

## ARTICLE 19

### Submission to the UN Universal Periodic Review of Guatemala

*14<sup>th</sup> Session of the Working Group of the Human Rights Council, October-November 2012*

1. ARTICLE 19 is an international, non-governmental human rights organisation established in 1986 that works around the world to protect and promote the right to freedom of expression and information, including by making submissions to IGOs on country performance in implementing established freedom of expression standards. The Mexico and Central America's Office was established in 2005.
2. In these written Comments, ARTICLE 19 focus on areas of concern related to the exercise of the right to freedom of expression in Guatemala with a view to clarify the areas in which Guatemala has failed to comply with its obligations, including to adopt all necessary measures to make this right effective:
  - **attacks and threats** against journalists, human rights defenders and social communicators for exercising their right to freedom of expression;
  - use of **the criminal law to restrict freedom of expression**;
  - **failure to promote pluralism and diversity of media**;
  - failure to give full protection to the **right to information**;
  - lack of regulation of **official advertising**; and
  - **highly restrictive media regulations**.

#### Attacks and threats

3. A problem in Guatemala is the increasing violence throughout the country against those who exercise the right to freedom of expression, journalists and human rights defenders, along with a lack of adequate rules and institutions to address these attacks. Leading to a climate of impunity. Other problems include an inadequate framework for broadcast regulation which lacks independence from government, which has failed to prevent monopolisation of the media and which does not foster community broadcasting, the lack of an independent oversight body to fully guarantee the right to information, and a failure to decriminalise defamation.

#### **Defamation**

4. ARTICLE 19 notes that crimes of defamation, slander and libel still exist in the Penal Code of Guatemala as recognized on paragraphs **450** and **465 to 469** from the Government Report. Prison sentences continue to be envisaged with the heaviest being from two to five years for the crime of defamation. Moreover, article 165 of the Penal Code of Guatemala states that the soil reproduction of slander or libel committed by

another person is also considered a crime with two to five years imprisonment. The Bill of Expression of Thought (*Ley de Emisión del Pensamiento*) containing media regulation establishes up to four months arrest when committing slander or libel through media. Contrary to the right to circulate information and ideas, recognised in Article 19 of the ICCPR and the HRC recommendation in 2001, criminal defamation has been used by official's individuals to hinder journalistic dissent.<sup>1</sup>

## The Right to Information

5. Paragraph 455 from the Government Report indicates that the Access to Public Information Law went into effect by Decree 57-2008 on April 21, 2009. ARTICLE 19 very much welcome this move. At the same time, we note the failure of the law to establish an independent administrative oversight body to review denials of the right to information<sup>2</sup>. The oversight body appointed for this matter is the Office of the Special Prosecutor for Human Rights, lacks the power to make binding decisions. This together with the lack of allocation of human and economic resources to review denials of the right to information hinders its power to investigate and resolve those denials to guarantee this right to society<sup>3</sup>.

## Media Regulation

6. Regulation of broadcasting in Guatemala fails in very important ways to conform to international standards. ARTICLE 19 have a series of concerns on the implementation of the right to freedom of expression recognised under Article 19 of the ICCPR including to adopt all necessary measures to make this right effective. The legal framework does not favour fair competition, it leaves decision-making in the hands of the government, rather than an independent regulatory authority, it has failed to address the serious monopolisation of the airwaves in Guatemala, and it has also failed to promote community broadcasting, contrary to international law.<sup>4</sup>
7. The allocation of radio and television concessions is done through a public auction according to article 61 of the Law of Telecommunications. The establishment of technical and financial requisites as main conditions for access to the airwaves makes

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<sup>1</sup> The lawsuit for libel and slander filed by the Vice President of the Republic of Guatemala, Rafael Espada against the journalist Marta Yolanda Díaz-Durán. Espada filed the lawsuit after Díaz-Durán published an opinion article on September 2009 on corruption which included the name of several important public officials.

<sup>2</sup> See *The Public's Right to Know: Principles on Freedom of Information Legislation*, *ibid.* and the Declaration of SOCIUS Peru, 2003: Conference on Access to Information.

