



Submission of the International Commission of Jurists in response to the Call for input for the Working Group on Business and Human Rights' report on respecting the rights of lesbian, gay, bisexual, transgender and intersex people in the context of business activities: fulfilling obligations and responsibilities under the UN Guiding Principles on Business and Human Rights

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Introduction

The International Commission of Jurists (ICJ) welcomes the opportunity to provide information to the Working Group on Business and Human Rights in response to its “Call for input for the Working Group’s report on respecting the rights of LGBTI people in the context of business activities: fulfilling obligations and responsibilities under the UNGPs”.¹ The forthcoming Working Group’s report to be presented to the 79th session of the General Assembly in October 2024 and the proposed further gender-related guidance to both States and businesses to adopt a LGBTI lens in implementing the UNGPs will be important. Indeed, the ICJ hopes that they will fill a glaring gap in norms and policy to govern the activities of business enterprises.

The comments and proposals below address only questions 1 and 2 of the questionnaire made available by the Working Group to respond to its Call for input, without prejudice to the provision of further input on other issues should the opportunity arise in the future.

Question 1: Negative impacts of business activities on the rights of LGBTI people

In reference to the Americas, the Inter-American Commission of Human Rights and its Special Rapporteur on Economic, Social and Cultural Rights in 2019 recalled that the societies on the continent are dominated by “entrenched ideas and cultural patterns of heteronormativity, cisnormativity, sexual hierarchy, sex and gender binaries, and misogyny.”² Such ideas and cultural patterns are compounded by almost “generalized intolerance toward people with non-normative sexual orientations, identities, and gender expressions and diverse sexual characteristics”³ fostering violence and discrimination against LGBTI persons or those perceived as such. This picture, the ICJ considers, is also applicable to other continents, where it gives rise to discrimination, intolerance, violence and denial of human rights also in the context of business activities, including with respect to their workforces and, more broadly, their relationships with communities and customers.

In relation to manifestations in the workplace, the ILO has reported that: (i) LGBTI workers are the object of invasive questions about their private lives at work; (ii) they must conform to the demands of binary notions of femininity or masculinity in order to achieve acceptance in the workplace; and (iii) in many cases they must hide, deny, or keep their sexual orientation and/or gender identity secret, whether to access a job, not lose one, or avoid situations of harassment, ridicule or retaliation.⁴ Discrimination is also evident in hiring procedures and persists throughout the entire employment process.⁵ At work, workers often keep their LGBTI identity secret and remain invisible because of the lack of recognition of their condition. They also face dismissal for revealing their LGBTI identity at work, and find it difficult to access complaints mechanisms and tools to identify situations of infringement on their rights at work.

Outside the workplace certain businesses deny admittance or service to LGBTI persons, provide products or services that are not gender-sensitive or appropriate, and publicly reproduce /disseminate content that is discriminatory against or denigrating of LGBTI persons.

Promoting diversity and cultivating an environment of respect and equality, both within their workplaces and the communities where they and their business affiliates operate, is not only in line with companies’ own responsibility to respect human rights, but it is also an opportunity for them to play a pivotal role. Proactively addressing discrimination and championing diversity and inclusion yields economic advantages and facilitates the exploration of fresh talent,

¹ Office of the High Commissioner for Human Rights, Call for input for the Working Group’s report on respecting the rights of LGBTI people in the context of business activities: fulfilling obligations and responsibilities under the UNGPs, available at: <https://www.ohchr.org/en/calls-for-input/2024/call-input-working-groups-report-respecting-rights-lgbti-people-context>.

² IACHR, REDESCA, Business and Human Rights: Inter-American Standards, 2019), pp. 199-202 https://www.oas.org/en/iachr/reports/pdfs/Business_Human_Rights_Inte_American_Standards.pdf ; see also IACHR, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, OAS/Ser.L/V/II.rev.2 Doc. 36, 12 November 2015, para. 48

³ Ibid.

⁴ ILO. Discrimination at work on the basis of sexual orientation and gender identity: Results of the ILO’s PRIDE Project (Fact sheet); ILO https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/briefingnote/wcms_380831.pdf

⁵ ILO p. 123

enhances decision-making processes, and cultivates loyalty among both customers and investors.

