operation.<sup>71</sup> However, even in the case surgery has been performed, individuals are still denied change of legal sex and name, with serious intrusion into their private life every time that they have to show identification<sup>72</sup>.

### **Article 19 (Freedom of Expression)**

The refusal of aforementioned public schools to allow the twelve homosexual youths to attend unless dressed according to their gender violates their Article 19 freedom of expression.<sup>73</sup> Article 19 guarantees freedom of expression through "any . . . media of . . . choice."<sup>74</sup> The youths chose to express themselves through their clothing, and state actors cannot deny them of this right under the ICCPR.

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<sup>65</sup> Grupo Safo, *supra* note 19, at 4.

<sup>66</sup> Maria Bolt Gonzalez, *IGLHRC Book: Nicaragua, International Gay and Lesbian Human Rights Commission*, July 23, 2003, available at [http://www.iglhrc.org/files/iglhrc/reports/19UR\\_Nicaragua.pdf](http://www.iglhrc.org/files/iglhrc/reports/19UR_Nicaragua.pdf).

<sup>67</sup> See generally Velasquez Rodriguez Case, Inter-Am. C.H.R., Series C, No. 4 (1988).

<sup>68</sup> ICCPR, *supra* note 7, art. 17.

<sup>69</sup> Ley de Certificaciones de Nacimiento y Defunción of May 2, 1981 (Nic.), available at [http://www.asamblea.gob.ni/index.php?option=com\\_wrapper&Itemid=153](http://www.asamblea.gob.ni/index.php?option=com_wrapper&Itemid=153).

<sup>70</sup> Email communication with Sam Montiel of Grupo Safo, Oct. 3, 2008.

<sup>71</sup> *Id.*

<sup>72</sup> The European Court of Human Rights in the cases *Goodwin v. United Kingdom* and *L. v. Lithuania* established that the refusal of the state to amend the birth certificate of a post-operative transsexual individual constitute a violation of the right to private life under article 8 of the European Convention of Human Rights. The Court also established in the case *Van Kuck v. Germany* that article 8 is violated when the state fails to provide for reimbursement of hormone therapy and gender reassignment surgery.

<sup>73</sup> *Colegios*, *supra* note 35.

<sup>74</sup> ICCPR, *supra* note 7, art. 19.

## **Article 22 (Freedom of Association)**

Though LGBT organizations are allowed to function in Nicaragua following the repealing of Article 204, they are not given a legal operating status that other organizations are given in Nicaragua.<sup>75</sup> This is due to the history of homophobia in Nicaragua. Under the recently repealed Article 204, the promotion and propaganda of sodomy and same-sex union were prohibited.<sup>76</sup> Hence, LGBT organizations could not legally exist, constituting a direct violation of ICCPR Article 22's freedom of association. The current status of LGBT organizations in Nicaragua is a carryover of the effects of this law.

## **Article 23 (Right to have a Family)**

Article 23 guarantees all individuals the right to of men and women to marry and have a family. The Human Rights Committee stated in *Joslin v. New Zealand* that this right did not extend to same-sex unions.<sup>77</sup> However, the lack of any legal recognition of same-sex union has led to the denial of benefits and protections enjoyed by individuals in opposite-sex unions.

### Partnership Rights

Individuals in Nicaragua cannot inherit items from their partners of the same-sex after death as their married counterparts would because they are not seen as family members under the Civil Code.<sup>78</sup> They are also not included in their partner's social security plans even though their opposite-sex counterparts are.<sup>79</sup>

### Domestic Violence

Individuals who suffer from domestic violence at the hands of their partner of the same sex are not protected under the Nicaraguan Penal Code. Though the Penal Code provides protection to victims of domestic violence in Article 111, it still defines domestic violence as violence between family members.<sup>80</sup> Marriage in Nicaragua is defined as an union between a man and a woman,<sup>81</sup> so same-sex partners do not qualify as family members for the protections given under the Penal Code.

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<sup>75</sup> Bethany Williams, North and South: The Disparate Legal Approach to Homosexual Activity in the United States and Nicaragua, 15 IND. INT'L & COMP. L. REV. 215, 240 (2004).

<sup>76</sup> See Amnesty International, *supra* note 4.

<sup>77</sup> *Joslin v. New Zealand*, Communication No. 902/1999, UN Doc. A/57/40 (2002).

<sup>78</sup> Título VI de las Sucesiones en el Código Civil, available at *available at* [http://www.asamblea.gob.ni/index.php?option=com\\_wrapper&Itemid=153](http://www.asamblea.gob.ni/index.php?option=com_wrapper&Itemid=153).

