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JOINT NGO SUBMISSION IN RESPONSE TO THE CALL FOR INPUT BY THE INDEPENDENT EXPERT ON PROTECTION AGAINST VIOLENCE AND DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY

In response to the call for contributions¹ by the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, CREA, Amnesty International, IWRAP-Asia Pacific and the Global Health Justice Partnership of Yale Law School and the Yale School of Public Health,² put forward this submission for consideration in the upcoming thematic report on gender, sexual orientation and gender identity (SOGI), to inform the Independent Expert's report to be presented to the 47th session of the Human Rights Council.

The submitting organizations are committed to promoting the universality of human rights and to ensuring that no experience of gender-based human rights violations and abuses is neglected. Our submission reaffirms the importance of UN human rights mechanisms taking a broad interpretation of gender and an intersectional approach in their human rights work. It also reaffirms the equal worth and dignity of all human beings regardless of their gender, sexual orientation, gender identity, expression or sex characteristics.

Gender discrimination works together with other vectors of discrimination, including those based on race, age, sexual orientation, citizenship, religious belief, ethnic identity, health status, and (dis)ability. Discrimination in all its guises offends the dignity and equal worth of human beings.

Our organizations 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, gender diverse and people with intersex characteristics which 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, in order to: minimize protection gaps and enable human rights developments that are responsive to the full range of gender-based human rights violations and abuses; to facilitate greater analytic clarity, better protection against the specific harms experienced through gender stereotyping by a diverse range of persons; and finally to promote the goals of feminist, women's rights, human rights and LGBTI rights organizations overall.

The submitting organizations are all engaged in the current discussion about how the concepts of gender, sexual orientation, gender identity and expression and sex characteristics, as deployed in the SOGI context, are to be understood to create better synergies with the gender analyses which have arisen from women's rights movements and feminist frameworks globally. To inform the Independent Expert's report, we would like to provide our analysis of some of the key questions and types of input sought.

In this submission, we are primarily responding to questions 8 and 10 of the Independent Expert's call, providing examples where the concept of "gender" or narratives of "gender ideology" have been used in religious narratives or narratives of tradition, traditional values or protection of the family to hinder the adoption of legislative or policy

¹ See <https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/GenderTheory.aspx>

² See CREA, <https://creaworld.org/>; Amnesty International, <https://www.amnesty.org/en/>; IWRAP-Asia Pacific, <https://www.iwraw-ap.org/>; and Global Health Justice Partnership of Yale Law School and Yale School of Public Health, <https://law.yale.edu/ghjp>

measures aimed at addressing or eradicating violence and discrimination based on sex, gender, sexual orientation and gender identity. We stress that while differently situated persons may face specific attacks or barriers to exercising their rights, our submission highlights the extent to which there are common roots and rights limiting practices in the ideology underlying the attacks, such that a comprehensive analysis can help build solidarity amongst those facing attacks as well as a more effective rights framework with which to respond.

1. NARRATIVES ABOUT “GENDER” AND “GENDER IDEOLOGY” USED TO RESTRICT RIGHTS AND BLOCK PROGRESSIVE DEVELOPMENTS

Everyone is subject to the gender stereotypes that are culturally and socially dominant in their particular context. This means that everyone has a gender identity, including those who identify as women, men, trans*, third gender, intersex and gender non-specific. However, the concept of “gender” has been purposefully misrepresented in order to serve as a core tactic and ideological tool for the proponents of the narrative that the so-called “gender ideology” will destroy nations and families. This narrative, originally crafted by scholars close to the Holy See, and building off of movements to restrict abortion rights, has been actively promoted by various interest groups (comprising the anti-gender movement) and some governments. The narrative uses an emotive framing to engage public opinion and lobby for regressive legal and policy change across countries and regions globally. It blames the so-called “gender ideology” for aiming to destroy “traditional” values, family and society and to erase the “natural” difference between individuals and cultures. This narrative has served as a rallying cry to attack everything from abortion to gender equality, LGBTI rights and comprehensive sexuality education. This coordinated attack on “gender” has been employed to negate the reality of unequal gender power relations embedded in families and communities, social and cultural structures, and state institutions. The goal is to block efforts by multiple social justice movements to hold states to account in addressing gender discrimination and violence, and underlying structural inequalities as part of their international legal obligations.