Question 2: States' measures, practices and remaining challenges

The UN Guiding Principles on Business and Human Rights are firmly based on States' existing international law obligations to respect, protect and fulfill human rights and should be read in that context. In addition, the UNGPs are grounded in the recognition of "the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights".⁶ The vast majority of human rights treaties do not make explicit reference to sexual orientation or gender identity or gender expression, let alone to sex characteristics, but UN human rights treaty bodies, among others, have repeatedly interpreted international human rights treaties as requiring States to respect, protect and fulfil the human rights of LGBT persons.

For instance, the Human Rights Committee (HRC) has ruled that Article 26 of the International Covenant on Civil and Political Rights (ICCPR) prohibits discrimination based on sexual orientation.⁷ States therefore have a legal obligation to guarantee the human rights guaranteed under the ICCPR without discrimination on the basis of sexual orientation.⁸ In *Toonen*, the Human Rights Committee interpreted the word "sex" in Articles 2, paragraph 1, and 26 of the ICCPR to include sexual orientation.⁹

The Committee on Economic, Social and Cultural Rights (CESCR) has confirmed that, under the International Covenant on Economic, Social and Cultural Rights (ICESCR), "sexual orientation" and "gender identity" are prohibited grounds of discrimination. Thus, States must ensure legal protections, as a minimum core obligation, for the right to work and rights at work without any form of discrimination, including discrimination based on sexual orientation, gender identity, or intersex status.¹⁰ Likewise, the Committee on the Elimination of Discrimination against Women has used the concept of "intersectionality"¹¹ to recognize that discrimination against women, which is based on gender and sex, is inextricably connected with other prohibited grounds of discrimination, including "sexual orientation and gender identity".¹²

Similarly, the conventions of the International Labour Organisation (ILO) prohibit discrimination, including on the basis of sex or "such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".¹³

⁶ United Nations Guiding Principles on Business and Human Rights, 2011. General Principle 1

⁷ Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992, 31 March 1994; para 8; Human Rights Committee, *Edward Young v. Australia*, Communication No 941/2000, CCPR/C/78/D/941/2000, 18 September 2003, para 10.4. See also: Human Rights Committee, *X v. Colombia*, Communication No 1361/2005, CCPR/C/89/D/1361/2005, 14 May 2007, para 7.2.

⁸ Human Rights Committee, Consideration of reports submitted by states parties under Article 40 of the Covenant, United States of America, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para 25. See also: Human Rights Committee, Consideration of reports submitted by states parties under Article 40 of the Covenant, Chile, UN Doc: CCPR/C/CHL/CO/5, 17 April 2007, para 16.

⁹ The Human Rights Committee sets out the following: "The State party has sought the Committee's guidance as to whether sexual orientation may be considered an "other status" for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation." See: Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992, 31 March 1994, para 8.7.

¹⁰ Committee on Economic, Social and Cultural Rights, General comment No. 23 (E/C.12/GC/23), 2016, para. 65(a); General comment No. 18 (E/C.12/GC/18), 2006, para. 12(b)(1)

¹¹ See: Submitting information to the Working Group on discrimination against women in law and in practice, available at: <http://www.esem.org.mk/en/index.php/important-news/2168-un-working-group-on-discrimination-against-women-in-law-in-practice-overview-submission-of-information-cases-to-the-working-group.html>

¹² Committee on the Elimination of Discrimination Against Women, General recommendation No. 27 on older women and protection of their human rights, CEDAW/C/GC/27, 16 December 2010, para 13.

¹³ See ILO Convention No. 111, art. 1

The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity, adopted by experts in 2007, specifically call on businesses to “act upon the important role they have in both ensuring respect for these Principles with regard to their own workforces and in promoting these Principles nationally and internationally”, and on the mass media to avoid using stereotypes, promote tolerance and acceptance and raise awareness about sexual orientation and gender identity.¹⁴

Surveys show increasing action by States to address discrimination and violence against LGBTI people. Eighty-one UN Member States, two non-UN Member States, and 33 non-independent jurisdictions have provisions protecting against employment discrimination based on sexual orientation.¹⁵ Ten States provide explicit constitutional prohibition of discrimination based on sexual orientation.¹⁶ In numerous other countries, judicial interpretation has extended constitutional protections to cover sexual orientation discrimination.¹⁷ Furthermore, there is a growing trend towards the adoption of comprehensive anti-discrimination legislation that encompasses not just sexual orientation but also gender identity and sex characteristics.