<sup>79</sup> Reglamento General de la Ley de Seguridad Social, Decreto 975, Mar. 1, 1982, *available at* [http://www.asamblea.gob.ni/index.php?option=com\\_wrapper&Itemid=153](http://www.asamblea.gob.ni/index.php?option=com_wrapper&Itemid=153).

<sup>80</sup> Código Penal art. 111 (Nic.), *available at* [http://www.asamblea.gob.ni/index.php?option=com\\_wrapper&Itemid=153](http://www.asamblea.gob.ni/index.php?option=com_wrapper&Itemid=153).

<sup>81</sup> Código Civil art. 94 (Nic.), *available at* [http://www.asamblea.gob.ni/index.php?option=com\\_wrapper&Itemid=153](http://www.asamblea.gob.ni/index.php?option=com_wrapper&Itemid=153).

## Article 24 (Protection of Children)

Article 24 requires the government of Nicaragua to protect its youth.<sup>82</sup> The disallowance of homosexual youths from attending school due to their style of dress and the de facto license given to police to brutalize the youth in the park also raise Article 24 implications under the ICCPR.<sup>83</sup>

## Concluding Notes

- Individuals face discrimination at the workplace due to their sexual orientation, gender identity and expression. They are denied employment opportunities and are subjected to harassment on the job. The Nicaraguan Labor Code does not include a provision against discrimination based on sexual orientation and gender identity, thus LGBT individuals have no protection from this treatment.
- LGBT individuals do not have adequate access to health care for the prevention and treatment of HIV/AIDS.
- There is no law preventing discrimination in housing or education based on sexual orientation and gender identity, so individuals are discriminated against with no redress.
- Unmarried same-sex couples do not have the same access to public housing and adoption as unmarried opposite-sex couples because of their sexual orientation in violation of existing jurisprudence of the Human Rights Committee.
- Same-sex couples are not protected by Nicaragua's domestic violence laws, nor are they given access to inheritance or pension rights because they are not married. Children are also subjected to harassment because of their parent's non conventional sexual orientation.
- No law exists to allow legal change of gender or name on a Nicaraguan birth certificate or other documents. Furthermore, transsexual individuals seeking a sexual reassignment surgery generally must travel outside the country to have the operation.
- Nicaragua does not give asylum protection to refugees fleeing from persecution based on sexual orientation and gender identity.

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<sup>82</sup> ICCPR, *supra* note 7, art. 24.

<sup>83</sup> See *Colegios*, *supra* note 35; see also Amnesty Email, *supra* note 53.

- Individuals are subjected to police brutality and harassment due to their sexual orientation and gender identity. They are often denied access to legal redress for this harassment and face bias in the judicial system.
- Organizations advocating for LGBTI human rights are not given the same legal operating status as other organizations in Nicaragua because of the object of their activities. This negatively affects their capacity to serve their communities and LGBT individuals subject to discrimination because of their sexual orientation or gender identity and/or expression.

## **Recommendations**

The Nicaraguan government should:

- Enact anti-discrimination legislation to prevent discrimination based on sexual orientation and gender identity in the workplace, public schools, and housing and provide redress for such discrimination;
- Enact hate crime legislation to prevent the harassment and violence against individuals based on their sexual orientation and gender identity, both by the general Nicaraguan population and the Nicaraguan police force;
- Adequately fund CONASIDA to provide treatment to LGBT individuals with HIV/AIDS and to provide male and female condoms, as well as health education, to members of the LGBT community to prevent the spread of HIV/AIDS;
- Enact legislation to grant unmarried same-sex couples access to public housing and adoption;
- Enact legislation to provide benefits to same-sex partners equal to those provided to married individuals to ensure, in particular, that they have access to inheritance and pension rights and protection under domestic violence laws;
- Enact legislation to legally recognize change of gender and name for travesti, transgender and transsexual individuals;
- Expand asylum law to include protection for individuals fleeing from persecution based on sexual orientation and gender identity;
- Grant legal operating status to LGBT advocacy organizations;

- Increase education and awareness about the LGBT community and respect for the individuals to dispel the hostile environment resulting from the repealed Article 204.

## **Proposed Questions for Government Delegation**

- Why has the government failed to include discrimination against individuals subject to discrimination because of their sexual orientation or gender identity and/or expression in its fifth periodic report to the Human Rights Committee?
- While recognizing the important decision of the law-maker in repealing Article 204 of the criminal code, how does the government plan to counteract the discriminatory culture created and left behind by the mentioned provision?
- Why has the government failed to enact hate crime legislation on grounds of sexual orientation and gender identity?
- How does the government plan to end discrimination on grounds of sexual orientation and gender identity in, among other fields, housing, employment and education?
- What measures does the government anticipate to provide better treatment to LGBT individuals living with HIV/AIDS?
- What measures does the government anticipate to provide to allow legal change of gender and name for transgender individuals to protect their right to private life?