This distorted interpretation of what “gender” means as a socially constructed category leads to rejection of the concept of “gender-based violence” as violence grounded in gender inequalities, fueled by gender power differentials and deployed as a mechanism to maintain a gender unequal and heteronormative social order. In this framework, the concept of “gender equality” is replaced with “gender complementary” (a concept promoted by the Holy See meaning women and men are not equal but rather have complementary social roles). LGBTIQ+ persons are disappeared in this complementary system. Policies to prevent and combat gender-based violence are considered not a means to achieve substantive equality but simply a harm-reduction strategy, or in other cases even the reality of gender-based violence is fully denied.

Unfortunately, the anti-gender movement lobbying efforts have resulted in some regressive developments in different countries. For example:

In Europe, several countries have contested and rejected the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) on the grounds that it promotes the term “gender” in conjunction with “gender identity”. They argue the Istanbul Convention thus opens the door for legalizing same-sex marriages and for individuals to freely choose their gender/gender identity in a manner delinked from biological sex, posing a threat to children’s identities, “traditional family”, “traditional values”, and social reproduction. Debates around the alleged threats posed by the ratification of the Istanbul Convention have occurred in an identical manner in Croatia (where the Convention was ultimately ratified),³ Ukraine (not ratified

³ Alcalde, M. and J. Šarić (2018, April 9), The Istanbul Convention in Croatia: Attending to the anxiety in the intersection of belief and policy-making, LSE Religion and Global Society blog, available at: <https://blogs.lse.ac.uk/religionglobalsociety/2018/04/the-istanbul-convention-in-croatia-attending-to-the-anxiety-in-the-intersection-of-belief-and-policy-making/>

yet),⁴ Slovakia (ratification rejected by Parliament),⁵ Hungary (Parliament adopted a political declaration rejecting the Convention)⁶ and Bulgaria (where the Constitutional Court declared it not in conformity with Bulgarian constitution).⁷ In Poland and Turkey, which had already been parties to the Convention, debates were centered around whether the countries should withdraw from the Convention. This culminated in Turkey's withdrawal notification submitted to the Council of Europe Secretariat-General on 21 March 2021.⁸ In Poland, the bill on the withdrawal from the Istanbul convention is currently discussed in the lower chamber of the parliament and the first vote is scheduled for 30 March 2021.⁹ The government is supporting it. The bill was tabled after Poland's PM had submitted a request to the Constitutional Tribunal to determine whether the Convention is in accordance with the country's constitution.¹⁰ Additionally, the Polish government tries to promote among other like-minded states the creation of a new family rights treaty to replace the Istanbul Convention.¹¹

As exposed by the European Parliamentary Forum for Sexual and Reproductive Rights (EPF), the anti-gender movement has developed a specific strategy for Europe called "Restoring the Natural Order: an Agenda for Europe", which seeks to campaign for overturning existing laws and policies guaranteeing sexual and reproductive rights through maximizing on opportunities arising in every country such as forthcoming ratifications of the Istanbul Convention or other ongoing legal and policy reforms.¹² The controversy and debates around the Istanbul Convention and the term "gender" in the countries and at European level also revealed that the anti-gender movement doesn't shy away from opening a united front against gender rights affecting both women and LGBTIQ+ communities. Notably, the tactics used by some advocates to present the Istanbul Convention as a treaty focused solely on women's protection from violence against women (VAW) and domestic violence (DV) as opposed to protection of all individuals from Gender Based Violence (GBV) more broadly, didn't make the Convention more acceptable for the governments opposing it or for the anti-gender movement. Unfortunately, this approach is instead a failed opportunity to examine the root causes behind all GBV and denial of human rights to both women and LGBTIQ+ people.

In Hungary and Poland, specific legal and policy reforms were enacted to restrict LGBTI rights while in Bulgaria the Constitutional Court's decision has a further reaching impact than simply stopping the ratification of the Istanbul Convention.

