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Agenda item 3

**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development****The law of inclusion****Report of the Independent Expert on protection against violence and
discrimination based on sexual orientation and gender identity, Victor
Madrigal-Borloz* *****Summary*

The present report is submitted to the Human Rights Council pursuant to Council resolutions 32/2 and 41/18. The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, analyses the current state of international human rights law in relation to the recognition of gender and gender identity and expression, in connection with the struggle against violence and discrimination in its different forms. The present report and the report to the General Assembly at its seventy-sixth session complement each other. Annex 1 contains a description of activities that have taken place since May 2020, and annex 2 provides an outline of the report to the General Assembly.

* The present report was submitted after the deadline to allow consideration of the large number of submissions received.

** The annexes to the present report are circulated as received, in the language of submission only.



Preamble

1. The activities carried out by the Independent Expert in the period from 1 May 2020 to 30 April 2021, which include dozens of consultations, hundreds of virtual events and thousands of interactions with States, civil society organizations, global and regional entities and persons with lived experiences, are included as annex 1 to the present report.
2. All the activities described, as well as the present thematic report, have been carried out under the omnipresent shadow of the coronavirus disease (COVID-19) pandemic, which at the time of writing has taken more than 3 million human lives and impacted all of humankind. If we are to learn the lessons as we build back better, one thing that we must do is not to pretend that any of this work has been carried out under business as usual: the Independent Expert wishes to place on record that the extraordinary support of all stakeholders speaks to the vital relevance of the issue addressed by this mandate and to the dedication of Member States and civil society to addressing violence and discrimination on the basis of sexual orientation and gender identity. Every meeting, conversation and submission has been considered with the understanding that behind their preparation there was a human being who, in addition to the already taxing task of defence and promotion of human rights, likely faced exhaustion and anguish resulting, among other things, from employment and financial uncertainty, health concerns, and the loss of loved ones. The same applies to the dedicated teams supporting the mandate at the Office of the United Nations High Commissioner for Human Rights (OHCHR) and supporting the Independent Expert at the Harvard Law School Human Rights Program, as well as to OHCHR and United Nations administrative personnel, editors, translators, experts and managers; it is only thanks to the strength of their resolve that this work has continued. The Independent Expert is indebted to all of them for their significant contribution throughout these most challenging of times.

I. Introduction

3. The notion that there is a gender norm, from which identities and expressions vary or depart, is based on a series of preconceptions that must be challenged if all humankind is to enjoy human rights. Among these misconceptions is the idea that it is a legitimate societal objective that persons adopt roles, forms of expression and behaviours that are considered entitlements or burdens according to their sex assigned at birth. Only by acknowledging the stereotypes, power asymmetries, inequality and fundamental violence that lies at the foundation of this system does the State comply with its obligation to address the violence and discrimination that it fuels, with its harrowing impact on women and girls in every corner of the world, including lesbian, bisexual and trans women; on gay, bisexual and trans persons; on other gender-diverse persons; and on intersex persons.
4. The thematic work on gender theory carried out under the mandate is thus an integral part of the Independent Expert's research agenda under Human Rights Council resolutions 32/2 and 41/18. This research process included a literature review, and a call for inputs, in response to which 529 submissions were received, including 42 submissions from State entities, from all regions, and 484 contributions from non-State stakeholders, including 202 from organizations and 282 from individuals.¹ The Independent Expert is humbled by this highly participatory process: in total, he received specific information concerning 88 United Nations Member States, covering all geographic regions and a significant proportion of the populations, cultures, legal traditions and religions of the world. All receivable and non-confidential submissions will be published on the web page for the mandate.²
5. A comparatively small number of other submissions were hateful or contained hate speech and were excluded *ad portas*. They will not be part of any publication sponsored by the mandate holder.

¹ Statistical information is available at www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/ReportGenderTheory.aspx.

² Submissions to the Independent Expert will be available at www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/ReportGenderTheory.aspx.

6. Given the richness of the response and the importance of this topic, the outcomes of the thematic work on gender and gender identity and expression will be reflected in the two reports issued by the mandate holder in 2021. The present report, entitled “The law of inclusion”, analyses the current state of international law in relation to gender and gender identity and expression, and its connection with the struggle against violence and discrimination in its numerous forms. In his report to the General Assembly at its seventy-sixth session, entitled “Practices of exclusion”, the Independent Expert will analyse the resistance to the use of gender theory and the risks that this creates to the human rights of women (including lesbian, bisexual and trans women) and to the eradication of all forms of violence and discrimination based on sexual orientation and gender identity. An outline of that report is included as annex 2.

7. Throughout the research process, it became evident that gender theory, gender-based approaches and intersectionality provide a framework for addressing multiple asymmetries of power (deriving from how sex is constructed and operates in societies), including those that feed violence and discrimination against women; and that they are also a sharp lens for analysing the root causes of violence and discrimination based on sexual orientation and gender identity and expression.

8. The present report uses the term gender-diverse to refer to persons whose gender identity and/or expression are at odds with what is enforced as a gender norm in a particular context at a particular point in time. Persons whose gender identity does not correspond to the gender that they were assigned at birth often identify with the term trans. The term cis is used in academic literature and analysis, and data collection and analysis, to refer to persons whose experience of gender is, or is perceived to be, in conformity with the sex assigned at birth.

9. The widely used acronym LGBT (lesbian, gay, bisexual and trans) and the term gender-diverse, as well as terms such as queer, questioning and asexual, are reflections of political and legal identities, and persons impacted by violence and discrimination based on sexual orientation and gender identity may identify themselves in ways that do not coincide with them. Some examples are seen in the lived experience of two-spirit persons (North America), muxes (Mexico), hijra (India), kathoey (Thailand), bakla (Philippines), travestis (Argentina and Brazil), fa’afafine (the Samoan islands) and leiti (Tonga). These identities are sometimes included in notions of either gender identity or sexual orientation, but they operate under an understanding of gender that does not neatly or necessarily coincide with either.

10. While some persons may or may not consider themselves to fall within rigid categorizations (for example, some trans straight women may embrace stereotypes of femininity and some cis lesbian women may not), a common feature of persons affected by violence and discrimination based on sexual orientation and gender identity is their resistance to the dominant ideologies to which these categorizations are ascribed. The resistance to gender stereotypes has been led by many kinds of non-conforming women; and it is of note that gender non-conformation runs not only to gender expression but also to the norms governing sexual conduct.

11. The gravitational force of binary gender constructions, and the resulting gender expectations, often pull in persons on the basis of their sex characteristics as well, and intersex people suffer damage from attempts or actions that aim to hammer them into sex categories that are inadequate for their lived experience. These violations often entail torture and ill-treatment. Attempts to recognize intersex persons in sex and gender classification systems have often failed to adequately establish the necessary legal and social frameworks to appropriately recognize their status.³

³ See www.ohchr.org/Documents/Issues/Discrimination/LGBT/BackgroundNoteHumanRightsViolationsagainstIntersexPeople.pdf.

II. Gender in international and regional human rights law, jurisprudence and international processes

12. Early references to the concept of gender can be traced to the Vienna Declaration and Programme of Action, of 1993, before its definite enshrinement in the Programme of Action of the International Conference on Population and Development, the Cairo Declaration on Population and Development and the Platform for Action of the Fourth World Conference on Women held in 1995 in Beijing. In all these processes, there was a strong recognition of the impact that preconceptions, stereotypes and expectations play in violence and discrimination against women, and of gender equality as an overarching global objective. Similarly, the two most recent core international human rights instruments, the Convention on the Rights of Persons with Disabilities and the International Convention for the Protection of All Persons from Enforced Disappearance, contain references to gender.

13. Analysis of the sources of international human rights law reveals a robust *corpus iuris* in which gender is 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 do not substitute each other, and gender identity and gender expression are inextricably linked to them as practices of concern in anti-discrimination analysis.

14. There is nothing in this definitional system that restricts gender to women. Although the concept of gender first appeared in feminist writings in the 1970s to challenge the then-dominant position of biological determinism, its object is the relational aspect of meanings of femininity and masculinity.⁴ Gender is therefore used in international human rights law as concerning human persons who live in gendered societies, among preconceptions and power hierarchies that will create a context for the development of their personal identities and social interactions. In this manner, gender theory is also relevant as a tool to address, analyse and transform systems of violent masculinity.

15. Similarly, nothing in the body of international law suggests that only trans or gender-diverse persons have a gender identity. The evidence leads to the conclusion that all human beings live in gendered societies traversed by power hierarchies and preconceptions. This process of consolidation of one's identity has been described, among others, by the Working Group on discrimination against women and girls⁵ and by the European Court of Human Rights and the Inter-American Court of Human Rights, all of which have identified the deeply intimate nature of gender identity,⁶ and how it is exteriorized through gender expression.

