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Submissions to the Senate of the Republic of the Philippines providing the basis in international human rights law for legislation that prohibits discrimination based on sexual orientation and gender identity.

1. The International Commission of Jurists (ICJ) congratulates the Senate of the Republic of the Philippines for embarking on consideration of Senate Bill No. 1738 entitled “ *An Act Prohibiting Discrimination on the Basis of sexual orientation and gender identity and providing penalties therefor.*” The ICJ endorses the object and purpose of this Bill and further says that the demonstrable intention of this proposed law honours article II section 2 of the Philippines Constitution that commits the State to “adopt the generally accepted principles of international law as part of the land.”

2. In this submission, the ICJ will clarify the basis for protection against discrimination based on “sexual orientation” and gender identity” in international human rights law and commend the effort to ensure these rights through Senate Bill No. 1738 as being consistent with the obligations of the Republic of the Philippines in international law.

The basis for “sexual orientation” as a prohibited category of discrimination in international law

3. The principle of non-discrimination is a cornerstone of international human rights law and it is embodied in the Charter of the United Nations¹, the Universal Declaration of

¹ Articles 1 (3) and 55 of the United Nations Charter.

Human Rights², the International Covenant on Civil and Political Rights³ and the International Covenant on Economic Social and Cultural Rights⁴. Article 2 (1) of the International Covenant of Civil and Political Rights (ICCPR), which was ratified by the Philippines in 1986, states that: “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.”

4. This principle is directly linked with the rights to equality before the law, protection against discrimination and equal protection of the law that are to be found in article 26 of the ICCPR⁵. The UN Human Rights Committee (HRC) – the expert body that oversees the implementation of the ICCPR - affirmed that the reference to “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 in Article 26 of the International Covenant on Civil and Political Rights *includes discrimination on grounds of sexual orientation*”⁶ (emphasis added).

5. The UN Committee on Economic, Social and Cultural Rights, the UN Committee on the Rights of the Child and the UN Working Group on arbitrary detention have all affirmed the right to protection from discrimination based on sexual orientation.⁷ In addition, the UN HRC has called on States not only to repeal laws criminalizing

² Articles 2, 7 and 10 of the Universal Declaration of Human Rights.

³ Articles 2, 3, 14, 25 and 26 of the International Covenant on Civil and Political Rights.

⁴ Article 2 of the International Covenant on Economic Social and Cultural Rights.

⁵ *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.*

⁶ Human Rights Committee, Communications: Australia, CCPR/C/50/D/488/1992, April 4, 1994, paras. 8.2-8.7. See also Human Rights Committee, Communications: Australia, CCPR/C/78/D/941/2000, September 18, 2003, para. 10.4.

⁷ See Committee on Economic, Social and Cultural Rights, General Comment No 15, E/C.12/2002/11, January 20, 2002, para.13; General Comment No 14, E/C.12/2000/4, August 11, 2000, para.18. Committee on the Rights of the Child, General Comment No 4, CRC/GC/2003/4, July 1, 2003, para. 6; General Comment No 3, CRC/GC/2003/3, March 17, 2003, para. 8. Reports of the Working Group on arbitrary detention E/CN.4/2004/3, December 15, 2003, para. 73; E/CN.4/2003/8, December 16, 2002, paras. 68-69 and 76. Opinions adopted by the Working Group on arbitrary detention No 7/2002, Egypt, E/CN.4/2003/8/Add.1, and January 24, 2003. See also Study on non-discrimination as enshrined in article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights, Working paper prepared by Emmanuel Decaux, E/CN.4/Sub.2/2004/24, June 18, 2004, para. 22.

homosexuality but also include the prohibition of discrimination based on sexual orientation in their constitutions.⁸ The UN HRC, in the individual case of *Young v Australia* stated that “article 26 comprises (also) discrimination based on sexual orientation.”⁹

6. The “***Guidelines on International Protection: gender-related persecution within the context of article 1 A (2) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees***” (2002),¹⁰ produced by the Office of the United Nations High Commissioner for Refugees (UNHCR) includes proscriptions of discrimination based on sexual orientation. Under the heading “Persecution on account of one’s sexual orientation,” it states that:

“Where homosexuality is illegal in a particular society, the imposition of severe criminal penalties for homosexual conduct could amount to persecution, just as it would for refusing to wear the veil by women in some societies. Even where homosexual practices are not criminalized, a claimant could still establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable to protect effectively the claimant against such harm.”