However, 69 nations still maintain discriminatory statutes that are wielded to “arrest, harass, blackmail, and exclude” individuals based on their perceived sexual orientation or gender identity.¹⁸ Although there is an increasing trend toward the enactment of broader national anti-discrimination legislation, the High Commissioner for Human Rights has underscored that “only one third of countries prohibit discrimination on the basis of sexual orientation,” merely one in 10 extend this protection to transgender individuals, and only one in 20 include intersex people in their anti-discrimination laws.¹⁹

In terms of guaranteeing the human rights of LGBTI persons, employment protection is regularly among the first protective measures to be enshrined in legislation.²⁰ Even in cases where the criminalization of same-sex activity persists, there are instances where countries have implemented anti-discrimination laws.²¹

The principle of non-discrimination and equal treatment under the law is fundamental, as outlined in instruments such as the Universal Declaration of Human Rights, the International Bill of Human Rights, and most national legal systems and constitutions. The adoption or amendment of anti-discrimination legislation offers a unique opportunity to secure greater protection for the human rights of LGBTI individuals and enhance the safeguarding of their human rights by including sexual orientation, gender identity, and expression as protected grounds alongside others like race, ethnicity, and disability. Legislative reform aimed at protecting and strengthening the rule of law is central to achieving sustainable development goals, long-term peace, stability, and the protection of human rights.

¹⁴ Yogyakarta Principles, Annex, 2007 <https://icj2.wpenginepowered.com/wp-content/uploads/2012/08/Yogyakarta-Principles-publication-2007-eng.pdf>

¹⁵ ILGA World: Lucas Ramon Mendos, Kellyn Botha, Rafael Carrano Lelis, Enrique López de la Peña, Iliá Savelev and Daron Tan, *State-Sponsored Homophobia 2020: Global Legislation Overview Update* (Geneva: ILGA, December 2020), pp. 26-27. https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf

¹⁶ Plurinational State of Bolivia, Ecuador, Fiji, Kosovo, Malta, Mexico, Nepal, Portugal, South Africa and Sweden

¹⁷ i.e. Andorra, Belize, Canada, Colombia, India, Switzerland, Thailand and Turkey; ILO, Information paper on protection against sexual orientation, gender identity and expression and sexual characteristics (SOGIESC) discrimination, 2019, para. 71. https://www.ilo.org/global/standards/WCMS_700554/lang-en/index.htm

¹⁸ Interparliamentary Plenary Assembly in Copenhagen in August 2021, the UN High Commissioner for Human Rights, Michelle Bachelet

¹⁹ UNDP, PGA (2022). *Advancing the Human Rights and Inclusion of LGBTI People: A Handbook for Parliamentarians*, p. 33. <https://www.undp.org/sites/q/files/zskqke326/files/2023-04/Advancing%20the%20human%20rights%20of%20LGBTI%20people%20-%20ENGLISH.pdf>

²⁰ Lucas Ramon Mendos, Kellyn Botha, Rafael Carrano Lelis, Enrique López de la Peña, Iliá Savelev and Daron Tan, *State-Sponsored Homophobia 2020: Global Legislation Overview Update* (Geneva: ILGA, December 2020), p. 18.

²¹ For instance, although Barbados criminalizes same-sex activity through its Sexual Offences Act (ch. 154, s. 9), the Employment (Prevention of Discrimination) Act 2020 prohibits discrimination based on sexual orientation. https://natlex.ilo.org/dyn/natlex2/r/natlex/fe/details?p3_isn=110880

Anti-Discrimination Provisions in the Private and Public Sector

Several countries, including Canada, Costa Rica, India, Kosovo, Mexico, South Africa, Ukraine and Uruguay, have adopted legislation specifically targeting discrimination based on sexual orientation and gender identity (SOGI) within the private sector. In India, for instance, the Transgender Persons (Protection of Rights) Act of 2019 prohibits discrimination against transgender and intersex individuals in the private sector. A Supreme Court ruling in 2008 mandated the government to ensure various rights, including access to education, employment, identity documents and voting rights for transgender individuals. This decision laid the groundwork for the introduction of the Transgender Persons (Protection of Rights) Bill, providing both legal and normative support for its enactment.²²

While anti-discrimination provisions targeting both the public and private sector are model examples of good practices for protecting human rights in business, enforcement gaps often remain for providing meaningful and effective remedy. For instance, although legislation against SOGI discrimination exists in Costa Rica, there is a notable absence of mechanisms to handle complaints and tools to recognize instances of SOGI rights violations.²³