<sup>3</sup> In its Joint Declaration on 6 December 2004 of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated that "*Those requesting information should have the possibility to appeal any refusals to disclose to an independent body with full powers to investigate and resolve such complaints*".

<sup>4</sup> ARTICLE 19, Submission to the Inter-American Commission on Human Rights: International Standards on the Regulation of Broadcasting, Toby Mendel, 2007.

equal opportunities impossible, thereby exacerbating the broadcasting media ownership concentration. This has undermined freedom of expression and favoured monopolistic practices as it results in the exclusion of a number of sectors, particularly the most vulnerable voices.

8. The laws grant the government control over the allocation of concessions, contrary to international standards, which call for broadcast regulation to be overseen by independent bodies.
9. Government discretion in the allocation of broadcasting licences, as well as other factors, have encouraged massive concentration of broadcast media ownership in the hands of commercial interests. Although Guatemalan Constitution prohibits monopolies<sup>5</sup>, Ángel González y González, a business man controls the 4 private VHF television channels<sup>6</sup>.
10. Despite recommendations on this topic made both in the UN and by the Inter-American Commission of Human Rights,<sup>7</sup> Guatemalan broadcasting laws do not recognise community broadcasters as a separate sector and continues to leave them in a state of legal vulnerability, even though indigenous groups represent the majority of population in the country. This together with the provisions stating public auction to allocate radio and television frequencies makes it inaccessible for communities to obtain a permit to operate a radio or television station. Furthermore, the few community radio stations face government harassment. In March 2006, nine indigenous community radio stations were shut down and some of their directors were arrested in the departments of Chimaltenango and Huehuetenango<sup>8</sup> accused of the crimes of pilfer or illegal interruption of communications for the use of frequencies without having permit.

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<sup>5</sup> Article 119 paragraph h and Article 130 of the Guatemalan Political Constitution.

<sup>6</sup> Principle 12 of the Declaration of Principles of the Freedom of Expression of the Inter American Commission of Human Rights of the OAS states that “Monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people’s right to information. In no case should such laws apply exclusively to the media. The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals”.

<sup>7</sup> The IACHR recommended in the annual report of the Special Rapporteur on Freedom of Expression of 2007 that governments should: “Legislate on community broadcasting so that part of the spectrum is designated for community radio stations; the assignation of these frequencies should consider democratic criteria which guarantee equality of opportunities for all individuals in accessing these”. The Special Rapporteur also recommended that regulations relating to community broadcasting should recognise the special characteristics of these media and should contain, at a minimum, the following elements: the existence of simple procedures for obtaining licences; no demands for strict technical requirements which would prevent them, in practice, even from submitting a request for a licence to the authorities; and the possibility of using advertising as a means of financial support.

<sup>8</sup> On March 2, 2006, prosecutors from the Public Ministry accompanied by police seized documentation on radio stations affiliated with the Consejo Guatemalteco de Comunicación Comunitaria (CGCC). On March 9, 2006, the radio station *Voz Latina* of Chimaltenango was shut down, and on March 15 its director, Ana Piedad Martín, was arrested; she was released after posting bond. On March 9, 2006, the radio stations *Presencia Stereo*, *Cairo*, and *Mayense*, of the department of Chimaltenango, and the radio station *Acción*, of the department of Huehuetenango, were shut down. In addition, on March 15, 2006, Oscar Rafael López, director of the radio station *Stereo Nolber Sideral*, of the department of Huehuetenango, and staff member Esbin Martínez Palacios, were arrested. Both were released after paying a fine.

Instead of complying with the international recommendations, in February 2007 the Executive published a series of administrative measures<sup>9</sup> which circumvent many of provisions about the need to carry out a process of tendering for any new allocation of radio or television concessions. Instead the new administrative measures purport to set a series of actions to prevent committing crimes by using airwaves to broadcast without having the permit.

11. The State has failed to adopt the adequate regulation and legal framework to place official advertisement to explicitly prohibit the use of public funds to reward or punish opinions of communicators or communications in media.