16. Human experience in relation to gender identity and expression is both complex and rich. Concepts of gender identity vary greatly across the world and, as previously noted, a wide range of gender identities and expressions exist in all regions as a result of long-established cultures and traditions that transcend particular concepts of gender that may be considered as the norm in a particular place and time. At the date of inception of the present report, cultures and countries from all over the globe, including Argentina, Australia, Bangladesh, Canada, Fiji, India, Indonesia, Mexico, Nepal, New Zealand, Pakistan, the Philippines, Samoa, Thailand, Tonga and the United States of America – these examples alone comprising more than a third of the world's population – recognize in cultural traditions, and sometimes also in law, genders that do not correspond with the male/female binary. Some submissions linked the prevalence of the binary, and the repression of gender diversity, with the history of colonialism and oppression, and noted that some precolonial cultures were more open to the idea of gender plurality than the colonial and postcolonial formal legal system.⁷

⁴ See www.ohchr.org/Documents/Issues/Women/WG/Gender-equality-and-gender-backlash.pdf.

⁵ Ibid.

⁶ European Court of Human Rights, *Van Kück v. Germany* (application No. 35968/97); and Inter-American Court of Human Rights, advisory opinion OC-24/17.

⁷ Submission by the Centre for Human Rights, University of Pretoria et al.

17. The United Nations High Commissioner for Human Rights and United Nations human rights mechanisms⁸ have addressed discrimination based on gender, gender identity and gender expression in their work, including in analysis of cases and in doctrinal work.

18. The same can be said of regional human rights bodies. The European Court of Human Rights has incorporated gender identity in its jurisprudence since 1992, first in connection with privacy and family life,⁹ and notably in 2003 through the recognition of gender identity as one of the most intimate aspects of a person's private life.¹⁰ While some submissions received suggest that "sex" does not include trans people, the jurisprudence of the European Court of Human Rights on article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) adopts an expansive conception of the notion, which extends protections to individuals on the grounds of sexual orientation and gender identity, and under the sex discrimination test of article 14, the Court has built up a fairly expansive understanding of gender theory.¹¹ The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) thoroughly integrates gender theory,¹² and contains a progressive definitional framework that includes sex, gender, gender identity, gender expression and sexual orientation¹³ – the legislative and public policy benefits of which have been observed by the Independent Expert during country visits.¹⁴ The Council of Europe has established a series of recommendations that include recognition of gender identity; notable among them is recommendation CM/Rec(2010)5 of the Committee of Ministers to member States on measures to combat discrimination on the grounds of sexual orientation or gender identity.¹⁵

19. The European Court of Justice has repeatedly held that the European Union anti-discrimination framework protects persons who have sought or are planning to seek legal gender recognition, in areas such as employment, access to employment-related social benefits (widower's insurance) and pensions;¹⁶ and a plethora of European Union documents relate to gender identity, among them Directive 2006/54/EC, in which it is stated that "the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex" and that "it also applies to discrimination arising from the gender reassignment (sic) of a person".¹⁷ Of note, the European Union's LGBTIQ Equality Strategy 2020–2025 recognizes gender identity and expression as grounds for discrimination and political action.¹⁸

20. Inter-American approaches to gender-based violence were initiated with the adoption by the Organization of American States (OAS) of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) in 1994,¹⁹ a broad regional commitment to action to address violence against

⁸ See, for example, Human Rights Council resolutions 17/19 and 27/32; A/HRC/29/23, paras. 21, 78 and 79; A/HRC/29/33/Add.1, paras. 86, 88 and 111 (q); General Assembly resolution 69/182; Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 27; Committee on Economic, Social and Cultural Rights, general comment No. 22 (2016), paras. 23 and 40; Committee on the Rights of the Child, general comment No. 15 (2013), para. 8; Committee on the Rights of the Child, general comment No. 20 (2016), paras. 33 and 34; Committee against Torture, general comment No. 2 (2007), para. 21; CCPR/C/KWT/CO/3, paras. 12 and 13; and CCPR/C/RUS/CO/7, para. 10.

⁹ *B. v. France* (application No. 13343/87).

¹⁰ *Van Kück v. Germany* (application No. 35968/97).

¹¹ *Napotnik v. Romania* (application No. 33139/13). See also *Khamtokhu and Aksenchik v. Russia* (applications Nos. 60367/08 and 961/11); *Markin v. Russia* (application No. 30078/06); *Enache v. Romania* (application No. 16986/12); and *Petrovic v. Austria* (156/1996/775/976).

¹² See <https://rm.coe.int/16805938a2>.

¹³ Istanbul Convention, art. 4 (3).

¹⁴ See A/HRC/41/45/Add.1.

¹⁵ See www.coe.int/en/web/sogi/rec-2010-5.

¹⁶ Submission by Transgender Europe.

¹⁷ See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006L0054>. The Independent Expert does not concur with the use of the term "gender reassignment" and acknowledges "legal recognition of gender identity".

¹⁸ See https://ec.europa.eu/info/sites/default/files/lgbtiq_strategy_2020-2025_en.pdf.

¹⁹ Thirty-two States are party to the Convention.

women. The most widely ratified of any of the region's human rights treaties, the Convention of Belém do Pará has driven advances in law, policy and practice at the national level throughout the region.²⁰ In its advisory opinion OC-24/17, the Inter-American Court of Human Rights recognized that the Convention of Belém do Pará applied to trans women on the basis of self-identification,²¹ and in *Atala Riffo* (Chile) it recognized that the core State obligation of non-discrimination set forth in article 1.1 of the American Convention on Human Rights covered gender identity.²²

21. In 2011, the Inter-American Commission on Human Rights created a unit on the rights of LGBTI persons, designated as a rapporteurship in 2014, to “continue to pay sufficient attention to this issue”.²³ This decision was made by the General Assembly of OAS in one of its yearly resolutions that, since 2008, recognize violence and discrimination based on gender identity and expression. In its first thematic report on the rights of LGBTI persons, the Commission examined the intersection of gender with sexuality, sexual orientation and/or gender identity, and found that “such acts of violence are manifestations of the combined structural and historical sexism and prejudice towards non-normative sexual orientations and gender identities”.²⁴ The Commission explored in detail the connection between gender and violence and discrimination in the cases of *T.B. and S.H.* and *Henry and Edwards* (Jamaica), in which it analysed the impact of sodomy laws on the criminalization of a lesbian and a trans woman on the basis of their sexual orientation and their identity and expression of gender.²⁵

22. The provisions of the African Charter on Human and Peoples' Rights support the conclusion that every person enjoys the Charter rights irrespective of gender identity. Resolution 275 of the African Commission on Human and Peoples' Rights²⁶ is based on the premise that gender identity is a ground for protection; and in its advisory opinion of 4 December 2020, the African Court on Human and Peoples' Rights noted that vagrancy laws amount to discrimination because they “punish the poor and underprivileged, including but not limited to ... the gender-nonconforming”.²⁷

Intersectionality

23. Human Rights Council resolutions 32/2 and 41/18 require the Independent Expert to work within intersectional perspectives, according to which an understanding of discrimination must be achieved through an awareness of all conditions that create the substantively distinct life experience of an individual,²⁸ and, in the case of populations, communities and persons historically subjected to discrimination, through an awareness of the conditions that have created a complex system of oppression structures that are multiple and simultaneous.²⁹

24. The observation of the Committee on Economic, Social and Cultural Rights about persons with disabilities being treated as genderless human beings³⁰ and the observation by the Committee on the Rights of Persons with Disabilities that women with disabilities may be subject to multiple and intersectional forms of discrimination based on gender and

²⁰ See www.oas.org/en/iachr/reports/pdfs/legalstandards.pdf. In addition, the Inter-American Convention Against All Forms of Discrimination and Intolerance addresses discrimination based on reasons of sex, sexual orientation, and gender identity and expression (art. 1.1).

²¹ See para. 78.

²² *Atala Riffo and Daughters v. Chile*.

²³ See

www.oas.org/en/iachr/igtbi/docs/2009,%20OAS%20GA%20RES.%202504%20Human%20Rights,%20Sexual%20Orientation,%20Gender%20Identity.doc.

²⁴ OAS/Ser.L/V/II.rev.1, Doc. 36, para. 270.

²⁵ See www.oas.org/en/iachr/decisions/2020/JM_13.095_EN.PDF.

