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**Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms**

## **Protection against violence and discrimination based on sexual orientation and gender identity**

### **Note by the Secretary-General**

The Secretary-General has the honour to transmit to the General Assembly the report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, submitted in accordance with Human Rights Council resolution [41/18](#).

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\* [A/76/150](#).



**Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz**

**Practices of exclusion**

*Summary*

In the present report, the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, analyses backlash against the incorporation of gender frameworks in international human rights law. The present report complements his report entitled “The law of inclusion” submitted to the Human Rights Council at its forty-seventh session.

## I. Introduction

1. The present report has been prepared in the omnipresent shadow of the coronavirus disease (COVID-19) pandemic, which at the time of writing has taken more than 4 million human lives. As we build back better, we bear in mind that none of the work reflected herein has been carried out under “business as usual”: meetings, conversations and submissions have behind them human beings who, in addition to the already taxing task of the defence and promotion of human rights, likely faced exhaustion and anguish arising from, inter alia, employment and financial uncertainty, health concerns and the loss of loved ones. This also applies to the teams supporting the mandate holder at the Office of the United Nations High Commissioner for Human Rights (OHCHR) and at the Human Rights Program at Harvard Law School, as well as United Nations administrative personnel, editors, translators, experts and managers; the work has been continued thanks to the strength of their resolve. The mandate holder is indebted to them for their significant contribution throughout these most challenging of times.

2. The present report is the second of two on gender theory. Entitled “Practices of exclusion”, it complements the report of the Independent Expert entitled “The law of inclusion”,<sup>1</sup> submitted to the Human Rights Council at its forty-seventh session. The methodology and research process described therein were also applied for the present report, together with the terminologies of cisgender and lesbian, gay, bisexual, trans and gender-diverse (LGBT) people.<sup>2</sup> The Independent Expert would like to highlight some of the features in the inputs received:

(a) Submissions from non-State actors generally followed two different approaches to gender: some supportive of inclusionary approaches leading to legal recognition of gender identity based on self-identification; and some suggesting an exclusionary approach almost invariably leading to the denial of legal recognition of the gender identity of trans and gender-diverse persons. In “The law of inclusion”, the Independent Expert concluded that international human rights law supports the inclusionary approach;

(b) In non-State submissions supporting an exclusionary approach, 297 replicated templates which are cited in the report as templates A (238 submissions), B (32 submissions) and C (27 submissions);

(c) Of 42 State submissions, an overwhelming majority (41) supported the inclusionary approach.

3. Gender frameworks are the quintessential feminist construct, and it is therefore natural that in the submissions that informed the report a dominant note was struck by the voices of women: cis and trans women; heterosexual, lesbian and bisexual women; straight and queer women; white women and women of colour; women from the global south and the global north; women expressing State and corporate positions; and women representing the poor and the disenfranchised. Other voices greatly impacted by these issues were also heard, among them those of trans men and gender-diverse persons and intersex persons.

4. While these voices will be given expression in a public repository of documents under the aegis of the mandate holder,<sup>3</sup> the Independent Expert confesses that the extraordinary learning opportunity offered by this research was accompanied by significant trepidation: we all speak from a vantage point, and the Independent Expert is aware of the significant limitations imposed by his own. He remains nonetheless

<sup>1</sup> [A/HRC/47/27](#).

<sup>2</sup> *Ibid.*

<sup>3</sup> [www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/ReportGenderTheory.aspx](http://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/ReportGenderTheory.aspx).

convinced that the present historical moment demands this work from the mandate holder, and he will remain thankful to all those who entrusted him with their views, knowledge and lived experiences.

5. The main findings of “The law of inclusion” include that gender is a concept enshrined in international human rights law, that gender identity and gender expression are protected thereunder and that gender frameworks, gender-based approaches and intersectionality provide a powerful lens for analysing the root causes of violence and discrimination based on sexual orientation, gender identity and gender expression. They enable the analysis of multiple asymmetries of power, deriving from the way in which sex is understood within society, including those that fuel violence and discrimination against women in all their diversity.

6. In the present report, the Independent Expert analyses backlash against the incorporation of gender frameworks into international human rights law, the risks that the backlash poses for the rights of women (including lesbian, bisexual and trans women) and for efforts to combat violence and discrimination based on sexual orientation and gender identity; and its connection with efforts to undermine multilateralism. The mandate holder concludes that exclusionary narratives and actions related to gender and gender identity exploit preconceptions, stigma and prejudice and contribute to the risk of perpetuating violence and discrimination. He further concludes that backlash arising from the recognition of gender in international law is a significant ongoing challenge likely to create significant damage unless it is met with decisive State action in the form of evidence-based approaches and administrative and other action. Failure to respond to this backlash may constitute a violation of State obligations under international human rights law.

## II. Practices of exclusion

7. The Independent Expert has noted a “steep rise in ultraconservative political leaders and religious groups using their platforms to promote bigotry, dehumanize persons on the basis of sexual orientation, gender identity, and gender expression, and foster stigma and intolerance among their constituencies”.<sup>4</sup> This trend, also described by the Working Group on discrimination against women and girls, is generated through orchestrated and well-resourced strategies aimed at negatively impacting the progressive recognition of human rights standards relating to gender equality and sexuality.<sup>5</sup>

8. The Independent Expert also notes the emergence of demands to separate human rights-based approaches on sexual orientation from those on gender identity, ultimately seeking to exclude trans and gender-diverse persons from the protection of international human rights norms and standards, and to challenge legal recognition of gender identity based on self-identification.

9. Resistance to the recognition of protection of gender, gender identity and gender expression under international human rights norms is often framed as resistance to the imposition of so-called “gender ideology”, a linguistic formula used symbolically to refer in an accusatory manner to progressive interpretations of human rights and describe a series of grievances as varied as opposition to equal marriage, gender identity recognition, comprehensive gender and sexuality education and voluntary termination of pregnancy, *inter alia*.<sup>6</sup> There is no single “gender ideology” narrative and the label exists largely in opposition to inclusionary human rights approaches. The concept also appears in narratives adopted by groups in various cultural and social contexts

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<sup>4</sup> A/HRC/38/43, para. 38, and A/74/181, para. 34.

<sup>5</sup> [www.ohchr.org/Documents/Issues/Women/WG/Gender-equality-and-gender-backlash.pdf](http://www.ohchr.org/Documents/Issues/Women/WG/Gender-equality-and-gender-backlash.pdf).

<sup>6</sup> *Ibid.*

to popularize hostile messaging around the mainstreaming of gender equality. “Gender ideology” narratives evoke a global conspiracy and a coordinated strategy aimed at destroying the political and social order,<sup>7</sup> and the malleable nature of the concept has cleared the path for its usage to push for restrictive ideas and policies.<sup>8</sup>

10. The notion of “gender ideology” has its origins in the opposition by conservative religious leaders to the advances in women’s empowerment made in relation to the International Conference on Population and Development, held in Cairo in 1994, and the Fourth World Conference on Women, held in Beijing in 1995, as the proposals made during these conferences were seen as an alleged danger for family models deemed as traditional.<sup>9</sup> In 1994, the concept of the “gender agenda” also emerged. All terms of this lineage refer pejoratively to women’s sexual and reproductive rights,<sup>10</sup> and are used mostly in attempts to block rights relating to sexuality and gender, comprehensive gender and sexuality education and the rights of LGBT persons. For example, in Paraguay, a campaign was launched to repeal programmes aimed at promoting gender-neutral language;<sup>11</sup> in New South Wales, Australia, another targeted the teaching of gender;<sup>12</sup> and in Mexico a campaign was carried out to advocate for the adoption of a policy that would require schools to seek permission from parents for the provision of learning materials on sexuality and gender to their children. One submission presented the example of a strategy identified by the European Parliamentary Forum for Sexual and Reproductive Rights, called “Restoring the natural order: an agenda for Europe”, with the objective of overturning existing laws and policies guaranteeing sexual and reproductive rights.<sup>13</sup>

11. “Gender ideology” narratives are employed by actors in State “and diplomatic spheres, by religious actors, in print and social media, at events of conservative secular groups and even in street demonstrations”<sup>14</sup> to challenge the recognition of gender under international law (anti-gender/gender sceptical/gender critical) or those challenging the protection of the rights of trans and gender-diverse persons (anti-trans). All appear to have common traits, including vigorous social media messaging, simple, catchy slogans, the ability to leverage resources from their followers through campaigns opposing social rights, flexibility and adaptability to local contexts.<sup>15</sup> Anti-trans narratives resonate with conservative platforms and are increasingly used strategically to energize and galvanize political bases. As noted in one submission, “by normalizing the false idea of a monolithic religio-cultural identity, and frequently entrenching a climate of fear within public discourse, rhetoric linked to sovereignty and patriarchal and absolutist interpretations of culture and religion are reinforced to achieve political, social and/or economic power”.<sup>16</sup> The boundaries between anti-gender and anti-trans narratives and practices thereby become increasingly blurred.