12. In addition, broadcasting regulation includes unjustified restrictions to the right of freedom of expression which have been used to hinder journalistic investigations and to punish opinions and ideas. For example:

- Article 41 of the Radio Communications Law prohibits:
  - Paragraphs 3. *Any transmission that results offensive to civic values and the national symbols, defamation of religious belief and those promoting racial discrimination;*
  - Paragraph 4. *All kinds of vulgar comedy and offensive sounds;*
  - Paragraph 5. *Transmissions that may cause corruption in the language, and those contrary to morals and good etiquette;*
  - Paragraph 8. *Exaggerated or false statements on the characteristics of the media outlet and those contrary to the interest of others;*
  - Paragraph 13. *Greetings, requests from the public or special acknowledgement. Those expressed by the media outlets would be considered commercial spots and should meet the standards of Article 29.*
  - Paragraph 14. *Promotion of fund raising, if they are not authorized by the competent authorities.*
  
- Furthermore, paragraph B of article 342 of the Guatemalan Penal Code includes the crime of figure incitement to financial panic. According to the law, financial panic consists on *elaborating, releasing or reproducing through any media or system of communication, false or inaccurate information that could undermine the confidence of customers, users, or investors of an institution subject to monetary regulation* with prison sentence being the heaviest up to two years. In 14 May 2009, the Guatemalan Internet user Jean Anleu Fernández was charged with this crime after posting on twitter the following message: *“First Action: Withdraw Money from the Rural Government Bank”*. Charges were dropped motivated by the international community pressure on the case.

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<sup>9</sup> Although the agreement establishes that its objective is to solve the problems of the “illegal radios” which do not have a financial objective, it reiterates and reinforce the provisions to initiate criminal proceedings instead of relying on administrative procedures against community radio stations which operate without a permit.

## Protection to Journalists and Human Rights Defenders

13. ARTICLE 19 notes that the Government Report totally ignores violence against journalists and human rights defenders. This serious issue has increased in recent years, in a climate characterized by overall public insecurity, political corruption and impunity. These attacks constitute a violation of the society's right of access to information and right to truth, and a serious impediment to the Guatemalan democratization process. Moreover, these attacks and the government's inability and/or lack of willingness to resolve them affect not only freedom of expression but the enjoyment of other human rights. In particular, these violations undermine the right to life (Article 6 of the ICCPR), the right to personal integrity (Article 7), the right to liberty (Article 9), the right to due process (Article 14), the right to legal protection (Article 17), and the right to political participation (Article 25).
14. According to local civil society organisations<sup>10</sup> 33 aggressions against journalists were registered in 2011; 19 in 2010; 60 in 2009; 68 in 2008. These include eight killings for the past 4 years, various death threats, attacks, cases of discrimination and restrictions to access to information. In April 2009 gunmen killed Rolando Santiz, a reporter investigating the murder of a suburban bus driver this is the only case of the eight recent killings that is actually been investigated by the Journalist Crime Unit of the Investigative Authorities. In its latest report, the United Nations Special Representative of Human Rights Defenders pointed out that "journalists reporting on cases of corruption or human rights violations perpetrated during the armed conflict are one of the groups most vulnerable to abuses within the human rights community."<sup>11</sup>
15. Following the Inter American Human Rights Court's ruling on the case of the disappearance of reporter Irma Flaquer,<sup>12</sup> in June of 2001 the Public Ministry of Guatemala created the Special Prosecutor's Office for Crimes against Union Workers and Journalists. This Office was eliminated in 2005 and was created the Special Prosecutor's Office for Human Rights.
16. The responsible for the crimes against journalists is the Journalist Crime Unit of the Investigative Authorities and its Prosecutor is Elmer Alex Yat who recently accepted that they have 80 files of violations against journalist's work, which 50 are from outside Guatemala City.
17. Guatemala Government also has failed to comply with international standards in order to respect and guarantee the right to freedom of expression as article 39 of the Radio

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<sup>10</sup> Observatory of Journalists of the News Agency Centro de Reportes Informativos sobre Guatemala CERIGUA.

<sup>11</sup> "Promotion and protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the right to Development", Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani\* \*\* Addendum MISSION TO Guatemala, A/HRC/10/12/Add.3 February 16<sup>th</sup>, 2009. Full text available at:

<http://www2.ohchr.org/english/issues/defenders/docs/A.HRC.10.12.Add.3.pdf>

<sup>12</sup> *Irma Flaquer v. Guatemala*, Case 11.766, Inter American Court of Human Rights

Communication Law<sup>13</sup> prescribes compulsory membership in an association prescribed by law for the practice of journalism<sup>14</sup>. No Journalist's Association currently exists therefore all media workers have to join the Humanities Association.