Labor Quotas and Public-Private Incentives

In Mexico, commendable practices in promoting workplace inclusivity for vulnerable populations, including SOGIE individuals, are exemplified through initiatives like the "Gilberto Rincón Gallardo" Distinctive Inclusive Business award by the Ministry of Labor and Social Welfare (STPS). This award acknowledges workplaces that uphold equal job opportunities, inclusion, and non-discrimination, "for people in situations of vulnerability".²⁴ Additionally, Mexico has implemented non-binding regulations such as the Regulation on Employment Equality,²⁵ which certifies organizations that integrate a gender perspective into their employment practices, a measure recognized by the Committee on the Elimination of Discrimination against Women (CEDAW).²⁶

Although social policies and legislation directed at SOGIESC (sexual orientation, gender identity, expression, and sex characteristics) workplace equality are essential, challenges remain in drafting legislation in a manner that is inclusive to all LGBTI persons. This discrepancy is evident in Argentina and Uruguay, where specific laws have been enacted to promote access to formal employment for transgender individuals. In Argentina, [Law No. 27.636](#) for the Promotion of Access to Formal Employment for Transvestites, Transsexuals and Transgender Persons, requires that the national public sector reserve at least one percent of hiring positions for transgender persons. Moreover, this legislation also provides tax incentives and soft loans for private businesses that hire transgender workers. Similarly, in Uruguay, Act No. 19.684 employs labour quotas to advance the right to work of transgender individuals. The law requires one percent of government jobs be reserved for transgender individuals and offers a pension scheme to compensate those persecuted during the 1973-1985 military dictatorship.²⁷

While these measures address and seek greater protection for the human rights of transgender individuals, they betray a lack of inclusivity with respect to LGBTI persons, highlighting the

²² ILO, Information paper on protection against sexual orientation, gender identity and expression and sexual characteristics (SOGIESC) discrimination, 2019, p. 36 and endnote 55
https://www.ilo.org/global/standards/WCMS_700554/lang--en/index.htm

²³ Business and Human Rights: Inter-American Standards "Section G. Lesbian, gay, bisexual, trans and intersex persons"- IACHR (2019) Op. Cit. pp. 199-202; ILO. PRIDE at work: Study on discrimination at work on the basis of sexual orientation and gender identity in Costa Rica (2016) Op. Cit. supra.

²⁴ Gilberto Rincón Gallardo" Distinctive Inclusive Business award, [In: Gender equality and women's empowerment in public administration, https://www.undp.org/sites/g/files/zskgke326/files/publications/es/MexicoFinal%20-%20HiRes.pdf](#)

²⁵ Mexican Standard on Labor Equality and Non-Discrimination, NMX-R-025-SCFI-2009, (2015)

²⁶ Concluding observations of the Committee on the Elimination of Discrimination against Women CEDAW/C/MEX/CO/7-8

²⁷ Act No. 19.684 (2018), <https://www.impo.com.uy/bases/leyes/19684-2018>; also recognized as a good practice in [CEDAW/C/URY/10](#)

importance of comprehensive legislation that aimed at guaranteeing the human rights of all LGBTI persons.

Collaboration Between Civil Society Organizations and Businesses

Civil society organizations play a crucial role in fostering collaboration between corporations and in promoting inclusive practices in the workplace and beyond. This collaboration can involve developing training programs to implement *UN Standards of Conduct for Businesses*, creating frameworks for inclusive workplace policies, and advocating for LGBTI-inclusive actions in the public sphere.

Positive examples of such collaborative projects include Albania, where UNDP and the non-profit Aleanca organized training sessions for business representatives to encourage the implementation of *UN Standards of Conduct for Businesses*.²⁸ In Austria, VIMÖ, the ERSTE Group and IBM published guidelines for companies on effectively engaging with “intersex”, transgender, and non-binary employees, colleagues and customers.²⁹ Similarly, Slovakia hosted the LGBTI+ Business Forum 2022, bringing together companies, organizations, and representatives from European agencies to promote LGBTI+ inclusion in the business sector.³⁰

Civil society organizations also serve as important channels for holding businesses accountable for their hiring practices and inclusive workplace policies while highlighting positive examples of good practices. For instance, in Chile, the Human Rights Campaign Foundation highlighted 20 major employers for their commitment to the advancement of the human rights of LGBTI people through the adoption of inclusive policies and practices.³¹ In Uzbekistan, CSOs can play a role in pressuring multilateral development banks to condition project funding on meaningful participation and protection of LGBTI individuals in their operations.³²