This Guideline clearly lays down a strong statement of principle against discrimination based on sexual orientation and illustrates that the vindication of this principle is not to be affected by particular national considerations.

⁸ Concluding Observation: Namibia, CCPR/CO/81/NAM, July 30, 2004

22. *The Committee notes the absence of anti-discrimination measures for sexual minorities, such as homosexuals (arts. 17 and 26). The State party should consider, while enacting anti-discrimination legislation, introducing the prohibition of discrimination on grounds of sexual orientation.*

Concluding Observations: Egypt, CCPR/CO/76/EGY, November 28, 2002

19. *The Committee notes the criminalization of some behaviours such as those characterized as "debauchery" (articles 17 and 26 of the Covenant).*

The State party should ensure that articles 17 and 26 of the Covenant are strictly upheld, and should refrain from penalizing private sexual relations between consenting adults.

⁹ Communication No. 941/2000: Australia, CCPR/C/78/D/941/2000, *Mr. Edward Young v Australia*, September 18, 2003

7. In the case of *Re GJ*¹¹, the Refugee Status Appeals Authority in New Zealand found in favour of an Iranian man who argued that he had a well-founded fear of persecution based, among other grounds, on his homosexuality. In construing that homosexuals formed “a particular social group”, the court stated that sexual orientation is either an innate or unchangeable characteristic or a characteristic so fundamental to identity or human dignity that it ought not to change. The Tribunal used case law from different jurisdictions¹² that supported the assertion that homosexuals constituted a “particular social group” that is worthy of protection. National constitutional law courts have increasingly accepted the notion that unjustifiable differential treatment and exclusion based on sexual orientation, violates the right to equality before the law and the protection against discrimination.¹³

8. Many States have taken action through both their constitution and legislation to prohibit

¹⁰ HCR/GIP/02/01

¹¹ <http://www.refugee.org.nz/rsaa/text/docs/1312-93.htm>

¹² See for eg, *Sanchez-Trujillo v Immigration and Naturalization Service*, 801 F. 2d 1571 (9th Cir 1986), *Canada (Attorney General) v Ward* (1993) 2 SCR 689

¹³ Ecuador: The Constitutional Court of Ecuador, Sentencia No 111-97-TC, *Registro Oficial (Official Registry)*, Supp, No 203, Nov. 27, 1997, at 67, in *invalidating a sodomy law as a violation of equality*:

“Homosexuals are, above all, bearers of all the rights of the human person and thus have the right to exercise them in conditions of full equality, which does not imply the absolute identity but rather a proportional equivalence between two or more beings, that is, their rights to enjoy legal protection, whenever in the manifestation of their conduct they do not infringe the rights of others just as is the case with all other persons”.

Danilowitz, 48(5) P.D. 749 ¶ 17 (1994), the Israeli Court held that the state airline’s policy of extending certain employee benefits to different-sex but not same-sex couples violated the constitutional guarantee of equality: “This discrimination—against homosexuals and lesbians—is improper. It is contrary to equality.”

Vriend v Alberta [1998] 1 S.C.R. 493, available at 1998

S.C.R. LEXIS 76. Section 15(1) of Canadian Charter of Rights and Freedoms, www.efc.ca/pages/laws/charter/charter.head.html, provides:

“[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination.. based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Court said that Section 15 requires that sexual orientation be “read into” a province’s general anti-discrimination law).

discrimination based on sexual orientation.¹⁴ This list of countries spans every continent of the world. At the regional level, member states of the European Union signed the Treaty of Amsterdam that inserted a new article 13 which authorized the Council of the European Union to “*take appropriate action to combat discrimination based on ...sexual orientation.*”¹⁵ Member states of the European Union have also authorized the solemn proclamation of the Charter of Fundamental Rights of the European Union, which in Article 21(1) provides that discrimination shall be prohibited on grounds “*such as . . . sexual orientation . . .*”¹⁶