²⁶ See www.achpr.org/sessions/resolutions?id=322.

²⁷ Advisory opinion 001/2018.

²⁸ A/HRC/38/43, paras. 23–24.

²⁹ Submission by Australia. See also

https://heinonline.org/HOL/Page?handle=hein.journals/stflr43&div=52&g_sent=1&casa_token=NmMiruknM8cAAAAA:Idk9iAOSpn0p3ybV3NkLQTEbampO9bfskyvnMQLGSYfcU9BdEqHMT0Q4dgSKCLKJ3DA7jNqhnbY&collection=journals.

³⁰ Committee on Economic, Social and Cultural Rights, general comment No. 5 (1994), para. 19.

disability³¹ are notable examples of how identities may be described as points of entry into an analysis of the privilege and discrimination that are created at the point of intersection of the multiple identities that every person encompasses in one body, including gender identity.

25. In one submission, it was remarked that, understood as intersectional, “all the grounds on which people face discrimination are seen to reinforce and worsen one another ... Race and gender together inhibit black women’s advancement to a degree that either factor separately might not.”³² Indeed, understanding discrimination as intersectional allows us to link different issues within the arenas of sexuality, race and gender.”³³ At the intersection of gender, gender identity, sexual orientation and race lies a spire that places some at the top of social integration indicator performance, and others at the very bottom. In the limited contexts in which statistical data exist, the situation revealed is deeply concerning: in a 2019 report, the Williams Institute documented that while 22 per cent of LGBT persons in the United States lived in poverty, the figure was 8.1 per cent for white cis gay men, but 31.3 per cent for black cis lesbian women, 38.5 per cent for black trans persons and 48.4 per cent for Latino trans persons.³⁴ In a 2018 report, the National Association of Travestis and Transsexuals (ANTRA), of Brazil, reported that 82 per cent of the victims of killings of trans persons in Brazil identified as being of African descent.³⁵

26. The understanding that intersectional analysis is fundamental to addressing violence and discrimination against women, including lesbian, bisexual and trans women, has permeated through public policy, and many State submissions acknowledged its importance. For example, in 2019, the Minister of Justice of New Zealand stated: “Women are twice as likely to suffer partner abuse than men. Maori women, queer women, trans women, women living with a disability and young women experience more violence and are more likely to be revictimized by current systems.”³⁶ In Uruguay, Law No. 19.580 on Gender-based Violence against Women, of 2018, reaffirms recognition of women of all ages, trans women and women of diverse sexual orientations, socioeconomic status, sense of belonging to the land, belief, cultural origin, ethnic or racial origin, and situations of disability, without distinction or discrimination.³⁷

27. The Independent Expert notes that intersectional analysis must also take into account the fact that lived experiences are not static. They may vary in relation to space (as persons move from rural to urban areas, across borders or even within cities), and they may vary in relation to time, a perspective that is particularly relevant in the case of children. The Committee on the Rights of the Child has recognized the concept of “gender” since its third general comment and has expressly linked this social construction to the marginalization of children and young people on the basis of gender identity,³⁸ recognizing the rights of children and young people to their gender identity and emerging autonomy,³⁹ and condemning forced surgeries or treatments on intersex adolescents.⁴⁰

28. In this context, the protection of human rights is not served by the negation of sexual orientation and gender identity.⁴¹ As the Independent Expert noted in his 2018 report on data collection and analysis, lack of data renders the community invisible and is at the core of the adoption of irrational State policies.⁴²

³¹ Committee on the Rights of Persons with Disabilities, general comment No. 1 (2014), para. 35, and general comment No. 6 (2018), para. 19.

³² Submission by the Association for Women’s Rights in Development (AWID) et al.

³³ Ibid.

³⁴ See <https://williamsinstitute.law.ucla.edu/publications/lgbt-poverty-us/>.

³⁵ See <https://antrabrasil.files.wordpress.com/2019/11/murders-and-violence-against-travestis-and-trans-people-in-brazil-2018.pdf>.

³⁶ Submission by the Human Rights Commission of New Zealand.

³⁷ Submission by Uruguay.

³⁸ Committee on the Rights of the Child, general comment No. 20 (2016), para. 34.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ See, for example, the submission by Togo.

⁴² A/HRC/41/45.

Gender-based violence and discrimination

29. As noted in one submission, “gender is a social construct deeply embedded in society as a basis for making decisions on social, economic and political inclusion and participation on the one hand and on exclusion and marginalization on the other”.⁴³ For the very few, gendered identities will contribute to the creation of experiences of privilege; for many, they will lead to experiences of discrimination and violence. That is often the case for women and for persons whose gender identity and/or expression does not fit squarely within the preconceptions attached to the sex assigned at birth; for these reasons, gender-based analysis has been an indispensable tool in the development of doctrine related to cases of violence and discrimination.⁴⁴

30. Furthermore, a broad understanding of gender allows for the systematic assessment of discrimination impacting persons because of their real or perceived sexual orientation, gender identity and/or expression,⁴⁵ and the interpretations issued by United Nations human rights treaty bodies indeed suggest this conclusion as a consequence of gender-based analysis. The Committee on the Elimination of Discrimination against Women affirms that “discrimination against women based on sex and/or gender is often inextricably linked with and compounded by other factors that affect women, such as ... being lesbian, bisexual or transgender”;⁴⁶ the Committee on Economic, Social and Cultural Rights has established that “the notion of the prohibited ground ‘sex’ has evolved considerably to cover not only physiological characteristics but also the social construction of gender stereotypes”;⁴⁷ having analysed a State’s failure to allow change of sex on official documents, the Human Rights Committee concluded that it was a form of discrimination because “the Government is failing to afford the author, and similarly situated individuals, equal protection under the law”;⁴⁸ and the Committee on the Rights of Persons with Disabilities uses the phrase “all genders”,⁴⁹ suggesting an understanding of gender as not binary. The Committee against Torture recognizes that States must ensure that their laws are “in practice applied to all persons, regardless of ... gender, sexual orientation, transgender identity”.⁵⁰

31. Recent inter-American case law provides good examples of how gender-based analytical tools are applicable and pertinent to the analysis of violence against trans women. Regarding *Hernández v. Honduras* – a case currently pending the issuance of a judgment by the Inter-American Court of Human Rights – in the merits report that the Inter-American Commission on Human Rights presented to the Court, the Commission found that the victim’s death had occurred in a context of discrimination based on prejudice which included police violence against LGBT persons, especially trans women sex workers – as was the case with the victim.⁵¹ In looking at what the case and its context demonstrate, the Commission especially noted the violence based on prejudice toward the gender identity and expression of trans women, and took into account the fact that Vicky Hernández and other trans women had essentially been forced into a cycle of violence by social exclusion leading to discrimination, and criminalization.⁵² For the Inter-American Commission on Human Rights, the case brought to light not only the absence of capacity to investigate within the State sector but resistance to investigating these forms of fatal violence against trans women in their

⁴³ See the joint submission by the Association for Women’s Rights in Development (AWID) and the Sexual Rights Initiative (SRI).

⁴⁴ See, for example, CCPR/C/119/D/2425/2014, para. 7.12; CEDAW/C/75/D/138/2018; CEDAW/C/73/D/99/2016; Committee on the Rights of Persons with Disabilities, general comment No. 3 (2016), para. 8; E/C.12/65/D/22/2017, para. 8.2; and E/C.12/63/D/10/2015, para. 19.5.

⁴⁵ Submission by CREA et al.

⁴⁶ Committee on the Elimination of Discrimination against Women, general recommendation No. 32 (2014), para. 6.

⁴⁷ Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 20. In the same comment, the Committee observed that both “sexual orientation” and “gender identity” were prohibited grounds of discrimination under the Covenant (para. 32).

⁴⁸ CCPR/C/119/D/2172/2012, para. 7.14.

⁴⁹ Committee on the Rights of Persons with Disabilities, general comment No. 5 (2017), para. 23.

⁵⁰ Committee against Torture, general comment No. 2 (2007), para. 21.

⁵¹ See www.oas.org/en/iachr/decisions/court/2019/13051FondoEn.pdf.