In Poland, the "gender ideology" narrative was introduced by the Catholic Church to spark a debate about the deepening crisis of family and society as early as 2013.¹³ The Law and Justice party's government made several attempts to further restrict access to abortion and criminalize sexuality education¹⁴ The Polish Constitutional Tribunal's ruling invalidating the constitutionality of access to abortion on the ground of "severe and irreversible

⁴ Ketelaars, E., (2018, September 26), When 'European values' do not count: Anti-gender ideology and the failure to comprehensively address GBV in Ukraine, LSE Engenderings blog, available at: <https://blogs.lse.ac.uk/gender/2018/09/26/when-european-values-do-not-count-anti-gender-ideology-and-the-failure-to-comprehensively-address-gbv-in-ukraine/>

⁵ Patriculo, C. (2019, November 29), Slovakia again refuses to ratify Istanbul Convention, Emerging Europe, available at: <https://emerging-europe.com/news/slovakia-again-refuses-to-ratify-istanbul-convention/>

⁶ Agence France-Presse in Budapest (2020, May 5), Hungary's parliament blocks domestic violence treaty, The Guardian, available at: <https://www.theguardian.com/world/2020/may/05/hungarys-parliament-blocks-domestic-violence-treaty>

⁷ Bulgarian Helsinki Committee, NGOs in Bulgaria Condemn Constitutional Court Decision Rejecting Istanbul Convention, 30 July 2018, available at: https://www.bghelsinki.org/en/news/20180730-press-istanbul-convention_EN/

⁸ Statement by the Directorate of Communications on Turkey's Withdrawal from the Istanbul Convention, 20 March 2021, available at: <https://www.iletisim.gov.tr/english/duyurular/detay/statement-by-the-directorate-of-communications-on-turkeyes-withdrawal-from-the-istanbul-convention>

⁹ See Polish Parliament website: <http://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=915>.

¹⁰ Polish tribunal to examine constitutionality of treaty against domestic violence (2020, July 31), Notes from Poland, available at: <https://notesfrompoland.com/2020/07/31/polish-tribunal-to-examine-constitutionality-of-treaty-against-domestic-violence/>

¹¹ Ciobanu, C. (2020, October 6), BIRN, Poland begins push in region to replace Istanbul Convention with "family rights" treaty, available at: <https://balkaninsight.com/2020/10/06/family-rights-treaty/>

¹² European Parliamentary Forum for Sexual and Reproductive Rights, "Restoring the Natural Order": The religious extremists' vision to mobilize European societies against human rights on sexuality and reproduction, available at: <https://www.epfweb.org/node/175>

¹³ See Odrowaz-Coates, Anna. (2015). Gender Crisis in Poland, Catholic Ideology and the Media. *Sociology Mind*. 5. 27-34. 10.4236/sm.2015.51004

¹⁴ Amnesty International, Poland: Abortion ban and regressive sexuality education laws must not be rushed through under cover of COVID-19, 14 April 2020, available at: <https://www.amnesty.org/en/latest/news/2020/04/poland/>

fetal defect or incurable illness that threatens the fetus' life" came into force in January 2021.¹⁵ The ruling party supported a bill that criminalizes any type of sexuality education or campaigning on matters connected with sexuality.¹⁶ One third of the municipalities in Poland have adopted resolutions against "LGBT propaganda" and declared themselves "LGBT-free zones" supportive of "natural family".¹⁷ Moreover, the same analytic framework has generated the attacks on the LGBTI community, with an increase in hate speech and hate crimes fueled by the ruling party over the last two years.¹⁸ Women human rights defenders have been prosecuted, including for distributing posters of the Virgin Mary with a rainbow halo,¹⁹ and women's rights activists were arrested and prosecuted for peacefully protesting the Constitutional Tribunal's decision, which effectively introduced a near-total ban on abortion.²⁰

In Hungary, anti-gender narratives have been systematically employed by Viktor Orbán's government while attempts to advance gender rights were portrayed in the media and in public discourse as a dangerous ideology threatening "Christian and Hungarian values".²¹ At the annual congress of the ruling party Fidesz in 2015, the Speaker of the Hungarian Parliament declared that the highest form of self-fulfillment of women is to give birth, complaining about the spread of "gender madness" in Europe.²² Politicians in government have habitually promoted women's role as primarily mothers and wives and undermined gender equality ever since.²³