18. Human rights defenders carry out their work in an increasingly environment of threats and aggressions. According to civil society organization UDEFEGUA<sup>15</sup> 409 aggressions against human rights defenders were registered in 2011; 305 in 2010; 352 in 2009; and 220 in 2008. There has been an increase of the killings against human rights defenders 19 in 2011; 8 in 2010; 15 in 2009; and 12 in 2008.
19. In 2005 the Government created the Special Prosecutor Office for Human Rights to investigate and prosecute aggressions against human rights defenders. In the same year of its creation, the Special Prosecutor Office received 129 complaints of Justice Officers, all of which 118 remain under investigation and only one case has been judged since. This means that investigations have been ineffective while the perpetrators benefit from impunity. This Office has recently received a 247,928.47 EUR support from the government of Sweden to strengthen their capacity building. One of the main areas that the Prosecutor's Office Human Rights should focus is in the investigation of journalists and human rights defenders aggressions in order to tackle the impunity and protect their freedom of speech right and the right to know of the society.
20. The general failure to achieve better results in this area reflects the absence of political will on the part of the Government to put an end to cases of attacks against journalists and human rights defenders. This situation makes them much more vulnerable and threatens the right of members of society as a whole to receive information which will allow them to form opinions, to criticise and ultimately to demand their rights.

## **Recommendations**

### **Defamation**

- Defamation should be decriminalised. Civil defamation rules should place the onus on public officials to prove the falsity of allegations of fact, should require public officials to tolerate a greater degree of criticism, and should impose overall limits on damage awards.

### **Right to Information**

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<sup>13</sup> Article 39 states that "... radio outlets can only hire as presenters, Guatemalan citizens with a legally recognized academic degree or a certificate from the General Directorate of Broadcasting. The General Directorate will authorize foreign broadcasters only in special cases and on a temporary basis...".

<sup>14</sup> I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5

<sup>15</sup> The Protection Unit for Human Rights Defenders (UDEFEGUA) was established in 2004 to monitor, protect and follow up on security issues against human rights defenders.

- Measures should be taken to guarantee the possibility of appeal refusals to disclose information to an independent body with full powers to investigate and resolve such complaints.

### **Media Regulation**

- The legal framework for broadcasting should be fundamentally revised to bring it into line with international standards in this area.
- All powers relating to media regulation, including licensing of broadcasters, should be exercised by an independent body.
- An effective system should be put in place for regulating concentration of media ownership, including by setting clear limits on media concentration, to replace the current ineffective anti-monopoly rules.
- The following measures should be adopted regarding licensing of broadcasters:
  - a. A plan should be developed for the allocation of broadcasting frequencies among all three tiers of broadcasters – public, private and community – along with a schedule for moving to this plan over the next 5-10 years.
  - b. Specific procedures and rules for licensing community broadcasters should be adopted which take into account their particular circumstances and which do not require them to compete with private broadcasters for licences (i.e. which are free or low-cost and which are not unduly onerous in terms of process). In the meantime, criminal actions against community radio stations should be suspended.
  - c. Support should be provided, through an independent regulator, for the establishment of new media outlets which enhance diversity through the provision of new and different content.
  - d. Objective licensing rules should be put in place for broadcasters with a view to promoting diversity, for example relating to minimum levels of news, local content and educational programming. All broadcasters should also be required to treat matters of public controversy, including political issues, in a balanced and impartial manner.
- Fair and objective rules should be put in place for the allocation of public advertising.

### **Protection for Journalists and Human Rights Defenders**

- Effective measures should be put in place to respond to attacks on journalists and human rights defenders which are designed to limit their right to freedom of expression. An important focus here should be to guarantee effective investigations into such attacks.
- There is a need for an effective policy of prevention of human rights violations, especially for those in rural areas. Special Prosecutor Office for Human Rights should guarantee the safety of journalists and human rights defenders and fortify the mechanism that already exists to protect these groups and prevent further aggressions.