12. The “gender ideology” narrative casts a wide net. It was noted in several submissions that this narrative was a crucial part of the strategy used in the campaign against the Final Agreement for Ending the Conflict and Building a Stable and Lasting

<sup>7</sup> A/HRC/40/60, para. 31, A/73/152, para. 27, A/HRC/43/48, paras. 34–40 and <https://www.hrw.org/news/2018/12/10/breaking-buzzword-fighting-gender-ideology-myth#>.

<sup>8</sup> Submission by OutRight.

<sup>9</sup> <https://gin-ssogie.org/family-and-traditional-values-regional-joint-declarations/san-leopoldo-declaration/>.

<sup>10</sup> Submission by GIN-SSOGIE.

<sup>11</sup> Submission by CREA and others.

<sup>12</sup> [www.starobserver.com.au/news/national-news/new-south-wales-news/public-schools-gender-theory/155482](http://www.starobserver.com.au/news/national-news/new-south-wales-news/public-schools-gender-theory/155482).

<sup>13</sup> [www.epfweb.org/node/175](http://www.epfweb.org/node/175).

<sup>14</sup> Submission by AWID and SRI.

<sup>15</sup> <https://rowman.com/ISBN/9781786600004/Anti-Gender-Campaigns-in-Europe-Mobilizing-against-Equality>.

<sup>16</sup> Submission by AWID and SRI.

Peace in Colombia in 2016,<sup>17</sup> and the Hungarian parliament recently adopted a political declaration rejecting the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) on the grounds that it defines gender as a social construct,<sup>18</sup> and passed legislation that denies access to legal gender recognition for transgender and intersex persons<sup>19</sup> and restricts information available to children and sexuality education.<sup>20</sup> In January 2021, a series of United Nations special procedures, including the Independent Expert, expressed their deep concern to Poland about a significant number of counties and municipalities that had passed resolutions declaring themselves free from so-called “LGBT ideology”, a public policy that appears to promote the idea that the human rights of LGBT persons are not protected under international and national law, issued in a context in which religious and political leaders had used deeply dehumanizing language to refer to LGBT persons, including “zoophiles”, “paedophiles”, “the plague” and “the pest”.<sup>21</sup>

13. Anti-gender narratives defend a world of absolutes that must be challenged if human rights are to be enjoyed universally. The preconceptions upon which that order is built are that human nature is to be classified with reference to a male/female binary system on the basis of the sex assigned at birth; that people fall neatly and exclusively into that system on the same basis; and that it is a legitimate societal objective that, as a result, people adopt roles, feelings, forms of expression and behaviours that are considered inherently “masculine” or “feminine”.

14. Challenging the male/female binary system is a daunting task. It has been an ordering principle for the socioeconomic, cultural, civil and political framing within States and at the regional and global levels and is a cornerstone of patriarchal and heteronormative concepts that are at the origin of most injustice, including discrimination and violence against women. It is, however, also a part of the framework that has shaped the development of international human rights law and, for the last six decades, has also been referred to in the global endeavour to achieve equality: often, gender equality is understood as socially and politically interchangeable with equality between men and women. Sex is thus an indispensable starting point for the analysis of discrimination and is central to most human rights-related tasks with regard to prevention, accountability and reparation. From the design of data collection systems, to the analysis of gender-based violence, the evaluation of public policy or the design of measures of non-repetition to the very design of the global development agenda, sex is interwoven into the backdrop of all international human rights endeavours.

15. Acknowledgement of this dominant reality, and due appreciation of its potential to further the protection of the human rights of half the population of the world, must not however be at the expense of shedding light on the limitations arising from its enforcement as an absolute, rigid dichotomy. OHCHR has documented the horrifying violations perpetrated against intersex persons with the objective of maintaining the binary of sex by unnecessarily cutting and pasting their bodies into one of the two existing binary moulds.<sup>22</sup> Their pain and suffering demonstrates that, because sex is

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<sup>17</sup> See, for example, submission by Corporación Femm.

<sup>18</sup> [https://index.hu/english/2020/05/05/istanbul\\_convention\\_rejected\\_parliament\\_hungary\\_fidesz\\_kdnp/?fbclid=IwAR3XJAcmUNaw7cfMniUrg](https://index.hu/english/2020/05/05/istanbul_convention_rejected_parliament_hungary_fidesz_kdnp/?fbclid=IwAR3XJAcmUNaw7cfMniUrg).

<sup>19</sup> [www.amnesty.org/en/latest/news/2020/05/hungary/](http://www.amnesty.org/en/latest/news/2020/05/hungary/). See also communication No. OL HUN 1/2020.

<sup>20</sup> Communication No. OL HUN 3/2020.

<sup>21</sup> Communication No. AL POL 1/2020.

<sup>22</sup> [www.ohchr.org/Documents/Issues/Discrimination/LGBT/BackgroundNoteHumanRightsViolationsagainstIntersexPeople.pdf](http://www.ohchr.org/Documents/Issues/Discrimination/LGBT/BackgroundNoteHumanRightsViolationsagainstIntersexPeople.pdf).

assigned at birth based on the perception that others have of their genitalia, sex assignment is tainted by social preconceptions, and is far from an absolute biological fact.

16. The biological reality of sex characteristics must not be conflated with the social construct of gender. Human beings have sex characteristics, which are biological features including genitalia and other sexual and reproductive anatomy, chromosomes, hormones and secondary features emerging from puberty: these are indeed a physical reality. While powerful, roles, behaviours, forms of expression, activities and attributes assigned to this biological reality by dominating social forces are constructs, and individuals must be able to ignore, shatter or subvert them as an exercise of freedom. This is the conceptual crossroads between the freedom of women from biological determinism (and hence respect for their bodily autonomy and their sexual and reproductive rights), and the freedom of trans and gender-diverse persons from the policing of their gender identity and expression (and hence respect for their right to legal recognition).

17. From a rights-based perspective, there is no justification for defending a system of oppression at the expense of the individual; on the contrary, there is an imperative to defend the individual's freedom from violence and discrimination. Therefore, conceptual, legal and political systems put in place to protect women from violence and discrimination must be available to all women, including trans women; protection must be available for trans men that is appropriate to their identity as men; and systems must be prepared to deal with the specificities for extending equivalent recognition to gender-diverse persons.

18. The mandate holder therefore recommends that States further the adoption of measures for the recognition of sex, gender, gender identity and gender expression as protected from discrimination and violence, including in public policy, legislation and access to justice. Gender is the methodological lens for examining and describing the boundaries set by roles, behaviours, forms of expression, activities and attributes assigned to the social understanding of sex, and it has previously been observed that there is a robust *corpus juris* in international human rights law that attests to its recognition.<sup>23</sup>

## A. Negation

19. The mandate holder has previously analysed certain mechanisms that amount to negation: that is, claiming that LGBT persons do not “naturally” exist in certain countries or regions of the world. Negation also involves depicting LGBT lives as contrary to a “natural” order, an idea embraced by many anti-gender narratives.

20. Women are targets of discrimination and violence around the world, and the recognition of their sexual and reproductive rights – that is, their ability to take decisions in relation to their bodies and sexuality – is a prerequisite for ensuring their full enjoyment of rights. “Gender ideology” narratives build on the idea that biology somehow predetermines the fate of women and men – in the case of the former, with reference to their reproductive abilities and with the result that their bodies are seen as collective property, or the property of society or their communities or families. This pseudo-biological argument attacks the principles of bodily autonomy and bodily integrity, calling into question the rights of women. Its consequences, however, also impact on LGBT persons: by defining reproductive abilities and bodies as collective property, subject to decisions as to what is considered the common good, their bodies are effectively taken out of their control and placed under the custody of the State, the community or the family. The mandate holder has previously stated that this conceptual construct has urgent relevance for lesbians who are tortured through

<sup>23</sup> A/HRC/47/27.

rape heinously described as “corrective”; for gay men, through coercive anal examinations; for all persons who are subjected to “conversion therapy” practices; for intersex infants who suffer torture through unnecessary procedures; the failure to respect these principles also precludes the intrinsic recognition of trans and gender-diverse persons, whose lives are perceived as defying biological preconceptions.

21. The concept of a natural order as the guiding principle of human and social existence is also present in conservative doctrine. The Holy See’s doctrine of complementarity, for example, holds that women and men are not equal but rather have complementary social roles, an arrangement which “allows a thorough response to the design of God according to the vocation to which each one is called”.<sup>24</sup> People’s personal traits are directly related to the meaning attached to the sex that they are assigned at birth:

Women have a unique understanding of reality. They possess a capacity to endure adversity and “to keep life going even in extreme situations” and hold on “tenaciously to the future”. This helps explain why “wherever the work of education is called for, we can note that women are ever ready and willing to give themselves generously to others, especially in serving the weakest and most defenceless. In this work they exhibit a kind of affective, cultural and spiritual motherhood which has inestimable value for the development of individuals and the future of society ...”.