⁵² *Ibid.*, see para. 57.

context, and within the larger pattern and practice that must be redressed and transformed in order for the State to meet its human rights obligations.⁵³

32. The Working Group on discrimination against women and girls has similarly observed that women who do not conform to gender stereotypes, including some who may identify as lesbian, bisexual or trans women, are particularly vulnerable to discrimination, violence and criminalization.⁵⁴ In a similar vein, intersex persons face stigma and discrimination because their bodies do not fit sex and gender norms, and intersex infants, children and adolescents are subjected to medically unnecessary surgery, hormonal treatment and other procedures in an attempt to forcibly modify their appearance or physical development to be in line with societal expectations about female and male bodies.⁵⁵

33. In a similar vein, the case of *Rojas Marín v. Peru*, decided by the Inter-American Court of Human Rights in 2020,⁵⁶ is a remarkable example of judicial recognition of the fluid nature of gender identity. At the time of the principal facts in 2008, the victim identified himself as a homosexual man, but at the time of the Court's decision in 2020, she identified herself as a woman. The Court examined the purposive nature of anal rape as a manifestation of violence and discrimination in 2008 and characterized the case as a hate crime because it "not only damaged the rights of Azul Rojas Marín, but was also a message to the whole LGBTI community, a threat to the freedom and dignity of this entire social group".⁵⁷

34. The previous mandate holder noted the links between the 2030 Agenda for Sustainable Development and violence and discrimination based on sexual orientation and gender identity, pointing out that Sustainable Development Goal 16, which among other things aims for a reduction of violence, must take into account violence based on sexual orientation and gender identity.⁵⁸ Similarly, while the gender-based approaches prescribed by Security Council resolution 1325 (2000) have historically been understood as a general reference to women, human rights defenders have campaigned to ensure an understanding of the particular impact of armed conflict on lesbian, bisexual and trans women and gender-diverse persons, an important task for moving past policies that often reflect patterns of criminalization, discrimination and marginalization faced more broadly.⁵⁹

35. The processes of reception of gender and of gender identity and expression in international human rights law have been described in the Yogyakarta Principles,⁶⁰ and in their update, known as the Yogyakarta Principles plus 10, which at the date of preparation of the present report have been referenced in universal periodic review proceedings, reports of the United Nations High Commissioner for Human Rights, reports of special procedures and treaty bodies, judgments of the European Court of Human Rights, judgments and advisory opinions of the Inter-American Court of Human Rights, and case and thematic reports of the Inter-American Commission on Human Rights, as well as countless decisions of domestic tribunals including the Supreme Courts of Botswana,⁶¹ India⁶² and Nepal,⁶³ national laws, such as of Argentina⁶⁴ and Belgium,⁶⁵ and public policy as is the case with Colombia⁶⁶ and Sweden.⁶⁷ The intensity of this reception correlates with the fact that the process leading to the Yogyakarta Principles, and their update, followed an interdisciplinary standard

⁵³ Submission by Elizabeth Abi-Mershed.

⁵⁴ A/HRC/29/40, para. 21.

⁵⁵ See www.ohchr.org/Documents/Issues/Discrimination/LGBT/BackgroundNoteHumanRightsViolationsagainstIntersexPeople.pdf.

⁵⁶ See www.corteidh.or.cr/docs/casos/articulos/seriec_402_esp.pdf.

⁵⁷ *Ibid.*, see para. 165.

⁵⁸ A/HRC/35/36, para. 66 (e).

⁵⁹ Submission by the Centre for Gender in Politics at Queen's University Belfast.

⁶⁰ See <https://yogyakartaprinciples.org/principles-en/>.

⁶¹ See <https://africanlii.org/sites/default/files/legabibo.pdf>.

⁶² See *Navtej Singh Johar v. Union of India*.

⁶³ See *Sunil Babu Pant et al. v. Nepal Government et al.* (2007), writ No. 917.

⁶⁴ Submission by the University of Buenos Aires.

⁶⁵ Submission by Belgium.

⁶⁶ Submission by Corporación Femm.

⁶⁷ See https://publikationer.sida.se/contentassets/b7c778a855dc4e92a5a9da1bebc48b0a/action-plan-for-sidas-work-against-gender-based-violence-2008-2010_680.pdf.

identification methodology, and focused on treaty law, international custom, national practice, judicial decisions and doctrine, many of which are referenced in the present report and all of which – pursuant to Article 38 (1) of the Statute of the International Court of Justice – are among the sources of international law.

Legal recognition

36. In 2018, when examining States’ obligations to uphold the human rights of trans and gender-diverse persons, the mandate holder concluded that the right to self-determine one’s gender was a fundamental part of a person’s freedom and a cornerstone of the person’s identity. The obligation of States is 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.⁶⁸ The obligations described include refraining from adopting measures that create obstacles to legal recognition or that make it impossible, as well as the positive aspect of adopting legal measures such as:

- (a) Being based on self-determination;
- (b) Being a simple administrative process;
- (c) Not being connected with abusive requirements, such as medical certification, surgery, treatment, sterilization or divorce;
- (d) Including the acknowledgement and recognition of non-binary identities in their full diversity and specificity;
- (e) Ensuring that minors have access to recognition of their gender identity.

37. The Independent Expert has evidence that, despite significant progress in regard to legal recognition of gender identity in conformity with these standards, procedures in place all over the world still carry deep remnants of pathologization. One submission noted that in Europe and Central Asia alone, 10 States still required sterilization as a prerequisite to legal recognition, while all States in Central and Eastern Europe and Central Asia still demanded a mental health diagnosis.⁶⁹ Another submission noted that in 2017 the Ministry of Health of Malaysia released a guideline medicalizing trans people and their identities, and recommending that teens with “gender issues” be subject to physical examinations, including examination of genitalia.⁷⁰

38. The mandate holder observes that some submissions argued against legal recognition of trans and gender-diverse persons, alleging a risk of erasure of cis women’s concerns and of the integrity of safe spaces for women, and the threat to development of girls through sport. While the arguments may vary, their ultimate tenet is that legal recognition of gender identity on the basis of self-determination is a threat for the furtherance of human rights of women who are not trans.

39. Addressing the significant oppression, violence and discrimination that are carried out every day against women around the world is a human rights imperative. This entails the gathering of evidence of violence and discrimination, analysis from an intersectional perspective, and appraisal of the consequences that such an evidence-based approach will yield in policymaking and legal reform processes. Such an approach, which is promoted regionally, for example by the design of the Istanbul Convention, ought to satisfy the need for an intersectional understanding of the lived experience of all women, including lesbian, bisexual and trans women.

40. Conversely, the evidence does not support the contention that legal recognition of gender identity can be seen as contrary to the struggle for equality, to the rights of women or to the rights of cis women. The Independent Expert is not persuaded by the allegation that these arguments are grounded in human rights-based approaches. They overwhelmingly appear to rely on anecdotal evidence, some of which would relate to some allegations of abuse, but most of which build on deeply discriminatory stereotypes of trans and gender-

⁶⁸ A/73/152, paras. 75–81.

⁶⁹ Submission by GATE.

⁷⁰ Submission by the Asia Pacific Transgender Network et al.

diverse persons, and overwhelmingly of trans women. This is the case, for example, of the claim that legal recognition of trans women per se threatens safe spaces, which appears to draw on stigma about predatory determinism. Statistical evidence or analysis does not support the contention that legal recognition of trans girls represents a blanket threat to development through sports, a notion that circularly seeks to rely upon but also to justify the harmful and offensive contention that trans girls are not girls. The idea that legal recognition of the existence of trans women creates a threat of erasure of the concerns of cis women disregards the duty of the State to consider all relevant angles of intersectional analysis, including gender identity, in the formulation of policy.

41. It is noteworthy that these contentions appear to suggest a shift of onus from the State (i.e. the duty bearer) to communities and persons that, as evidence shows, are deeply disenfranchised (i.e. trans and gender-diverse persons, the rights holders). The Independent Expert has provided ample evidence to the effect that legal recognition on the basis of self-determination is the key to protecting trans and gender-diverse persons from the unacceptable state of extrajudicial execution, forced disappearance, torture and ill-treatment, beatings and harrowing emotional pain being inflicted on them, and from their systematic exclusion from education, employment, housing, health care and all other sectors of social and community life; such recognition is therefore not optional, but a human rights imperative as well.

42. The mandate holder further notes 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, as well as integration through sectors such as sports and culture.

43. The Independent Expert is also concerned that some of these claims appear to reproduce privileged and/or colonial bias which disregards gender diversity around the world. Furthermore, he is concerned that by seeking a regression to sex as rigidly defined through a male/female binary, they deny the international law formation process described in the present report and appear to support notions of biological determinism, in which the mandate holder recognizes grave risk for the rights of all women, among them lesbian, bisexual and trans women.

44. The impact of these narratives in public policy is already taxing trans communities around the world, and the number of extraordinary, unjustified and arbitrary legal measures either adopted or under discussion in different confines in the world, which seek to limit or exclude access to social integration by trans women and girls, trans men and boys, and gender-diverse persons, are of great concern to the Independent Expert; they are directly connected to the narratives described.