Protection against discrimination based on sexual orientation extends to access to military service

9. On the particular issue of prohibiting discriminatory practices that deny access to public services, including military service, the ICJ commends the draft bill and says that there is strong precedent for this position in international human rights law. In the case of *Lustig Prean v UK*,¹⁷ the European Court of Human Rights (ECHR) found a violation of the right to respect for private and family life, in favour of applicants of the United Kingdom armed services who were subjected to police investigations concerning their homosexuality, and who were administratively discharged after admitting homosexual orientation. Their dismissal was solely attributable to their admission of homosexual orientation and was pursuant to a Ministry of Defence policy that excluded homosexuals from the UK armed Forces.

10. The Court considered that the investigations conducted into the applicants’ sexual orientation together with the applicants’ discharge from the armed forces constituted especially grave interferences with their private lives. The Court found that the Government had not demonstrated “particularly convincing and weighty reasons” to justify those interferences, and noted that the Government’s core argument was that the presence of

¹⁴ See International Lesbian and Gay Association (ILGA) *World Legal Survey on Anti Discrimination Law (Sexual Orientation)*; “*European Treaties and Legislation and National Constitutions and Legislation Expressly Prohibiting Discrimination based on Sexual Orientation*” by Dr. Robert Wintemute (last updated September 20, 2002) at: http://www.ilga.info/Information/Legal_survey/list_of_international_treaties.htm

¹⁵ <http://europa.eu.int/eur-lex/en/treaties/index.html>

¹⁶ http://www.europarl.eu.int/charter/pdf/text_en.pdf

homosexuals in the armed forces would have a substantial and negative effect on morale and, consequently, on the fighting power and operational effectiveness of the armed forces. The Government relied, in this respect, on the Report of the Homosexual Policy Assessment Team (HPAT) published in February 1996. The Court found that, insofar as the views of armed forces' personnel outlined in the HPAT Report could be considered representative, those views were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation. It was noted that the Ministry of Defence policy was not based on a particular moral standpoint and the physical capability, courage, dependability and skills of homosexual personnel were not in question. Insofar as those negative views represented a predisposed bias on the part of heterosexuals, the Court considered that those negative attitudes could not, of themselves, justify the interferences in question any more than similar negative attitudes towards those of a different race, origin or colour.

11. Finally, the ECHR in *Lustig Prean* considered that it could not ignore widespread and consistently developing views or the legal changes in the domestic laws of Contracting States in favour of the admission of homosexuals into the armed forces of those States. Accordingly, the ECHR found that convincing and weighty reasons had not been offered by the Government to justify the discharge of the applicants.

12. Though the case of *Lustig Pean* was decided on the basis of a violation of the right to privacy, the ICJ submits that the reasoning of the ECHR can easily found the arguments for a violation of the right to non-discrimination in similar circumstances. The Court offered powerful reasoning against practices that preclude entry into the armed forces on the basis of sexual orientation.

The basis for “gender identity” as a prohibited category of discrimination in international law

13. The International Commission of Jurists endorses the protections offered to “gender identity” by this draft bill and supports its proposed definition. The ICJ notes that widely held

¹⁷ 1999 ECHR 71

beliefs of what properly constitutes *male* or *female* conventions have been used as an instrument of oppression against individuals who do not fit or conform to the stereotypical or binary models of masculine or feminine. Personal deportment, mode of dress, economic independence in women and the absence of an opposite sex partner, are all features that may subvert gender expectations and attract discriminatory responses based on gender. Lesbians, gay men, transgender persons, travestites and intersex individuals are often seen as flouting rules concerning gender roles. By acknowledging “gender identity” as a prohibited category of discrimination, the draft legislation properly addresses how the departure from binary models of genders has been a source of discrimination and violence in the Philippines.