22. Negation undermines bodily autonomy in respect of the ability of LGBT persons (and others) to access the benefits of family life. The Holy See refers to the institutional model of a family, described as “where a structure and finality exist independent of the subjective preferences of the spouses”, contrasting it with a vision of a family that is purely contractual and voluntary, “irrespective of sexual difference or procreation”; in other words, in contrast with same-sex families. A human rights-based approach directly challenges such a concept: the European Court of Human Rights<sup>25</sup> and the Inter-American Court of Human Rights<sup>26</sup> have both reached the conclusion that it would be a breach of human rights norms and standards to maintain that same-sex couples cannot enjoy family life, and that a family may also consist of persons with different gender identities and/or sexual orientations. They thereby recognize the dignity of “the emotional ties of a couple formed by two persons who are part of a historically oppressed and discriminated minority”, separating that recognition from the finality set in the name of religion or any other institutional driver:

the Court notes that, in order to deny the right of access to the institution of marriage, it is typically asserted that the purpose of marriage is procreation and that such a union could not meet this purpose. The Court finds that this assertion is incompatible with the intention of article 17 of the Convention, which is the protection of the family as a social reality.<sup>27</sup> Moreover, the Court considers that procreation is not a characteristic that defines conjugal relationships, because affirming the contrary would be demeaning for couples – whether married or not – who, for whatever reason, are unable or unwilling to procreate.<sup>28</sup>

<sup>24</sup> [www.educatio.va/content/dam/cec/Documenti/19\\_0997\\_INGLESE.pdf](http://www.educatio.va/content/dam/cec/Documenti/19_0997_INGLESE.pdf) (emphasis added).

<sup>25</sup> European Court of Human Rights, application Nos. 29381/09 and 32684/09.

<sup>26</sup> Inter-American Court of Human Rights, Advisory Opinion OC-24 of 24 November 2017, para. 192.

<sup>27</sup> Supreme Court of Justice of Mexico, First Chamber, 19 June 2015, 1a./J.43/2015.

<sup>28</sup> Inter-American Court of Human Rights, Advisory Opinion OC-24, para. 221.



23. Many submissions alluded to the significant opposition led by some faith-based groups,<sup>29</sup> in many cases through narratives that fuel stigma and hatred in the name of religion. These narratives often negate the status of LGBT persons as human beings deserving of dignity and respect. The national human rights institution of the Philippines reported that faith-based groups have disseminated the false narrative that necrophilia and paedophilia are sexual orientations endorsed by the LGBTQ+ community.<sup>30</sup>

24. In contrast, many traditional and religious practices have rejected narratives of negation and have instead fostered inclusionary environments. An example is given by the Fellowship of Christian Councils in Southern Africa, whose programme is focused on both the inclusion of diverse sexual orientations and the protection of LGBT individuals from violence and discrimination in churches, which by extension includes wider society.<sup>31</sup> Within the Inter-American system, the Coalition of Religions for Peace, composed of faith-based organizations and religious representatives, is not linked to agendas on sexual diversity issues but to sustainable development, environmental justice and gender violence.<sup>32</sup> At the global level, the Coalition of Religions, Beliefs and Spiritualities in Dialogue with Civil Society is composed of more than 25 civil society organizations, interfaith dialogue spaces, faith-based organizations and other movements, whose objective is to support coalitions that promote human rights agendas, in particular on LGBTIQ issues, sexual and reproductive rights and feminist agendas.<sup>33</sup> In December 2020, more than 350 religious leaders from 10 religions signed the Declaration proclaiming the sanctity of life and dignity of all people regardless of a person's sexual orientation or gender identity.<sup>34</sup>

25. When examining States' obligations to recognize trans and gender-diverse persons and uphold their human rights, the mandate holder and numerous United Nations and regional human rights mechanisms have concluded that the right to self-determine one's gender is a fundamental part of a person's freedom and a cornerstone of a person's identity. The obligation of States is therefore to provide access to gender recognition in a manner consistent with the rights to freedom from discrimination, equal protection of the law, privacy, identity and freedom of expression.<sup>35</sup>

## B. Defence of the national State

26. Actors promoting regressive interpretation of rights make strong parallels between the nation and the family. Within this framing, the patriarchal and heteronormative family is depicted as the only one adding value to a country's national heritage. "Gender ideology" is conversely framed as an attack on national identities and traditions. As noted in one submission, "the nation and the family become almost interchangeable once the nation is imagined as a single homogenous social unit of kinship – indeed, a family – particularly when grounded in racial ideologies

<sup>29</sup> Submissions by Ireland and Hong Kong Equal Opportunities Commission. Some of the authorities mentioned as having led or supported anti-gender campaigns represented the following faith-based groups: Catholic (submissions by Bolivia (Plurinational State of), Croatia, Honduras, Malta, Human Rights Ombudsman of Guatemala, Çavaria and CIPAC), Christian Orthodox (submissions by Cyprus, Malta, Association Spektra), Evangelical (submission by Plurinational State of Bolivia), Pentecostal (submission by CHOICE), Islamic (submissions by Bosnia and Herzegovina, CHOICE) and Jewish (submission by Human Rights Ombudsman of Guatemala).

<sup>30</sup> Submission by the Commission on Human Rights of the Philippines.

<sup>31</sup> Submission by GIN-SSOGIE.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> See <https://globalinterfaith.lgbt>.

<sup>35</sup> A/73/152, para. 21.

of shared origin and supremacy”.<sup>36</sup> This definition of family does not take into account the fact that, in most contexts, families are diverse, and in some they are highly diverse:<sup>37</sup> in Brazil, where there are over 28 million female-headed households, several professional organizations have denounced the promotion of the single patriarchal and heteronormative model of family.<sup>38</sup> On 15 December 2020, the Independent Expert expressed his concern to Hungary on the formulation of draft bill T/13647, which enshrines the restrictive interpretation of family ties based on a marriage in which “the mother is a woman and the father is a man”.<sup>39</sup>

27. Opponents to this view of the world are seen as “anti-national”, “unpatriotic” or “traitors”. In some cases, nationalistic discourse is intertwined with xenophobic messages, such as those directed at lesbians, who are accused of threatening the survival of the national population, and during his country visit to Ukraine, for example, the Independent Expert was told that lesbian, bisexual and trans women were portrayed as unpatriotic by extreme right-wing groups because they defied societal expectations for reproduction and motherhood.<sup>40</sup> Nationalistic discourse is often accompanied by narratives of intrusion into domestic matters.<sup>41</sup> As noted in one submission, “critiques of anti-gender efforts are labelled as critiques of national sovereignty through democratic, secular, or universal human rights claims and gender itself is seen as a revived neo-colonialist project of the United Nations and Western international organizations”.<sup>42</sup>

28. There is also strong evidence of violence and discrimination based on gender identity because of narratives of exclusion under states of exception and in humanitarian and armed conflict. In Congo, Colombia, Iraq and the Syrian Arab Republic, information indicates that sexual violence has been used by certain armed groups as a form of social control, or “moral cleansing”.<sup>43</sup> As noted in one submission,

pre-existing vulnerabilities resulting from inequalities rooted in patriarchal power structures, lack of legal protection, deeply embedded prejudices against individuals who do not, or who are perceived as not conforming to prevailing gender norms, and other factors are often exacerbated by armed conflict. New threats can also arise, such as the emergence of armed actors with extremist religious ideologies that do not tolerate sexual and gender diversity. CRSV [conflict-related sexual violence] is therefore both an extension of and a facilitator of the heteropatriarchal system, norms and values that are present in times of peace, but which may be intensified and take new forms during armed conflict.<sup>44</sup>

29. In the Syrian Arab Republic, for example, United Nations investigators have reported incidents in which men have been beaten, tortured and raped or threatened with rape by State security forces, on the grounds of their sexual orientation.<sup>45</sup> In Myanmar, United Nations investigators concluded that transgender people of Rohingya ethnicity were targeted by authorities with sexual violence, reportedly because of their gender and sexual orientation, and that the sexual violence against trans persons amounted to crimes against humanity of torture, rape, other inhumane

<sup>36</sup> [www.pagina12.com.ar/167101-el-macho-asustado](http://www.pagina12.com.ar/167101-el-macho-asustado).

<sup>37</sup> See, for example, [CCPR/C/78/D/941/2000](https://www.unhcr.org/refugees/c/119/D/2216/2012), [CCPR/C/89/D/1361/2005](https://www.unhcr.org/refugees/c/89/D/1361/2005) and [CCPR/C/119/D/2216/2012](https://www.unhcr.org/refugees/c/119/D/2216/2012).

<sup>38</sup> See [https://sxpolitics.org/wp-content/uploads/2016/03/Protection\\_of\\_the\\_family\\_OCHR.pdf](https://sxpolitics.org/wp-content/uploads/2016/03/Protection_of_the_family_OCHR.pdf).

<sup>39</sup> Communication No. OL HUN 3/2020.