45. Where human rights are concerned, concerns about the possibility of risk of abuse do not justify closing access to rights. The mandate holder deeply respects the importance of safe spaces for all women; their integrity must be at all times protected from all objectively identified risks. That risk management measures need to be efficient and effective is as evident as the fact that they cannot promote, replicate or condone stigma or stereotypes that are at the core of violence and discrimination on the basis of gender identity; they must also not be used as an obstacle to the enjoyment of human rights by rights holders. Evidence-based approaches, free from prejudice and stigma, are key to compliance with those duties.

46. Similarly, the concerns of all women must be reflected in data gathering and analysis – and lead to consequences in public policy, including in evidence-based approaches to ensure that inclusion through sports and other realms of social life fulfils the objective of promoting the development of all girls, including lesbian, bisexual and trans girls.

47. In essence, the task described is the work of prevention, which is incumbent upon States, and which requires evidence-based approaches to risk identification, avoidance, mitigation, and management, rather than negation of the rights of persons, communities and populations, particularly when that negation will build on stigma and prejudice and therefore fuel the spirals of violence and discrimination of which the mandate holder has produced abundant evidence.

Bodily autonomy

48. The relationship between bodily autonomy and the right to have one's physical and mental integrity respected, and their inextricable connection with legal notions of agency, has been documented by the United Nations Population Fund (UNFPA) as being fundamental to the enjoyment of all other human rights, including the right to health as described by the Committee on Economic, Social and Cultural Rights: "the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation".⁷¹ This conceptual construction has urgent relevance for lesbian women who are tortured through rape heinously called "corrective"; for gay men, through coercive anal examinations; for all persons who are subjected to practices of "conversion therapy"; and for intersex infants and children who are subjected to procedures called, equally heinously, "normalizing".⁷² Bodily integrity, or freedom from physical acts that are not consented to, is directly violated by all these forms of violence, and many others documented as part of the work of this mandate, which bear a direct relation to efforts to violently hammer persons into moulds of sex or gender and the connected stereotypes.

49. Around the world, intersex infants, children and adolescents are subjected to medically unnecessary surgery, hormonal treatment and other procedures in an attempt to forcibly modify their appearance or physical development to be in line with societal expectations about female and male bodies.⁷³ At the root of these violations against intersex people lie harmful stereotypes, stigma, taboos and pathologization. Early surgery carried out on intersex children is a blatant and cruel effect of binary gender norms, and United Nations and regional human rights mechanisms have called on States to protect the right to bodily integrity and autonomy, and to self-determination of intersex children.⁷⁴

50. The definition of bodily autonomy is also of fundamental importance for trans persons who face cruel, inhuman and degrading treatment, and possibly torture, in the form of requirements for gender recognition such as medical certification, surgery, treatment, sterilization or divorce. In his 2018 country visit to Georgia, the Independent Expert observed that a majority of the trans men he interviewed were missing their middle finger, and was subsequently shocked to learn that a medical authority entitled to certify a person as being a "true" trans person demanded that the said finger be amputated to create a prosthetic penis as part of the requirements for legal recognition.⁷⁵ Access to transition-related medical care is part of the measures ensuring bodily autonomy for trans persons, and the Independent Expert is concerned by efforts to criminalize or restrict such access.

51. Bodily autonomy and integrity are also of relevance to freedom from gender-based violence and discrimination, which impact lesbian, bisexual and trans women. As noted by UNFPA, "where there are gender-discriminatory social norms, women's and girls' bodies can be subject to choices made not by them, but by others, from intimate partners to legislatures. When control rests elsewhere, autonomy remains perpetually out of reach."⁷⁶

52. To guarantee freedom and equality, such situations, and other situations, must be taken into account. Security of LGBT and intersex persons concerns their right to have their physical and mental integrity respected, including freedom from undue interference in bodily integrity,⁷⁷ a principle that is also fundamentally important for trans and gender-diverse persons, for example trans men, whose sexual and reproductive rights – including all decisions concerning pregnancy and sexual and reproductive health – must be acknowledged and protected.

⁷¹ Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000), para. 8.

⁷² See www.ohchr.org/Documents/Issues/Discrimination/LGBT/BackgroundNoteHumanRightsViolationsagainstIntersexPeople.pdf.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ See A/HRC/41/45/Add.1.

⁷⁶ United Nations Population Fund, *My Body Is My Own: Claiming the Right to Autonomy and Self-Determination*, p. 8, available at www.unfpa.org/sites/default/files/pub-pdf/SoWP2021_Report_-_EN_web.3.21_0.pdf.

⁷⁷ Human Rights Committee, general comment No. 35 (2014), para. 3.

Comprehensive gender and sexuality education

53. During his 2019 country visit to Ukraine, the Independent Expert observed a total absence of knowledge within the State about the needs and well-being of LGBT pupils in primary and secondary education, the abuses and challenges that they face and the impact on their educational achievements. As a result of this situation, 49 per cent of students felt unsafe at school because of their sexual orientation or gender identity, and 88.5 per cent of LGBT and gender-diverse students and pupils had suffered verbal harassment in schools and 53.5 per cent had suffered physical abuse in the course of the previous year.⁷⁸

54. The provision and reception of comprehensive gender and sexuality education is legally protected under article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights. The Independent Expert wishes to underline the importance of comprehensive gender and sexuality education to deconstruct stigma that lies as a powerful root cause for violence and discrimination, to promote the full development of the human personality and the sense of its dignity under article 13 of the International Covenant on Economic, Social and Cultural Rights,⁷⁹ to deconstruct stereotypes about sex, sexuality and pleasure, and to prevent gender-based violence. As noted by the Committee on the Elimination of Discrimination against Women, “Schools perpetuate and reinforce social prejudices, often as a result of the poor implementation of policies by school governance bodies, as well as irregular enforcement of non-discrimination policies by teachers, principals and other school authorities. Limited education and cultural taboos are among the factors that prevent lesbian, bisexual, transgender and intersex students from achieving social mobility and increase their vulnerability to violence.”⁸⁰

III. Effective State measures

55. Prevention, accountability and reparation are dimensions of State responsibility under international human rights law. The Independent Expert is persuaded by the evidence that the adoption of gender-based and intersectional analysis, as described, is a fundamental component of a diligent discharge of that responsibility.

Knowledge and data collection and analysis

56. States are increasingly recognizing and implementing their duty to gather data on discrimination and violence on the grounds of gender identity and expression, and recognizing the connection between this and gender mainstreaming. A majority of States reported having some system in place to this end, which may be based on data gathered from justice sector institutions or from public surveys. For example, in Spain, the Ministry of the Interior gathers and analyses data on hate crimes on the basis of sexual orientation and gender identity;⁸¹ in 2017, the Government of the United Kingdom of Great Britain and Northern Ireland gathered 108,000 responses through a national LGBT survey spanning many areas of life, including health, education and the criminal justice system.⁸² One submission remarked that “as part of the strategies implemented to combat and eliminate gender-based violence, the Colombian State and the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women) developed the Integrated Gender Violence Information System, which seeks to integrate information from different entities on violence against women and includes sexual orientation and gender identity as separate categories”.

57. Gender-based public management is a particularly ambitious and meaningful undertaking. In Sweden, gender budgeting is used, and the Government has decided to

⁷⁸ A/HRC/44/53/Add.1, para. 72.

⁷⁹ See also Committee on the Rights of the Child, general comment No. 20 (2016), para. 60.

⁸⁰ Committee on the Elimination of Discrimination against Women, general recommendation No. 36 (2017), para. 45.

⁸¹ Submission by Spain.

⁸² Submission by Stonewall.

implement gender mainstreaming in the legislative process, governance and international work.⁸³

Legislation

58. Several States reported that gender perspectives had been enshrined at the constitutional level;⁸⁴ others reported the adoption of legislation prohibiting discrimination on the basis of gender and gender identity and expression⁸⁵ and/or legislation addressing hate crimes committed on that basis.⁸⁶ To these must be added the vast number of laws, adopted the world over, aimed at preventing and eradicating gender-based violence, which is today the most developed and prolific domain of gender-related laws, and legislation enacted for the legal recognition of gender identity, which was surveyed by the Independent Expert in 2018.