In Trinidad and Tobago, CAISO has developed the Model LGBTI+ Workplace Policy for Trinidad and Tobago, aimed at creating a clear framework for inclusivity and equality within workplaces.³³ Likewise, in Ireland, Dublin Bus has drafted the “Workplace Gender Transition Policy and Guidelines”, demonstrating a commitment to supporting transgender individuals in the workplace by providing clear protocols and support mechanisms for “gender transitions”.³⁴

These initiatives represent proactive steps towards creating more inclusive and supportive work environments for LGBTI+ individuals. Through such collaborative efforts, civil society organizations can contribute significantly to advancing the human rights of LGBTI+ people and their inclusion in the corporate sector and beyond.

Additionally, civil society organizations can conduct corporate benchmarking initiatives to monitor the implementation of UNGPs with a focus on SOGIESC. These initiatives typically assess companies' commitments to achieving substantive equality for individuals facing discrimination based on SOGIESC, their efforts in empowering LGBTI individuals through rights-based approaches, and their measures, including affirmative action, to eliminate discrimination

²⁸ LGA-Europe, Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People Covering Events that Occurred in Europe and Central Asia Between January-December 2022, Annual Review 2023, <https://www.ilga-europe.org/report/annual-review-2023/>

²⁹ VIMÖ, ERSTE Group and IBM publish guide to collaboration with inter*, trans* and non-binary people, June 2022, <https://vimoe.at/2022/06/01/vimoe-leitfaden/>

³⁰ LGA-Europe, *supra*, note 28

³¹ HRC Recognizes Major Employers in Chile Committed to LGBT Inclusion, July 2020 <https://www.hrc.org/news/hrc-releases-report-recognizing-major-employers-in-chile-committed-to-lgbt>

³² Uzbekistan: Society pressures multilateral development banks to urge country to stop anti-LGBTQ crackdown, April 2023 <https://www.business-humanrights.org/en/latest-news/uzbekistan-society-pressure-multilateral-development-banks-to-urge-country-to-stop-anti-lgbtq-crackdown/>

³³ ‘Finding an Equal Place at Work’-The Model LGBTQI+ Workplace Policy for Trinidad and Tobago , May 2022, <https://caisott.org/wp-content/uploads/2023/04/Updated-LGBTI-workplace-policy.pdf>

³⁴ Dublin Bus, Workplace gender transition policy and guidelines <https://www.dublinbus.ie/getmedia/0d1efc83-78ab-4554-9124-033460f7f785/Gender-Transition-Policy-and-Guidelines.pdf>

and promote equality.³⁵ Furthermore, benchmarking evaluates companies' utilization of resources to combat harassment and SOGIESC-based violence, their engagement of gender- and culture-sensitive experts to assess the effectiveness of their measures, and their regular communication with rights-holders. Collaboration with civil society organizations possessing expertise in SOGIESC issues, sensitization of decision-makers on SOGIESC equality, and advocacy for SOGIESC equality are also integral components of these benchmarking initiatives.

Furthermore, corporations are increasingly acting as influential entities in the public domain. In Kenya, for example, a coalition comprising 27 global companies advocated for the full recognition of the human rights of LGBTI people to improve the country's economic conditions and competitiveness.³⁶

Trade Incentives as a Tool for Advancing Recognition of the human rights of LGBTI persons

Trade incentives can be leveraged as a tool for advancing the recognition of the human rights of LGBTI people. For instance, within the European Union (EU), countries granted preferential tariffs under the Generalized System of Preferences- GSP plus status are required to adhere to 27 international human rights and labour treaties as a condition to maintain their status.³⁷ Presently, countries benefiting from the GSP plus include Bolivia, Cape Verde, Kyrgyzstan, Mongolia, Pakistan, Philippines, Sri Lanka and Uzbekistan.

³⁵ Human Rights Campaign, Corporate Equality Index, <https://www.hrc.org/resources/corporate-equality-index>

³⁶ Global firms urge Kenya to end discrimination against sexual minority groups, July 2022 <https://www.business-humanrights.org/en/latest-news/global-firms-urge-kenya-to-recognize-sexual-minorities/>

³⁷ JOINT REPORT TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the Generalised Scheme of Preferences covering the period 2020-2022 [https://ec.europa.eu/transparency/documents-register/detail?ref=JOIN\(2023\)34&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=JOIN(2023)34&lang=en)