<sup>40</sup> [A/HRC/44/53/Add.1](https://www.unhcr.org/refugees/a/hrc/44/53/Add.1), para. 26.

<sup>41</sup> For examples, see [www.awid.org/sites/default/files/atoms/files/rights-at-risk-ours-2017.pdf](http://www.awid.org/sites/default/files/atoms/files/rights-at-risk-ours-2017.pdf).

<sup>42</sup> Submission by CHOICE.

<sup>43</sup> [www.unidadvictimas.gov.co/sites/default/files/documentosbiblioteca/caracterizacion\\_situacionallgbti.pdf](http://www.unidadvictimas.gov.co/sites/default/files/documentosbiblioteca/caracterizacion_situacionallgbti.pdf). See also [S/2020/487](https://www.unhcr.org/refugees/s/2020/487) and [S/2016/361](https://www.unhcr.org/refugees/s/2016/361).

<sup>44</sup> Submission by All Survivors Project.

<sup>45</sup> [A/HRC/25/65](https://www.unhcr.org/refugees/a/hrc/25/65).

acts and persecution as part of the widespread and systematic attack against the Rohingya civilian population.<sup>46</sup>

30. Such violations are enabled through systems of repression that enforce the idea that diversity in sexual orientation and gender identity is somehow harmful to society, and that LGBT persons are disordered or antisocial. As a result, LGBT persons become the “other”, “foreign”, or even a threat to national cohesion, culture and tradition. Urgent measures must be taken by States to dismantle these systems of repression and to foster social inclusion of LGBT persons and highlight their significant contribution to the social fabric of a nation.

### C. Traditional values

31. The narrative of “traditional” values<sup>47</sup> is often wielded against women and LGBT advocates. According to the Special Rapporteur on human rights defenders, “a common accusation directed in particular at those working on women’s rights, gender issues, and LGBT rights, is the assertion that these defenders are somehow advocating or attempting to import ‘foreign’ or ‘Western’ values, which contradict national or regional culture. State agents or representatives are often alleged to be responsible for such stigmatization”.<sup>48</sup>

32. The idea of defence of traditional values may give rise to the “othering” of groups that challenge them. In 2018, for example, the Executive Council of the African Union asked the African Commission on Human and Peoples’ Rights to withdraw the observer status given to the Coalition of African Lesbians, in order to “take into account the fundamental African values, identity and good traditions, and to withdraw the observer status granted to non-governmental organizations who may attempt to impose values contrary to the African values”,<sup>49</sup> a request to which the Commission acceded.<sup>50</sup>

33. These narratives have been successful because they appeal to anxieties about their future and that of their families, their sons and their daughters. As noted in one submission,

the threat to children’s innocence is at the heart of anti-gender discourse, which is based on a ‘policy of fear.’ The proposal in the face of this moral panic is to offer the past as the best future: to return to societies where traditional gender roles placed women in a situation of inferiority. This proposal is based on offering a ‘safe’ alternative focused on the traditional family, the nation and religious values as opposed to individualism that – according to conservative groups – represents gender policies. This strategy has expanded internationally and regionally, so that similarities can be found in speeches, actors and aesthetics in several countries.<sup>51</sup>

34. Narratives of defence of traditional values are often accompanied by accusations of criminal intent and antisocial behaviour. Paedophilia and corruption of minors are two frequent narratives, with a well-known example being the Russian Federation law

<sup>46</sup> [A/HRC/42/CRP.4](#), paras. 180 and 188.

<sup>47</sup> See, for example, submission by Angola.

<sup>48</sup> [A/HRC/16/44](#) and [A/HRC/16/44/Corr.1](#).

<sup>49</sup> African Commission on Human and Peoples’ Rights, decision on the thirty-eighth activity report of the African Commission on Human and Peoples’ Rights (Doc.EX.CL/921 (XXVII)).

<sup>50</sup> African Commission on Human and Peoples’ Rights, 45th activity report of the African Commission on Human and Peoples’ Rights, 2018.

<sup>51</sup> Submission by Coalición LGBTTTI y de trabajadoras sexuales con trabajo en la Organización de los Estados Americanos.

of June 2013 “aimed at protecting children from information promoting the denial of traditional family values” that bans the “promotion of non-traditional sexual relations to minors”, also known as the “gay propaganda law”.<sup>52</sup> The Independent Expert regrets to see that, despite international outcry, several other States have since attempted to adopt or have adopted similar legislation. In June 2014, the human rights committee of the parliament of Kyrgyzstan approved a bill criminalizing the dissemination of information “aimed at forming positive attitudes towards non-traditional sexual relations”,<sup>53</sup> and in June 2021, Hungary passed legislation that bans the dissemination of sexual education content in schools.<sup>54</sup>

35. While legal action may be used as a basis for State-sponsored discrimination in the 68 countries where same-sex activities are criminalized, violent and discriminatory acts remain a reality everywhere in the world. For example, owing to the criminalization by Malaysia of sexual orientation and gender identity, Muslim trans persons in Malaysia can be subject to arrest, fines and judicial corporal punishment under a number of State sharia provisions: they may be charged with *musahaqah* (sex between women), which can result in up to three years in prison, fines and up to six strokes with a cane or a combination of the three.<sup>55</sup> In Indonesia, transgender women are subject to arrest and/or fines under State sharia laws that criminalize a man (who wears) a woman’s attire or poses as a woman for immoral purposes.<sup>56</sup>

36. The mandate holder has gathered abundant evidence that human experience in relation to what is currently defined under international human rights law as gender identity and expression vary greatly across the world and has existed around the world and throughout history, and the evidence suggests that, in many countries, the rigid understandings of the male/female binary as a main ordering social principle are the result of colonialism.<sup>57</sup>

#### D. Financing anti-gender narratives

37. It was concluded in a recent report<sup>58</sup> that the financial architecture behind a so-called global “anti-gender” movement comprises wealthy individuals, non-profit organizations and religious institutions. Funding is funnelled through private donations, contributions through non-profit charitable foundations and financial sponsorships of projects and events that coalesce around the defence of a “natural” order, including legal strategies to fight non-discrimination policies that include protection based on sexual orientation and gender identity.

38. The aggregate revenue of organizations based in the United States of America associated with the anti-gender movement from 2008 to 2017 was \$6.2 billion;<sup>59</sup> and at least \$1 billion was funnelled into countries across the globe. The report concluded that, globally, funding for the anti-gender movements is at least three times the funding for projects and events that promote the human rights of LGBT persons.<sup>60</sup> Several submissions testified to such trends: for example, 72 per cent of respondents

<sup>52</sup> Communications Nos. AL RUS 8/2012; UA RUS 12/2011.

<sup>53</sup> A/69/335, para. 53.

<sup>54</sup> <https://kafkadesk.org/2019/05/19/hungarian-parliament-speakers-homophobic-comments-spark-outrage/>.

<sup>55</sup> Communication No. OL MYS 5/2018. See also [www2.esyariah.gov.my/esyariah/mal/portaltv1/enakmen/State\\_Enact\\_Ori.nsf/100ae747c72508e748256faa00188094/089a6047d6694e25482570dd000ce51d?OpenDocument](http://www2.esyariah.gov.my/esyariah/mal/portaltv1/enakmen/State_Enact_Ori.nsf/100ae747c72508e748256faa00188094/089a6047d6694e25482570dd000ce51d?OpenDocument) (in Malay).

<sup>56</sup> See for instance communication No. UA IDN 1/2018.

<sup>57</sup> A/HRC/47/27, para. 16.

<sup>58</sup> <https://globalphilanthropyproject.org/meet-the-moment/>.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

to a recent survey carried out in the Caribbean region reported that an anti-gender movement in their country is not only active but has also increased in visibility in the previous two years.<sup>61</sup>

39. In “The law of inclusion”, the mandate holder described the sophisticated system of protection and promotion of human rights that comprises organizations working at the local, national, regional and global levels for the furtherance of the human rights of LGBT persons, and which has developed some distinct traits of resilience, resourcefulness and professionalism. It must always be borne in mind that most of the data gathered around the world in relation to violence and discrimination based on sexual orientation and gender identity comes from non-governmental sources, and that the visibility that their work has provided to the manner in which violence and discrimination are manifested in the everyday life of LGBT persons around the globe lies behind every major conquest for these communities and populations.

40. Both the Independent Expert and the Special Rapporteur on the situation of human rights defenders have extensively documented the legal, material and risk factors that substantively impact the advocacy and protection work carried out by civil society organizations led by and serving LGBT and intersex persons,<sup>62</sup> and the mandate holder is convinced that enhanced efforts are required from State and non-State actors to preserve the integrity of the civil society spaces in which they carry out their work.