59. Other legislative efforts are focused on particular areas. In the Philippines, for example, the Safe Spaces Act, of 2018, provides a definition of gender, gender identity and/or expression, and penalizes gender-based sexual harassment (including transphobic remarks) in public spaces.⁸⁷ In Mexico City, the Law for Prevention and Eradication of Discrimination raises awareness of gender, gender identity and expression as categories protected from discrimination.⁸⁸ In the Netherlands, the Ministry of Education, Culture and Science invests in multi-year programmes and alliances that tackle myths and stereotypes around LGBTI people; one example is Act4respect, which works towards ending gender-based violence by addressing gender stereotypes that are the root of gender-based violence.⁸⁹ In Argentina, Law No. 27.499, known as the Micaela Law, establishes compulsory training on gender and gender-based violence for all persons working in the public service or in the executive, legislative or judicial branch of government.⁹⁰ In Malta, the law specifically prohibits “medical interventions driven by social factors without the consent of the minor”, which directly relates to the situation of intersex infants.⁹¹

Public policy

60. State and non-State entities uniformly underscored the importance of gender-conceptual frameworks, analyses and mainstreaming as a tool for achieving social justice through public policy. The Independent Expert received abundant evidence, from all regions of the world, of the existence and implementation of national plans aiming at gender equality, and of the full incorporation of gender identity in many of them. In Angola, for example, the National Policy for Gender Equality and Equity includes, among other things, definitions of gender analysis, gender stereotypes and gender identity, and the National Human Rights Strategy, of 2020, includes a cross-cutting approach to gender as well as specific actions for

⁸³ Submission by Sweden.

⁸⁴ See, for example, the submissions by Argentina, Bolivia (Plurinational State of), Honduras, Mexico and Nepal, and by the Defensoría del Pueblo (Peru).

⁸⁵ See the submissions by Andorra, Australia, Croatia, Cyprus, Germany, Honduras, Israel, Italy, Malta, Mauritius, Mexico, Norway, Spain (Catalonia), Sweden, the United Kingdom of Great Britain and Northern Ireland, and Uruguay, and by the Procuraduría para la Defensa de los Derechos Humanos (Nicaragua) and the Commission on Human Rights (Philippines). Non-State submissions included mentions of Afghanistan (in the submission by All Survivors Project), Colombia (in the submission by Colombia Diversa), Montenegro (in the submission by Asocijacija Spektra et al.), Slovenia (see <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7273>) and the United Kingdom (in the submission by Stonewall).

⁸⁶ See the submissions by Croatia, Cyprus, Israel, Malta, Norway, Spain and the United Kingdom, and by the Danish Institute for Human Rights, the Ombudsman of Argentina, and the Human Rights Commission (New Zealand). A non-State submission included mention of Colombia (in the submission by Colombia Diversa).

⁸⁷ Submission by the Commission on Human Rights (Philippines).

⁸⁸ Submission by the Human Rights Commission of Mexico City.

⁸⁹ Submission by the Netherlands.

⁹⁰ Submission by Argentina.

⁹¹ See www.ohchr.org/Documents/Issues/Discrimination/LGBT/BackgroundNoteHumanRightsViolationsagainstIntersexPeople.pdf.

the promotion and protection of women's and LGBT human rights.⁹² On 20 January 2021, the incoming administration in the United States issued an executive order titled Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation,⁹³ which broadly applies existing sex non-discrimination laws to protect LGBTQ people consistent with the United States Supreme Court ruling in 2020 in *Bostock v. Clayton County*.⁹⁴ In Nepal, the National Implementation Plan on Human Rights also creates provision for the protection of trans persons.⁹⁵ As regards the Netherlands, the Gender and LGBTI Equality Policy Plan for 2018–2021 outlines the government commitment to equal treatment, equal opportunities and the right to live in safety.⁹⁶

61. In Norway, the Government's current "Safety, Diversity, Openness" action plan is based on a comprehensive and intersectional gender analysis. It makes a range of different public sectors accountable and addresses the junctions between sexual orientation, gender identity and expression, and other grounds for discrimination (e.g. ethnicity, disability and age).⁹⁷ Bosnia and Herzegovina has adopted its third consecutive Gender Action Plan, in which LGBTI persons are listed as one of the cross-cutting areas of the Plan.⁹⁸

62. Some countries, such as Uruguay,⁹⁹ reported having created national councils to deal with challenges such as extreme gender-based violence, and specialized gender units with designated human resources and the budget allocation necessary to carry out their tasks effectively.¹⁰⁰ In Sweden, the Gender Equality Authority, established on 1 January 2018 and responsible for follow-up, analysis, coordination and support as regards the effective implementation of gender equality policy, was assigned to address the challenges in the enjoyment of human rights by LGBTI persons.¹⁰¹ In Cyprus, the Ministry of Education, Sports and Culture has formed an interdepartmental committee, with representatives from all its departments and services, which oversees and coordinates all gender equality issues. Its work is based on an action plan (for 2018–2020) that is aimed at supporting the inclusion of gender equality in matters related to the structures of the educational system and to teacher in-service training.¹⁰²

63. In Argentina, the Interministerial Programme for Prevention of Violence and Promotion of Gender Equality in Sport has been established.¹⁰³ Its main objectives are to mainstream the gender perspective and diversity in all areas and at all levels of the community and of sports institutions, to promote the inclusion of LGBTI+ women and individuals in sport, to raise awareness about structural gender stereotypes impacting the lives of LGBTI+ women and people in these areas, and to prevent and address gender-based violence in sports.

64. Measures adopted as part of public policy are nonetheless recognized as being vulnerable to political volatility, and of particular concern to the Independent Expert is the extent to which these issues appear to have become partisan in a manner that makes them especially vulnerable to political shifts.

Jurisprudence

65. Gender identity has been recognized in a number of judgments by the Supreme Court of Argentina,¹⁰⁴ the Supreme Court of Chile¹⁰⁵ and the Constitutional Chamber of the

⁹² Submission by Angola.

⁹³ See www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation.

⁹⁴ Submission by Human Rights Campaign.

⁹⁵ Submission by Nepal.

⁹⁶ Submission by the Netherlands.

⁹⁷ Submission by Norway.

⁹⁸ Submission by Bosnia and Herzegovina.

⁹⁹ Submission by Uruguay.

¹⁰⁰ Ibid.

¹⁰¹ Submission by Sweden.

¹⁰² Submission by Cyprus.

¹⁰³ Submission by Argentina.

¹⁰⁴ See <http://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumentoById.html?idDocumento=6115732&cache=1518739300001>.

¹⁰⁵ Supreme Court of Chile, judgment of the Third Chamber, of 5 November 2019, No. 21.393-2019.

Supreme Court of Costa Rica.¹⁰⁶ Notably, the Constitutional Court of Colombia¹⁰⁷ has established that gender identity and sexual orientation are aspects inherent in individuals which are part of their innermost selves, but which should be able to be fully externalized, and be recognized and respected.¹⁰⁸

66. In 2020, the landmark United States Supreme Court ruling in *Bostock v. Clayton County* affirmed that discrimination on the basis of gender identity was a form of prohibited sex discrimination and violated Title VII (the Civil Rights Act of 1964).¹⁰⁹

67. In the Flemish Region of Belgium, policy measures to address violence based on sexual orientation and gender identity are taken under the scope of gender-based violence, and include violence connected with a person's gender, gender identity or gender expression. This includes sexual violence (such as rape, assault and sexual intimidation), partner violence, human trafficking and slavery, forced marriage, genital mutilation, partner violence and transphobic violence.¹¹⁰

Reparations

68. Notions of prevention and redress are deeply intertwined, and are a fundamental element arising from the determination of State responsibility for human rights violations. In this connection, successive mandate holders have identified the decriminalization of sexual orientation and gender identity and the legal recognition of gender identity based on self-identification as State responsibilities under international human rights law.

69. Guarantees of non-repetition, in their turn, constitute the measures to provide due assurance that violations will not reoccur. Among them, perhaps the most meaningful are those that tend to impact on the development of society as a whole, including actions in the education, health-care and employment sectors, in the area of political participation, in family settings and in the immigration services. Strategic action may come in the form of non-repetition measures mandated by the judiciary. In Colombia, the Ministry of the Interior issued a public policy on the rights of LGBTI persons in order to comply with a judgment in which the Constitutional Court had called for a comprehensive national public policy for the LGBTI sector.¹¹¹

70. Reparation will address damage, and includes restoration, compensation and satisfaction. Restoration may take many forms, some of which may consist of administrative measures and others of which may be the care and professional assistance that victims require to re-establish their physical, moral and legal integrity after the violations they have suffered. Measures of rehabilitation may involve the legal, occupational and medical spheres, as well as measures conducive to the restoration of the dignity and reputation of the victims. At best, restoration can redress violations in a partial manner, and compensation is deemed to be a substitutive means.