14. Violence against transgender persons is a worldwide phenomenon and exists no less in the Philippines¹⁸. It affects groups that are often marginalized in terms of economic, social and political status and who are vulnerable, due to gender and sexual non-conformity. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has highlighted in various reports, several cases of killings of travestite and transgender persons.¹⁹ Similarly, the Special Rapporteur on torture has reported serious abuses against transgender and travestite individuals in various country reports²⁰. The UN Committee against Torture in 2002 specifically addressed the issue of abuses against transgender activists in its Concluding observation in Venezuela²¹.

15. The need to address the recognition of a fundamental right to gender identity as a way of fully acknowledging the dignity of *all* persons, has been considered by the European system for the protection of human rights. Although the 1950 text of the European Convention on

¹⁸ Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, E/CN.4/2004/56/Add.1, March 23, 2004

¹⁹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2003/3, January 13, 2003, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to Honduras, E/CN.4/2003/3/Add.2, June 14, 2002;

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2001/9/Add.1, January 17, 2001;

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2001/9, January 11, 2001;

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2000/3, January 25, 2000

²⁰ Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, E/CN.4/2002/76, December 27, 2001;

Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, interim report, A/56/156, July 3, 2001

²¹ E/CN.4/2002/76/Add.1, March 14, 2002,

Human Rights does not explicitly mention gender identity and sexual orientation among the grounds provided by the principle of non discrimination of article 14, the inclusion of both sexual orientation and gender identity within the scope of the Convention itself has been acknowledged in the past decade by the case law of the European Court of Human Rights.²²

16. In the case *Goodwin v. United Kingdom*²³, the justices of the European Court of Human Rights recognized the rights of “*individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost*”, by arguing that “[i]n the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved”. More recently, in *Van Kück v. Germany*²⁴, the justices have recognized the “*right to gender identity and personal development*” as a “*fundamental aspect of [the person’s] right to respect for private life*” protected by article 8 of the European Convention being **gender identity**, according to the Court in the light of the previous cases, “*one of the most intimate areas of a person’s private life*”(emphasis added).

17. Some countries have adopted express or implied protections based on gender identity, in domestic legislation.²⁵ This trend is set to continue in light of robust case law development in this area.

Conclusion

18. In order to develop a full sense of common citizenship among people of all sexual orientations and gender identities, conduct that reinforces inequality must be proscribed by law, investigated where it exists and dealt with according to laws that offer relevant human rights protection. In describing the normative scope that underpins the framework for equality before the law, Sachs J

²² In the December 21, 1999 judgment in the case of *Salguierdo da Silva Mouta v Portugal*, in which the European Court of Human Rights found a violation of article 8 in conjunction with article 14, on the basis of the applicant’s sexual orientation. See 1996 ECHR 176

²³ Appl. no. 28957/95 (16 January 2002).

²⁴ Appl. No. 30968/97 (12 June 2003).

²⁵ See International Lesbian and Gay Association (ILGA) *World Legal Survey on Anti Discrimination Law (Gender Identity)*; “*European Treaties and Legislation and Selected National Legislation Expressly or Impliedly Prohibiting Discrimination based on Gender Identity* ” by Dr. Robert Wintemute (last updated September 20, 2002) at:

in the case of *National Coalition of Gay and Lesbian Equality v Minister of Justice* in the South African Constitutional Court, opined as follows:

*“ ... What the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal ceases to be the basis for establishing what is legally normative. More broadly speaking, the scope of what is constitutionally normal is expanded to include the widest range of perspectives and to acknowledge, accommodate and accept the largest spread of difference. What becomes normal in an open society, then, is not an imposed and standardized form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour.”*²⁶

19. The ICJ commends the general intention of the draft Bill and encourages the discussion in the Senate of the Philippines so there can be an agreed commitment to its overall objectives, which are not only laudable but are supported by international human rights law. It is hoped that the Bill will enjoy steady progress through the parliamentary processes and into law.

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http://www.ilga.info/Information/Legal_survey/Legislation%20Prohibiting%20Discrimination%20Based%20On%20Gender%20Identity.htm

²⁶ National Coalition of Gay and Lesbian Equality and another v Minister of Justice, *para 134 at:*
http://hrw.org/lgbt/pdfs/africa_sodomy_1998.pdf