## E. Impact of anti-gender narratives

41. Anti-gender narratives create significant risk for the furtherance of the rights of women and can foster violence and discrimination based on sexual orientation and gender identity. Some examples previously brought to the attention of the mandate holder include:

(a) The curtailing of reproductive and sexual health education programmes in Brazil, Chile, Colombia, Ecuador and Paraguay;<sup>63</sup>

(b) The adoption of legislation proclaiming blanket bans on discussion of gender theory or related opinion in education establishments, as in Romania;<sup>64</sup>

(c) The adoption of legislation and policies prohibiting the distribution of information on LGBT persons to children, as in the Russian Federation,<sup>65</sup> Hungary<sup>66</sup> and Kazakhstan;<sup>67</sup>

(d) The adoption of State-level legislation barring participation of trans women in women and girls’ sports, as in the United States;<sup>68</sup>

(e) The level of pushback against the Istanbul Convention owing to its progressive inclusion of gender frameworks. Much of the criticism from reluctant or withdrawing States is focused on the use of the term “gender” in the Convention, which States view as supporting same-sex marriage and “gender ideology”. During his country visit to Ukraine, the Independent Expert noted that the All-Ukrainian Council of Churches and Religious Organizations has successfully lobbied to prevent

<sup>61</sup> Submission by OutRight.

<sup>62</sup> Ibid.

<sup>63</sup> A/HRC/43/48, paras. 34–40.

<sup>64</sup> Communication No. OL ROU 3/2020.

<sup>65</sup> Communication Nos. AL RUS 8/2012; UA RUS 12/2011.

<sup>66</sup> Communication No. OL HUN 3/2020.

<sup>67</sup> Communication No. OL KAZ 5/2018.

<sup>68</sup> [www.hrc.org/press-releases/breaking-first-anti-trans-bill-of-2021-signed-into-law-by-mississippi-governor-tate-reeves](http://www.hrc.org/press-releases/breaking-first-anti-trans-bill-of-2021-signed-into-law-by-mississippi-governor-tate-reeves). See also submission by Human Rights Campaign.

the ratification of the Convention, with some arguments stating that the Convention's inclusion of "gender" and "sexual orientation" presented threats to Christianity and the "identity" of Ukraine.<sup>69</sup> Recently, the Hungarian parliament rejected the ratification of the Convention on the grounds that it defines gender as a social construct;<sup>70</sup> in March 2021, Turkey withdrew from the Convention. In Poland, conservative opposition argued that the Convention is a gateway to "leftist ideology" that would create support for abortion and other liberal law;<sup>71</sup> in Bulgaria the Constitutional Court declared it as not in conformity with the Bulgarian constitution.<sup>72</sup>

42. The mandate holder is particularly concerned by the levels of violence against LGBT persons that are condoned and, at worst, promoted by such narratives and practices. As the present report was under preparation, far-right demonstrators stormed the headquarters of Tbilisi Pride and attacked journalists, leaving 20 people injured in the incident. Police were reported to have been at the scene but did not intervene. Public authorities spoke about the incident but showed no support for the march organizers. The Prime Minister stated that it was an "unreasonable plan to hold a demonstration in a public place". A Pride parade, scheduled to take place on 5 June, was cancelled. This is unfortunately only one example of the levels of repression to which LGBT persons are subjected in their daily lives, and which include killings, torture, kidnapping, beatings, harassment, threats and – as has been well documented by the mandate holder – unconscionable levels of social exclusion.

43. Addressing acts of discriminatory violence and hate crimes, as well as incitement thereto<sup>73</sup> is part of the fundamental duty of States when complying with their international obligations.<sup>74</sup> It is an endeavour that requires the involvement of all functions of the State: the establishment of appropriate legal frameworks<sup>75</sup> (including, naturally, the dismantling of criminalization of same-sex consensual activity); of relevant public policy; and of effective and efficient access to justice.

44. Similarly, States must adopt a framework for addressing hate speech. There are several United Nations publications that can help forge a policy framework for addressing incitement to hatred, such as the Rabat Plan of Action,<sup>76</sup> which contains threshold tests and recommendations for understanding the distinction between freedom of expression and hate speech that are relevant to social media and other aspects of the digital universe, and the United Nations Strategy and Plan of Action on Hate Speech,<sup>77</sup> as well as the detailed guidance on its implementation.<sup>78</sup> According to the Strategy, hate speech is often rooted in, and generates, intolerance and hatred and, in certain contexts, can be demeaning and divisive.<sup>79</sup>

<sup>69</sup> See A/HRC/44/53/Add.1, para. 11.

<sup>70</sup> <https://kafkadesk.org/2020/05/07/hungary-rejects-istanbul-convention-on-gender-equality-and-womens-rights/>.

<sup>71</sup> [www.euractiv.com/section/non-discrimination/news/polish-official-istanbul-convention-could-impose-leftist-ideology/](http://www.euractiv.com/section/non-discrimination/news/polish-official-istanbul-convention-could-impose-leftist-ideology/).

<sup>72</sup> <https://balkaninsight.com/2018/07/27/bulgaria-s-constitutional-court-says-istanbul-convention-not-in-line-with-basic-law-07-27-2018/>.

<sup>73</sup> International Covenant on Civil and Political Rights, art. 20 (2); International Convention on the Elimination of All Forms of Racial Discrimination, art. 4 (a).

<sup>74</sup> International Covenant on Civil and Political Rights, art. 9 (1). See also Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 9.

<sup>75</sup> Human Rights Committee, general comment No. 35 (2014), para. 9.

<sup>76</sup> A/HRC/22/17/Add.4, annex, appendix.

<sup>77</sup> [www.un.org/en/genocideprevention/hate-speech-strategy.html](http://www.un.org/en/genocideprevention/hate-speech-strategy.html).

<sup>78</sup> *United Nations Strategy and Plan of Action on Hate Speech: Detailed Guidance on Implementation for United Nations Field Presences* (United Nations publication, 2020).

<sup>79</sup> [www.un.org/en/genocideprevention/hate-speech-strategy.shtml](http://www.un.org/en/genocideprevention/hate-speech-strategy.shtml).

### III. Opposition to legal recognition of gender identity

45. As the human rights standards applicable to legal recognition of gender identity have been developed and identified, and consequently the obligations of Member States in relation to the measures required in that connection, a series of counterclaims have appeared in the international and domestic realms.

46. To better understand these claims, the Independent Expert thoroughly reviewed submissions received, in particular those opposed, critical or sceptical in relation to international human rights norms and standards relating to legal recognition of gender identity and the protection of the human rights of trans and gender-diverse persons. Many themes and arguments reappeared across submissions, and the Independent Expert observes that 297 submissions were the result of concerted action through three templates of arguments.

47. Commonly cited arguments in these submissions included arguments that:

(a) Sex, sexual orientation and gender identity must be separated and treated differently in any legal analysis of violence and discrimination. According to this first series of claims, alleged attempts to replace the category of sex with gender derive from misogynistic intentions. These lines of argumentation are closely related to claims that gender theory contradicts science and biological sex, and some refer to the alleged risk of harm to the political and legal claims of lesbian and bisexual women, as well as gay men;

(b) Legal recognition of gender identity allegedly threatens the well-being of children. These submissions argue that recognizing children's gender identity or even the possibility of learning about gender identity can cause physical and emotional harm;

(c) Comprehensive gender and sexuality education is allegedly counterproductive and can harm children and infringe on parental rights;

(d) Trans women are allegedly a danger for women's segregated spaces, such as locker rooms, restrooms, shelters and detention facilities;

(e) Trans women allegedly threaten women's sports.

#### A. The sexual orientation and gender identity approach

48. Sex and gender are autonomous concepts; similarly, sexual orientation, gender identity and gender expression are lived experiences of every human being.<sup>80</sup> Gender identity does not determine sexual orientation, or vice-versa, and the fact that human diversity, in its immense scope, resists neat categorizations for these features is precisely what places them at the origin of violence and discrimination when they do not conform to certain expectations or rules. Therefore, sex and gender are distinct and unique points of entry into the analysis of violence and discrimination. As the mandate holder has recently stated, "gender and sex do not substitute each other, and gender identity and gender expression are inextricably linked to them as practices of concern in anti-discrimination analysis".<sup>81</sup>

49. The Independent Expert observes that lack of conceptual clarity may lead to a counterproductive confusion between these concepts and reiterates the findings of "The law of inclusion", in which he concluded that a distinction between sex and gender has gained clarity in international human rights law.<sup>82</sup> The mandate holder has

<sup>80</sup> *United Nations Strategy and Plan of Action on Hate Speech: Detailed Guidance on Implementation*.

<sup>81</sup> [A/HRC/47/27](#), para. 13.