71. The form or nature of measures of satisfaction is not rigid and depends on the circumstances of each case, but they tend to restore the social, communal, family and individual fabric. In fact, the diverse measures of satisfaction may also constitute important elements to reinforce the State commitment to non-repetition of similar actions in the future. Measures of satisfaction may include one or a combination of the following:

- (a) Verification of the facts and full and public disclosure of the truth;
- (b) Official declaration or judicial decision restoring the dignity, the reputation and the rights of the victim;
- (c) Public apology;
- (d) Commemorations and tributes to the victims;

¹⁰⁶ See <https://nexuspj.poder-judicial.go.cr/document/sen-1-0007-985766>.

¹⁰⁷ See judgments T-062 of 2011 and T-363 of 2016.

¹⁰⁸ Constitutional Court of Colombia, judgment T-099 of 2015.

¹⁰⁹ Submission by Human Rights Campaign.

¹¹⁰ Submission by Belgium.

¹¹¹ Submission by Colombia Diversa.

(e) Inclusion of an accurate account of the violations that occurred, in training and educational material.

72. Examples of reparations for violations connected to gender identity are still scarce. In 2018, the Parliament of Sweden took the decision to pay compensation to trans people who had been forcibly sterilized between 1972 and 2013. In Argentina, in the Province of Santa Fe, the State created a historical reparations programme through Provincial Law 13298, under which monetary compensation is given to persons incarcerated during that period due to their sexual orientation or gender identity. The Uruguayan law on gender identity includes compensation for the ill-treatment, imprisonment and torture that trans persons were subjected to under the dictatorship.

Civil society spaces

73. An overwhelming majority of the submissions presented to the Independent Expert underlined the importance of civil society spaces, which have given rise to data collection and analysis systems, joint action, and – in the context of COVID-19 – support and solidarity. There is a highly sophisticated system for the protection and promotion of human rights that comprises organizations working at local, national, regional and global level, and which has developed some distinct traits of resilience, resourcefulness and professionalism. The fact 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 ought to serve as proof of the effectiveness of such a system.

74. Faced with the singular challenges brought forth by the times and by backlash, one of the movement's strengths appears to be its ability to identify common objectives. One submission expressed its model of "work in solidarity to ensure everyone's equal enjoyment of rights, with particular awareness of the need for attention and protection for the voices and experiences of trans, non-binary and gender-diverse people and people with intersex characteristics, who have been neglected in the past, including and in addition to the range of women's rights, which continue to be challenged. It is essential to adopt and affirm such an inclusive approach to gender ... to promote the goals of feminist, women's rights, human rights and LGBTI rights organizations overall."¹¹²

75. However, civil society spaces are shrinking, or, perhaps more accurately, they are actively being shrunk, and enhanced efforts are required from State and non-State actors to preserve their integrity. The Global Philanthropy Project concluded that many government and multilateral donors were only providing limited amounts of funding for lesbian, bisexual and queer women and trans and intersex persons. 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.¹¹³

Monitoring and evaluation

76. In most cases, efforts concerning the evaluation of overarching programmes have been deployed by civil society alone.¹¹⁴ This is a pattern noted by the Independent Expert in relation to most State review processes. The absence of monitoring and evaluation approaches to measure the efficiency and effectiveness of gender-based frameworks is deeply concerning, and is one of the areas in which State action ought to focus its attention most urgently.

IV. Conclusions

77. The Independent Expert recognizes two fundamental duties of the State in connection to the processes described in the present report:

¹¹² Submission by CREA et al.

¹¹³ Ibid.

¹¹⁴ Submission by Colombia Diversa.

(a) To prevent, prosecute and punish violence and discrimination on the basis of sexual orientation, gender identity and gender expression and, if relevant, provide reparation to the victims;

(b) To recognize every human being's freedom to determine the confines of their existence, including their gender identity and expression.

78. Gender-based approaches and legal recognition of gender identity and expression provide the human-rights based framework for the fulfilment of those duties, and international human rights law, under the aegis of which these approaches have developed, has played a powerful role in the protection of the human rights of LGBT persons through the recognition of gender, and through the specific recognition of gender identity and expression as practices of concern in discrimination analysis.

79. Gender describes a sociocultural construct that ascribes certain roles, behaviours, forms of expression, activities and attributes determined to be appropriate according to the meaning given to biological sex characteristics. Under this definition, 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.

80. The use of the terms gender and gender identity and expression in international human rights law includes all persons, communities and populations. Whether self-defining into a specific gender, or remaining gender-fluid, across binaries, gender is in operation through the work of naming things as masculine and feminine. The concepts of gender, sex, and gender identity and expression are related, but can be applied independently as protected grounds.

81. The work of addressing and ultimately eradicating violence and discrimination based on sexual orientation and gender identity demands the adoption of intersectional analysis, the sites of which include laws and policies which claim to be gender-neutral or are gender-specific (and may discriminate both against cisgender hetero- and lesbian-identified women and trans and other gender-nonconforming women and men).

82. Legal recognition of gender identity, and protection from violence and discrimination related to it, to gender expression and to sexual orientation, are inextricably connected with bodily autonomy. Security of LGBT and intersex persons concerns their right to have their physical and mental integrity respected, including freedom from undue interference in bodily integrity.

83. Protection from violence and discrimination based on sexual orientation and gender identity also substantively rely on the implementation of comprehensive gender and sexuality education, in full conformity with freedom of expression and the promotion of the full development of the human personality and the sense of its dignity under the International Covenant on Civil and Political Rights (art. 19) and the International Covenant on Economic, Social and Cultural Rights (art. 13).

84. The work to address and ultimately eradicate violence and discrimination based on sexual orientation and gender identity is not in opposition to the human rights of women; on the contrary, these areas of concern are largely overlapping and conceptually, socioeconomically, politically and legally reinforce each other.

85. The implementation of the mandate places the Independent Expert in a vantage point of being able to observe the dynamics of the human and social movements in the struggle against violence and discrimination based on sexual orientation and gender identity. Narratives that appear to displace responsibilities from oppressors to persons, communities and populations that are themselves deeply oppressed concern the mandate holder deeply.

86. 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 kindness and compassion. Not only does the inclusive language of the Universal Declaration of Human Rights itself compel all of us to behave

in this way to all other human beings born free and equal in dignity and rights,¹¹⁵ but it appears to be at the core of preserving and safeguarding the common heritage built by our elders, and the extraordinary power of a movement that has achieved so much and is currently at risk.

V. Recommendations

87. The Independent Expert recommends that States recognize the value of gender-based approaches, and uphold rights related to gender and sexuality as universal and inalienable, indivisible, interdependent, and interrelated to all other rights. Within this context, the Independent Expert recommends that States ensure recognition of the right to bodily and mental integrity, autonomy and self-determination, and of the requirements that are concomitant to them, such as socioeconomic inclusion, housing, employment, education, and in particular, comprehensive gender and sexuality education.

88. The Independent Expert also recommends that States adopt, 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 iuris* of international human rights law that has been identified in the present report, and ratify the relevant regional conventions that are conducive to that end.

89. The Independent Expert further recommends that States implement data gathering and analysis systems that allow for intersectional analysis of violence and discrimination. In accordance with the well-established advice provided under this mandate, the Independent Expert recommends that in the design of these measures a gender-mainstreaming approach be adopted, that embeds measures to address violence and discrimination based on sexual orientation and gender identity, includes communities, populations and peoples in the key decision-making processes, and allows for their meaningful participation in all stages from design to monitoring and evaluation.

90. The Independent Expert recommends that States put in place measures to identify human rights violations carried out on the basis of sexual orientation and gender identity, accompanied by fact-finding and, if appropriate, acknowledgement of responsibility and applicable reparation measures conducive to redress.

91. The Independent Expert wishes to reiterate the recommendation that States provide access to legal recognition of gender identity in a manner consistent with the rights to freedom from discrimination, equal protection of the law, privacy, identity and freedom of expression, and adopt all necessary measures so that such recognition:

- (a) Is based on self-determination by the applicant;
- (b) Is a simple administrative process;
- (c) Is not connected with abusive requirements, such as medical certification, surgery, treatment, sterilization or divorce;
- (d) Includes the acknowledgement and recognition of non-binary identities in their full diversity and specificity;
- (e) Ensures that minors have access to recognition of their gender identity.

92. The Independent Expert recommends that States redouble their efforts to dismantle any remnants of pathologization in relation to sexual orientation and/or gender identity.