<sup>82</sup> [A/HRC/47/27](#).

gathered significant evidence to the effect that, under international human rights law, in its current state, sex and gender are autonomous concepts. They are autonomously under constant scrutiny to ensure that their implementation reflects the real diversity of humankind, whereby sex ought not to reduce women to biological reproductive functions. As noted in one submission, anti-gender approaches “ignore feminist scholarship on sex as assigned and as more complex and diverse in biological reality than the male/female binary. It also erases the diverse gendered and sexual identities found in many indigenous cultures and pre-colonial societies, obscuring the fact that masculinity/femininity are themselves colonial constructs”.<sup>83</sup>

50. The Independent Expert further observes that the way in which LGBT persons experience and act upon sexual desire and gender constructs is a crucial determinant for their experiences of discrimination and violence and these are deeply interconnected. In other words, gender identity and gender expression provide actual or perceived links to sexual orientation that are often at the origin of stigma and violence, a conclusion which many United Nations and regional human rights mechanisms have also reached. The mandate holder has gathered abundant evidence since the creation of the mandate to the effect that the mechanisms that fuel stigma and discrimination have historically been, and continue to be, similar if not the same: negation, through criminalization, pathologization and demonization. Once these processes are engaged, the consequences for individuals are the same, regardless of whether stigma and discrimination are experienced based on sex, sexual orientation, gender or gender identity. Furthermore, although an intersectional approach acknowledges that individuals can hold multiple identities across different spectrums, it also acknowledges that a person’s experiences of these identities are interconnected. In other words, a person’s sexual orientation is relevant to that individual’s experience of gender identity. The approach at the origin of the creation of the mandate reinforces this root cause analysis.

## **B. Alleged impact on children’s rights**

51. Some stakeholders questioning gender-based approaches focus their claims on trans and gender non-binary children and youth, alleging that legal recognition of their gender identity harms them by forcing them to undergo medical gender-affirming treatment; and that trans youth are victims of external indoctrination through social media and peers that pressure them to follow a so-called “transgender trend”.<sup>84</sup>

52. Several submissions claimed that, while some children experience “gender dysphoria”, this condition “resolves” itself before adulthood and that acceptance of children’s non-cisgender identity is therefore a manifestation of “gender ideology”.<sup>85</sup> It should be noted that much of the evidence cited in these submissions does not support the claims made thereunder.<sup>86</sup>

<sup>83</sup> Submission by AWID and SRI.

<sup>84</sup> For example, see submission by Jane Dobson and others.

<sup>85</sup> Template A.

<sup>86</sup> The evidence presented in template A submissions appears to lead to conclusions different from those suggested therein. A detailed analysis of the sources leads to the conclusion that gender dysphoria in adolescence is persistent and medical interventions may be appropriate. In other cases, the limitations of the studies are significant, such as that in which it is declared that the percentage of gender dysphoria found to be persistent “is probably an underestimation of the true numbers, because the clinicians involved usually had lost contact with their patients over the years, the questions involved are sensitive, and in some studies there was reliance on mothers’ reports only” (see [www.sciencedirect.com/science/article/abs/pii/S0890856709603865?via%3Dihub](http://www.sciencedirect.com/science/article/abs/pii/S0890856709603865?via%3Dihub)) or that which reveals the impact of losing contact with patients over the years (thus the claim that only 21 out of 77 study participants were in the “persistent” group is misleading when only 54 study participants agreed to the follow-up portion of the study)



53. It is argued in some submissions that gender-affirming treatments can have negative mental health consequences for children and young persons.<sup>87</sup> Again, the evidence presented has been contested within the scientific community, by which it has been instead argued that “data support the concept that gender identity is not strictly a binary phenomenon”.<sup>88</sup> More fundamentally, presenting diverse gender identities as a form of mental health disorder is a form of pathologization and inconsistent with the human rights obligations of States under the international human rights law of inclusion,<sup>89</sup> as well as inconsistent with the 11th revision of the International Classification of Diseases, published by the World Health Organization in 2019.<sup>90</sup> The Independent Expert also notes that these arguments are at odds with the most recent medical evidence, in which it has been concluded that “those who received treatment with pubertal suppression, when compared with those who wanted pubertal suppression but did not receive it, had lower odds of lifetime suicidal ideation”.<sup>91</sup>

54. Trans and gender-diverse children and adolescents are protected from discrimination based on gender identity. When States deny children the agency to consent to gender recognition procedures, they are excluding them, often de jure and de facto from gender recognition, with a corresponding heightened risk of persecution, abuse, violence and discrimination. In its general comment No. 20, the Committee on the Rights of the Child emphasized “the rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy” and concluded that “States should also take effective action to protect ... transgender ... adolescents from all forms of violence, discrimination or bullying by raising public awareness and implementing safety and support measures”.<sup>92</sup>

55. The Independent Expert expressed concerns to Hungary, for example, in relation to the adoption of a bill that restricts children’s gender identity to the sex assigned at birth.<sup>93</sup> According to the explanatory note to the bill, “new, modern ideological processes prevalent in the Western world” endanger the constitutional right of children to protection and care; therefore, legislators must act to “safeguard the child’s identity that exists unchangeably from birth” as part of protecting their right to dignity. It further explains that “sex at birth is an attribute that cannot be changed: people are born either male or female”, using language that appears to coincide with a governmental campaign outlawing the identities of trans and gender-diverse persons.

56. The mandate holder is concerned about the impact of developments as a consequence of these and other actions whereby the notion of the agency of youth and children in relation to their gender identity is rejected. On 6 April 2021, for example, the State legislature of Arkansas, United States, adopted legislation banning gender-affirming medical treatments for transgender children, overriding a veto from the Governor and intense opposition from major medical organizations across the country.<sup>94</sup>

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(see [www.researchgate.net/publication/23449293\\_Psychosexual\\_Outcome\\_of\\_Gender-Dysphoric\\_Children](https://www.researchgate.net/publication/23449293_Psychosexual_Outcome_of_Gender-Dysphoric_Children)). Two other sources, including the American Psychiatric Association’s DSM-5, claim that rates of gender dysphoria persistence from childhood into adolescence or adulthood vary, ranging from 2.2 to 30 per cent in “natal males” and from 12 to 50 per cent in “natal females” (see [www.appi.org/Diagnostic\\_and\\_Statistical\\_Manual\\_of\\_Mental\\_Disorders\\_DSM-5\\_Fifth\\_Edition](https://www.appi.org/Diagnostic_and_Statistical_Manual_of_Mental_Disorders_DSM-5_Fifth_Edition)).

<sup>87</sup> Template A.

<sup>88</sup> [www.baltimoresun.com/opinion/op-ed/bs-ed-lgbtq-hopkins-20160928-story.html](https://www.baltimoresun.com/opinion/op-ed/bs-ed-lgbtq-hopkins-20160928-story.html).

<sup>89</sup> A/73/152, paras. 19–24.

<sup>90</sup> <https://icd.who.int/en>.

<sup>91</sup> [www.ncbi.nlm.nih.gov/pmc/articles/PMC7073269/](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7073269/).

<sup>92</sup> Committee on the Rights of the Child, general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, paras. 33 and 34.

<sup>93</sup> Communication No. OL HUN 3/2020.

<sup>94</sup> [www.aacap.org/AACAP/Latest\\_News/AACAP\\_Statement\\_Responding\\_to\\_Efforts-to\\_ban\\_Evidence-Based\\_Care\\_for\\_Transgender\\_and\\_Gender\\_Diverse.aspx](https://www.aacap.org/AACAP/Latest_News/AACAP_Statement_Responding_to_Efforts-to_ban_Evidence-Based_Care_for_Transgender_and_Gender_Diverse.aspx).

57. States should take the best interests of the child as a primary consideration and respect the child's right to express views in accordance with the age and maturity of the child, in line with the Convention on the Rights of the Child and, in particular, in keeping with the safeguards established pursuant to article 19 of the Convention, which must not be excessive or discriminatory in relation to other safeguards that give recognition to the autonomy and decisional power of children of a certain age in other areas. States should also fulfil their obligation to ensure to the maximum extent possible the survival and development of the child<sup>95</sup> and the creation of an environment that respects human dignity.<sup>96</sup>

58. Several submitters claimed that comprehensive gender and sexuality education constituted a violation of children's rights.<sup>97</sup> In particular, many submitters repeated verbatim a list of 14 supposed "harms" of comprehensive gender and sexuality education, including that it sexualizes children, "normalizes" and "promotes" sexual pleasure and non-procreative sex acts and undermines parental rights.<sup>98</sup> It was argued in one submission that comprehensive gender and sexuality education is a form of "pornography".<sup>99</sup> The Independent Expert observes, however, that no credible evidence was provided to support any of these claims, while the health benefits of comprehensive gender and sexuality education are well documented.<sup>100</sup> The Independent Expert recalls the findings of treaty bodies that schools are important for fostering inclusion and that international human rights standards require that States ensure that schools comply with these obligations.<sup>101</sup>

### C. Alleged impact on women's rights

59. The mandate holder received several submissions in which it was argued that recognition of self-determined gender eliminates the protections of the category of sex and would be tantamount to misogyny,<sup>102</sup> by creating a legal environment where the challenges, discrimination and violence suffered by cis women will become invisible in policy and practice.<sup>103</sup> The fight for equality is an essential component of international human rights law and the Sustainable Development Goals. Nevertheless, under this framework, the Independent Expert does not consider the protection of women and girls to be inconsistent with the rights of any LGBT individuals, including trans persons.

60. One common argument – repeated verbatim by several submitters – was that by eliminating sex as a legal category, policies to combat the structural inequality of women become irrelevant.<sup>104</sup> The Independent Expert has previously made it abundantly clear that sex and gender are protected categories under international

<sup>95</sup> Convention on the Rights of the Child, art. 6. See also Committee on the Rights of the Child, general comment No. 5 (2003) on general measures of implementation of the Convention.

<sup>96</sup> Communication No. AL IRL 1/2015.

<sup>97</sup> Template C. See also submissions by Family Watch International, LGB Alliance Deutschland, Object Now, Women's Human Rights Campaign, Voorzij, Allan Darwin, Florence Humbert, Jane Dobson and others, Kenin R. Stuurman, Outi Mäki and Stuart Barnes.

<sup>98</sup> Template C.

<sup>99</sup> Submission by the Project for Human Development.

<sup>100</sup> See, for example, Committee on the Rights of the Child, general comment No. 20 (2016), para. 58.

<sup>101</sup> See, for example, Committee on the Elimination of Discrimination against Women general recommendation No. 36 (2017) on the right of girls and women to education, para. 45, and Committee on the Rights of the Child, general comment No. 20 (2016), para. 59.

<sup>102</sup> Template B.

<sup>103</sup> See, for example, submissions by HazteOir.org, Women's Human Rights Campaign, Women's Liberation Front, Victoria Feuerstein.

<sup>104</sup> Template C.

human rights law and nothing in his findings suggests that either of them should be explicitly or implicitly eliminated.

61. In addition, arguments about data collection must not be used to undermine the rights and recognition of individuals whose gender identity does not align with their biological sex as assigned at birth. In “The law of inclusion” the mandate holder stated that “some of these positions appear to build on the notion, persuasively refuted by an intersectional analysis, that non-trans women are a monolithic interest group that is not significantly traversed by race, age, nationality, and socioeconomic, migratory and other status, and also that they disregard the lived realities of trans men and other gender-diverse persons, and their health, employment, housing and education determinants”.<sup>105</sup>

62. Another argument is that “gender ideology” forces lesbian women to enter into relationships with trans women, or else be labelled “transphobic”.<sup>106</sup> In the fields of sexual relations and sexual violence, the mandate holder acknowledges the centrality of the concept of consent, amply explored in international human rights law<sup>107</sup> and according to which consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances. The mandate holder sees no reason why this framework would not be adequate for the relationships cited.

63. Some submissions presented the claim that segregated spaces, particularly prisons, changing rooms and bathrooms, are threatened by the granting of access to trans women. The Independent Expert notes that submissions repeated (often verbatim) the same set of seven alleged incidents of trans women (or persons purporting to be trans women) causing harm to cisgender women in safe spaces.<sup>108</sup> Even among the small set of cited cases, several of the incidents recounted in these submissions are factually contested.<sup>109</sup>

64. These evidentiary shortcomings notwithstanding, the mandate holder has previously voiced the view that “the claim that legal recognition of trans women per se threatens safe spaces ... appears to draw on stigma about predatory determinism”<sup>110</sup> and has suggested a risk management approach that should include all objectively identified risks for safe spaces for all women (including lesbian, bisexual and trans women), which cannot promote, replicate or condone stigma or stereotypes.<sup>111</sup>

#### **D. Alleged impact on women and girls’ sports**

65. In its report on social, economic and cultural inclusion, the mandate holder concluded that trans and gender non-conforming students can face humiliation

<sup>105</sup> A/HRC/47/27, para. 42.

<sup>106</sup> Template B. See also submissions by Fair Play for Women, LGB Alliance Deutschland, LGB Alliance India, LGB Alliance Teymio, LGB Alliance UK, Partners for Ethical Care, Jane Dobson and others, Kana Kudo and others, Lisa Jordan, Outi Mäki, Sheila Jeffreys.

<sup>107</sup> See, for example, A/HRC/47/26, paras. 27–53.

<sup>108</sup> Template C.

<sup>109</sup> See, for example, an account of a trans woman at Evergreen State College in the United States. While submissions alleged that the woman had assaulted others in a locker room, reports suggest that the woman simply used the locker room in an ordinary fashion, but other users complained ([www.transadvocate.com/colleen-francis-and-the-infamous-evergreen-state-college-incident\\_n\\_10765.htm](http://www.transadvocate.com/colleen-francis-and-the-infamous-evergreen-state-college-incident_n_10765.htm); <https://abc7.com/archive/8870832/>). Another frequently cited example – a case from a school in Decatur, United States – was ultimately found to be unsubstantiated on further investigation, although investigators did criticize the school for failing to conduct its own thorough investigation (<https://decaturish.com/2020/06/department-of-education-cant-substantiate-assault-in-oakhurst-bathroom-finds-title-ix-violations/>).

<sup>110</sup> A/HRC/47/27, para. 40.

<sup>111</sup> Ibid., para. 45.

through gendered uniforms and abuse with regard to accessing sex-segregated toilets and changing rooms and participating in sports activities,<sup>112</sup> and remarked on the abundant evidence received proving that programmes aiming at inclusion in sport are of exceptional value.<sup>113</sup> A recent survey carried in the United States revealed that policies allowing transgender youth to access athletics can mitigate the very significant harms they face, including shocking levels of suicidal ideation. The benefits included lower suicide risk, greater feelings of safety, lower exposure to harassment and lower rates of depression.<sup>114</sup>

66. The International Olympic Committee has recognized that “it is necessary to ensure insofar as possible that trans athletes are not excluded from the opportunity to participate in sporting competition” and that, while the overriding sporting objective is to ensure fair play, “to require surgical anatomical changes as a precondition to participation is not necessary to preserve fair competition and may be inconsistent with developing legislation and notions of human rights”.<sup>115</sup> The consensus is to adopt self-identification as the basic standard, and allow trans men to compete without restriction, and trans women to compete based on a test of testosterone levels in serum.<sup>116</sup> World Athletics reached consensus on the testosterone test in 2019.<sup>117</sup>

67. The world of sports is the other locus in which attacks on the rights of trans persons have clearly intensified, and the participation of transgender athletes in national league tournaments has now become an arena of heated debate. As noted in one submission, “the main thesis that trans athletes have advantages when competing – when considering hormonal measurements and body structure – is widely and systematically used by conservative political groups to hinder previous decisions of ethical committees that established more inclusive policies in sports competitions”.

68. The implications are concrete and fast-paced; by early April 2021, it was reported that 20 state legislatures in the United States had passed or were considering passing legislation banning the participation of trans women in women’s sports, even though in most cases the sponsors of the bills cannot cite a single instance in their own state or region where such participation has caused problems.<sup>118</sup>

69. There is no evidence supporting the idea that inclusionary policies discourage the participation of women and girls in sports. A recent survey in the United States revealed that, in states with inclusionary policies, high school girls’ participation in sports either increased or remained unchanged from 2011 to 2019; conversely, in states with exclusionary policies, girls’ participation has decreased.<sup>119</sup>

70. The Independent Expert finds the example of women and girls’ sports a particularly telling example of the use of narratives based on allegations of speculative or potential harms that could result from protecting the rights of trans people, often based on a range of harmful and negative stereotypes about trans women. The participation of trans persons in the Rio Olympics in 2016 constitutes a sobering reminder of the extent to which integration remains a challenge: zero trans persons among 11,238 athletes. The Tokyo Olympics in 2021 will likely be the first

<sup>112</sup> A/74/181, para. 7.

<sup>113</sup> A/74/181, para. 89.

<sup>114</sup> [www.americanprogress.org/issues/lgbtq-rights/reports/2021/02/08/495502/fair-play/](http://www.americanprogress.org/issues/lgbtq-rights/reports/2021/02/08/495502/fair-play/).

<sup>115</sup> [www.nytimes.com/2016/01/26/sports/olympics/transgender-athletes-olympics-ioc.html](http://www.nytimes.com/2016/01/26/sports/olympics/transgender-athletes-olympics-ioc.html).

<sup>116</sup> [https://stillmed.olympic.org/Documents/Commissions\\_PDFfiles/Medical\\_commission/2015-11\\_ioc\\_consensus\\_meeting\\_on\\_sex\\_reassignment\\_and\\_hyperandrogenism-en.pdf](https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf).

<sup>117</sup> [www.worldathletics.org/news/press-release/international-federations-rules-transgender-a](http://www.worldathletics.org/news/press-release/international-federations-rules-transgender-a).

<sup>118</sup> <https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports-914a982545e943ecc1e265e8c41042e7>.