93. The Independent Expert recommends that States redouble efforts to carry out monitoring and evaluation of gender-based approaches in public policy, law, and access to justice, and ascertain their efficiency and effectiveness in addressing and being conducive to eradicating gender-based violence and discrimination. Attention should

¹¹⁵ Universal Declaration of Human Rights, art. 1.

be paid to the way that differently situated persons face gender discrimination, whether cisgender, trans or gender-diverse, heterosexual or homosexual, in order to ensure specific understanding of elements of both prevention and redress.

94. **The Independent Expert further recommends that States create and uphold an enabling environment for civil society organizing for the rights of trans, non-binary and gender-nonconforming persons, and respect and protect their right to freedom of assembly and association. States should support civil society organizations led by and serving LGBT and intersex persons through robust funding opportunities and capacity-building training.**

Annex I

Activities 2020–2021

1. Violence and discrimination based on sexual orientation and gender identity are never justified and must be prevented, prosecuted and punished and, if relevant, be at the base of measures of reparation.
2. Since his last report to the Human Rights Council in 2020, the Independent Expert increased his virtual presence and made every possible effort to reach people, communities and populations unable to travel as a result of the COVID-19 pandemic and the connected response and recovery measures. At the outset of the pandemic, he organized three virtual Town Hall meetings on 30 April and 1 May about its impact on LGBT people. He organized a virtual expert meeting on the topic of monitoring & evaluation for the activities of the mandate on 29 and 30 September and virtual consultation to collect input for the drafting of the mandate's 2021–2023 Work Plan on 20 November.
3. The Independent Expert organized seven virtual events in English or Spanish, including some with French or Portuguese interpretation, to increase the visibility of his work on the impact of the COVID-19 pandemic on LGBT persons, on practices of “conversion therapy”, and on the situation of LGBT persons in Ukraine. These events brought together thousands of participants from all regions of the world. For instance, the launch events of the report on practices of “conversion therapy” in June 2020, garnered the participation of about 430 persons and more than 26.000 views on social media.
4. In June and October 2020, the Independent Expert participated in virtual interactive dialogues with the Human Rights Council and the General Assembly. Throughout the year, he also maintained virtual contact with representatives of United Nations entities, CSOs, and business leaders. At the regional level, activities were carried out with the OAS and its LGBTI Core Group, the IACHR, and the Council of Europe and European institutions. Dozens of bilateral exchanges with representatives of Member States were also held.
5. At the domestic level, the work on practices of “conversion therapy” provides an example of the manner in which the mandate hopes to add value to ongoing efforts. With the support of UN and national partners, the respective report was presented to audiences in Mexico, Indonesia, Malaysia and Peru. Since the publication of the mandate's report on the issue, legislation has been adopted in Germany and Mexico, and the mandate has engaged with parliamentary commissions working on the issue in Canada, France and The Netherlands. In October 2020, the European Parliament's Intergroup on LGBTI rights requested the European Commission to act on the mandate's recommendation for a global ban through legislation or public policy. Work with parliaments has also been done in Colombia, where the mandate presented its opinion in a hearing focussing on the implementation of the National Human Rights Action Plan and the components related to LGBT persons, and Peru, where it held a dialogue with a parliamentary commission on his findings concerning these heinous practices.
6. Since May 2020, the Independent Expert attended parliamentary hearings on the impact of COVID-19 (Congress of the Republic of Colombia); combating rising hate against LGBTI people in Europe (Committee on Equality and Non-Discrimination of the Parliamentary Assembly of the Council of Europe); and the European Commission's LGBTIQ Equality Strategy 2020–2025 (European Economic and Social Committee).
7. At the invitation of UN leadership, OHCHR, the International Organization for Migration (IOM), the Joint United Nations Programme on HIV/AIDS (UNAIDS), the United Nations Development Programme (UNDP), the World Bank and other multilateral development banks, and the Commonwealth Secretariat (often in partnership with Governments, Parliaments, academia, and civil society partners), the Independent Expert took part in 13 meetings and events covering key issues, such as the importance of UN system-wide action on advancing the human rights of LGBT people, the impact of COVID-19 on LGBT persons, human rights and HIV/AIDS, data for equality, business and human rights, the role of parliamentarians in building more inclusive societies, hate speech,

reparations, sexual orientation and gender identity in countries affected by fragility, conflict and violence and the situation of LGBT persons in Latin America, the Caribbean and francophone West Africa.

8. Between 1 May 2020 and 30 April 2021, at the invitation of Member States, government representatives, academia, and CSOs, the Independent Expert delivered five keynote addresses and participated in 55 panels and presentations during which he engaged with hundreds of stakeholders from all corners of the world. Among these events, 13 were on the impact of the COVID-19 pandemic on LGBTI people, six on practices of “conversion therapy”, two on the criminalization of LGBT persons, three on hate crimes against LGBTI persons in Latin America and the Caribbean, three on faith, and two on LGBTI persons and the development agenda. The latter included the first-ever side-event organised by the LGBTI Stakeholder Group within the framework of the High-Level Political Forum.

9. During the reporting period, the Independent Expert gave more than 40 in-depth interviews for television, radio and print media and issued essays, video messages and op-eds relevant to the mandate, and developed an active social media presence, and the data available shows that the mandate has built an audience across different regions of the world. He also issued 19 individual or joint official press releases and media statements, including one thematic statement on the impact of the pandemic on LGBT persons issued on the occasion of the 2020 International Day against Homophobia, Transphobia and Biphobia, which was joined by a group of 96 United Nations and regional independent experts.

10. The Independent Expert sent 25 communications in which allegations of human rights violations in relation to sexual orientation and gender identity were raised with other Special Procedures and/or by which he sought to provide technical advice on legislation and policies.

Annex II

The mandate's research on gender theory

1. The present report and the report to the 76th session of the General Assembly are complementary.
2. With this report, the Independent Expert provides an analysis of the current state of international human rights law in relation to the recognition of gender, gender identity and expression, and its connection with the struggle against violence and discrimination in its numerous forms. This analysis will provide the foundation for the examination of narratives of resistance to the use of gender theory that the Independent Expert will carry out in his report to the General Assembly.
3. In his report to the 76th session of the General Assembly, the Independent Expert will highlight how anti-gender narratives and the preconceptions, stigma and prejudice that underpin them create risks to the protection of all women, including lesbian, bisexual and trans women, and to the eradication of all forms of violence and discrimination. He will also highlight how resistance to and attacks against gender theory and related gender-based approaches, including gender identity and expression, are likely to create significant damage.
4. The first part of the report to the General Assembly will analyse the impact of anti-gender narratives on the human rights framework and the progressive interpretation of human rights standards, especially relating to gender equality and sexuality. He will also examine the impact of such narratives on efforts to combat violence and discrimination based on sexual orientation, gender identity and expression.
5. More specifically, the Independent Expert will examine processes of dehumanization and the emergence of narratives that seek to separate human rights-based approaches on sexual orientation from those on gender identity, seeking to exclude trans and gender diverse persons from the protection derived from the implementation of gender theory.
6. He will also examine how the three institutional drivers for the perpetuation of stigma and discrimination identified by the mandate, i.e. criminalization, pathologization, and demonization, interact with the narratives of gender ideology and how narratives of exclusion percolate to all sectors of State action and enable the adoption of regressive laws and restrictive policies.
7. In doing so, he will counterpose the narrative of a “natural” order based on biological determinism that predetermined the fate of women and men on the basis of their reproductive abilities with the principles of equality, freedom, bodily autonomy and bodily integrity. Further, he will examine narratives that contrapose rights-based approaches to alleged cultural and religious norms. He will show how “othering” mechanisms and the narrative of traditional values is used to justify discrimination or violence based on gender identity and expression, or sexual orientation.
8. In the second part of his report, the Independent Expert will analyse claims that challenge the connection between gender theory in international human rights law with its connection with gender identity and gender expression theory. He will examine the use of narratives based on allegations of speculative or potential harms that could result from protecting the rights of trans persons, in particular that:
 - (a) The legal recognition of children's gender identity allegedly threatens their well-being;
 - (b) Legal recognition of the gender identity of trans women based on self-identification allegedly threatens the rights of all women and girls who do not identify as trans;
 - (c) Trans women allegedly threaten spaces designed to protect women from violence and discrimination;
 - (d) The existence of trans women allegedly threatens the recognition of the lives of cis women and, in some cases, their safety;

(e) The existence of trans women allegedly threatens women's sports.

9. Throughout his report, the Independent Expert will recall the foundations of international human rights law presented in the present report to deconstruct and oppose anti-gender narratives and allegations that are mostly based on speculation, assumptions, or harmful and negative stereotypes about trans persons that are used to fuel misconceptions and perpetuate stigma.