<sup>119</sup> [www.americanprogress.org/issues/lgbtq-rights/reports/2021/02/08/495502/fair-play/](http://www.americanprogress.org/issues/lgbtq-rights/reports/2021/02/08/495502/fair-play/).

that will see the participation of one trans athlete,<sup>120</sup> who will compete among 196 weightlifters (and as 1 of 98 women):<sup>121</sup> 0.009 per cent of the 11,091 athletes whose presence is anticipated at the games.<sup>122</sup>

## E. A final note

71. Throughout his career, the Independent Expert has often analysed claims of torture. In one such case, the victim was arrested one night without cause and taken to a police station, slapped in the face and beaten in the stomach; raped with a police baton and finally thrown into a bare cell to spend the night lying naked in the concrete floor. Justice would be denied for years and, in a way, still partially is. This is the story of Azul Marin, who at the time of her arbitrary arrest in 2008 identified as a gay man and currently identifies as a woman. When describing his thoughts and his own sense of physical revulsion at these facts, the Independent Expert has often referred to the observations of Veena Das:

we begin to think of pain as asking for acknowledgement and recognition; denial of the other's pain is not about the failings of the intellect, but the failings of spirit. In the register of the imaginary, the pain of the other not only asks for a home in language, but also seeks a home in the body.<sup>123</sup>

72. At the beginning of the present report, the Independent Expert acknowledged the limitations of his vantage point. One of its advantages, however, is that the mandate holder is positioned to observe the dynamics of the human and social movements in the struggle against violence and discrimination based on sexual orientation and gender identity. He does not fail to note, with great concern, that some of the arguments against legal recognition of gender identity and gender expression were presented by organizations or persons who declare their allegiance to human rights-based approaches and refer to their own histories of activism and as human rights defenders. He would like to invite them to reflect on the extent to which the narratives that they are promoting displace responsibilities from oppressors to persons, communities and populations that are themselves deeply oppressed, as the abundant evidence gathered by the mandate holder attests.

73. All persons who struggle against violence and discrimination based on sexual orientation and gender identity have in common certain lived experiences that should provide a notion of the importance of seeing each other, listening to each other and acting towards each other with respect, kindness and compassion. The inclusionary language of the Universal Declaration of Human Rights<sup>124</sup> itself compels all of us to behave in this way to all other human beings born free and equal in dignity and rights, and is at the core of preserving and safeguarding the common heritage built by our elders.

<sup>120</sup> [www.espn.com/olympics/story/\\_/id/31399857/nzl-weightlifter-set-become-first-transgender-olympic-athlete](http://www.espn.com/olympics/story/_/id/31399857/nzl-weightlifter-set-become-first-transgender-olympic-athlete).

<sup>121</sup> [www.iwf.net/wp-content/uploads/downloads/2018/04/FINAL-2018-03-29-Tokyo-2020-Qualification-System-Weightlifting.pdf?fbclid=IwAR21O1BGSpactyxR-LuF0W53-ATOybaZQikGN1cWDrQHVJWrzR4zM2exYg4](http://www.iwf.net/wp-content/uploads/downloads/2018/04/FINAL-2018-03-29-Tokyo-2020-Qualification-System-Weightlifting.pdf?fbclid=IwAR21O1BGSpactyxR-LuF0W53-ATOybaZQikGN1cWDrQHVJWrzR4zM2exYg4).

<sup>122</sup> <https://olympics.com/tokyo-2020/en/news/tokyo-2020-next-year-s-games-in-numbers>.

<sup>123</sup> [www.jstor.org/stable/20027354](http://www.jstor.org/stable/20027354).

<sup>124</sup> Universal Declaration of Human Rights, art. 1.

## IV. Conclusions and recommendations

### A. Conclusions

74. **Human rights are indivisible, interdependent and interrelated. Together, they bring to life the ideal of freedom and equality, including, most importantly, freedom from violence and discrimination. Gender is enshrined in international human rights as the term used to describe the sociocultural constructs that assign roles, behaviours, forms of expression, activities and attributes according to the meaning given to biological sex characteristics. Under this definition, gender and sex are not interchangeable concepts, and gender identity and gender expression, inextricably linked to them, are also protected under international human rights law.**

75. **Just like LGBT persons, gender-diverse and intersex persons have existed in all times and all places, and violence and discrimination based on sexual orientation and gender identity have been perpetrated in all places in the name of an ordering principle that benefits the very few. It is an extraordinary achievement that the international community is now aware of – and has available emerging systematic data about – the horrifying levels of suffering inflicted.**

76. **“The law of inclusion” and “Practices of exclusion” arose from the deliberate intention to set out two paths that the international community has before it at this time. The former describes an inclusionary approach arising from the best features of international human rights law as a tool that is constantly optimizing its capacity to redress injustice and inequality invisible to previous generations or deliberately made invisible by their actions. It builds on the reassuring promise that human rights treaties are living instruments, the interpretation of which must evolve with time and with the conditions of contemporary life.<sup>125</sup> This evolutive interpretation is consequent upon the general rules of interpretation set out in the Vienna Convention on the Law of Treaties, and upon the extraordinary achievements of feminism: just as the process through which international human rights law incorporated gender is a feminist achievement, the inclusionary recognition of gender identity and expression in anti-discrimination analysis and international human rights law is a consequence of the feminist thinking that must always inform the law, public policy and access to justice.**

77. **Conversely, the path set out in “Practices of exclusion” relies on a static interpretation of the law and accordingly invites a defence of absolute truths deriving from the conviction that there is nothing new under the sun: the binary as an unquestionable dichotomy, patriarchy as an immutable order, heteronormativity as the unchallenged ideal. In other words, it appears to lead to the defence of the very orders upon which most injustice that exists in the world today – such as against women or LGBT persons – have been built. The Independent Expert is of the opinion that exclusionary narratives exploit preconceptions, stigma and prejudice to create an atmosphere of panic and moral concern and create the risk of perpetuating violence and discrimination. In particular, the mandate holder’s analysis leads to the conclusion that the claim that the existence of trans or gender-diverse persons poses a risk per se to communities and populations is based not on any credible evidence but on preconceptions and stigma in a manner fitting the definition of hate speech. Like other forms of hate speech, including xenophobic, misogynistic or racist speech,**

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<sup>125</sup> Inter-American Court of Human Rights, Advisory Opinion OC-24, para. 58.

these have managed to capture the popular imagination and are a dominating feature of so-called “culture wars”.

78. The mandate holder is convinced that it is the duty of the State to respect and protect every human being’s freedom to determine the confines of their existence. Gender identity and gender expression are an essential part of that determination, and backlash arising from the recognition of gender in international law is a significant ongoing challenge likely to lead to significant harms unless it is met with decisive State action.

79. States and other stakeholders, including United Nations agencies, must become aware of the seriousness of this threats and take decisive and concerted actions to counter exclusionary practices that threaten to undermine the international, regional and national human rights and gender frameworks built by the feminist movement over recent decades. Of particular concern to the mandate holder are the risks to rights related to gender and sexuality, comprehensive gender and sexuality education, bodily autonomy, sexual and reproductive rights and legal recognition of gender identity. Practices of exclusion are not in conformity with international human rights law and must be treated accordingly, including, when necessary and appropriate, by placing them under the legal framework for hate speech and hate crimes.

## **B. Recommendations**

80. Given the complementary nature of the reports on “The law of inclusion” and “Practices of exclusion” the Independent Expert hereby reiterates the recommendations made in the former, including in particular the imperative of recognizing the value of gender-based approaches and of upholding rights related to gender and sexuality as universal and inalienable, indivisible, interdependent and interrelated to all other rights, and of adopting, in their legislation, public policy and systems for access to justice, an understanding of gender and gender identity and expression that is in conformity with the *corpus juris* of international human rights law.

81. The Independent Expert also recommends that States ratify relevant universal and regional conventions conducive to giving full consequence to the protection of women, in all their diversity, from violence and discrimination – and in particular from violence and discrimination based on sexual orientation and gender identity; and continue to develop the *corpus juris* to protect women, including lesbian, bisexual and trans women, and LGBT persons from violence and discrimination.

82. In relation to the practices of exclusion that have been analysed in the present report, the Independent Expert recommends that States:

(a) Address acts of discriminatory violence and hate crimes based on sexual orientation and/or gender identity, as well as incitement to them through all necessary measures in law, public policy and access to justice, with the involvement of the communities, populations and persons who are impacted by them;

(b) Adopt a framework to address hate speech, bearing in mind the standards and best practice identified in the Rabat Plan of Action, the United Nations Strategy and Plan of Action on Hate Speech and the detailed guidance on its implementation;

(c) Carefully analyse exclusionary rhetoric and practices and challenge these with evidence-based information and, based on this evidence, adopt all necessary measures to protect women in all their diversity from violence and discrimination, including through awareness-raising measures.

83. Finally, the Independent Expert recommends that States redouble their resolve to resist attempts to eliminate the concept of gender from the language in global and regional treaties and other international instruments, on the clear understanding that gender frameworks, gender-based approaches and intersectionality provide a powerful lens for analysing the root causes of violence and discrimination based on sexual orientation, gender identity, and gender expression.

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