A smear campaign with the same root elements has been concurrently underway against LGBTI people, and the Speaker of the Parliament compared same-sex marriage and adoption to pedophilia.²⁴ In December 2020, amendments to the Fundamental Law were passed which stipulate that children's gender identity is restricted to their sex assigned at birth, and their upbringing must reflect the values enshrined in Hungary's constitutional identity and Christian culture and that family ties must be based on marriage, where "the mother is a woman and the father is a man."²⁵ An omnibus bill adopted in December 2020 stipulates that only married couples should be allowed to adopt children, while single people can adopt only by special permission of the Minister without Portfolio for Family Affairs. This prevents LGBTI people from adopting children, as same-sex marriage is not legalized in Hungary, and same-sex partnerships do not contain adoption rights. Previously LGBTI people could adopt children, but not as a couple and only as individuals. This also violates children's rights, including to private and family life.²⁶

Hate-motivated attacks by violent far-right groups against LGBTI persons and feminists have become frequent and borrow from the same "anti gender-ideology" script. In 2012, Budapest Pride was banned by police though later the

¹⁵ Amnesty International, Poland's Constitutional Tribunal Rolls Back Reproductive Rights, 22 October 2020, available at: <https://www.amnesty.org/en/latest/news/2020/10/polands-constitutional-tribunal-rolls-back-reproductive-rights/>

¹⁶ Czuchnowski, W, and P.Kośmiński (2019, October 15), PiS chce pięciu lat więzienia za edukację seksualną. Projekt ustawy na ostatnim posiedzeniu Sejmu, Gazeta Wyborcza, available at: <https://wyborcza.pl/7,75398,25311941,pis-chce-pieciu-lat-wiezienia-za-edukacje-seksualna-projekt.html?disableRedirects=true>

¹⁷ Ciobanu, C. (2020, February 25), A third of Poland declared 'LGBT-free zone', BIRN, available at: <https://balkaninsight.com/2020/02/25/a-third-of-poland-declared-lgbt-free-zone/>

¹⁸ Polish election: Andrzej Duda says LGBT 'ideology' worse than communism, BBC, 14 June 2020, available at: <https://www.bbc.com/news/world-europe-53039864>. See also Amnesty International, Statement on the incidents in Warsaw on the night of August 7-8, 2020 after the arrest of the LGBT + activist, Margot, available at: <https://amnesty.org.pl/oswiadczenie-w-sprawie-zajsc-w-warszawie-w-nocy-z-7-na-8-sierpnia-2020-r-po-zatrzymaniu-aktywistki-lgbt-margot/>. See also <https://rownosc.org.pl/wp-content/uploads/2020/11/Dyskryminowanie.-Sytuacja-osob-LGBTQIA-w-Krakowie.pdf>

¹⁹ Amnesty International, Poland: Rainbow halo women's acquittal shows tactics of intimidation against activists, 2 March 2021, available at: <https://www.amnesty.org/en/latest/news/2021/03/poland-rainbow-halo-womens-acquittal-shows-tactics-of-intimidation-against-activists/>

²⁰ Gera, V. (2021, February 12), Women's rights activist charged for role in Polish protests, ABC news, available at: <https://abcnews.go.com/Health/wireStory/womens-rights-activist-charged-role-polish-protests-75822878>

²¹ Viktor Orbán expands Hungary's anti-LGBTQ+ measures, 21 May 2020, Deutsche Welle, available at: <https://www.dw.com/en/viktor-orban-expands-hungarys-anti-lgbtq-measures/a-53526969>

²² See video recording in Hungarian here: <https://444.hu/2015/12/13/kover-nem-akarunk-genderoruletet>

²³ Grzegorzczuk, M. (2020, December 17), Another dark week for human rights in Hungary, Emerging Europe, available at: <https://emerging-europe.com/news/another-dark-week-for-human-rights-in-hungary/>. See also Pivarnyk, B. (2018, 4 July), Family and gender in Orbán's Hungary, The Heinrich Böll Foundation, available at: <https://www.boell.de/en/2018/07/04/family-and-gender-viktor-orbans-hungary>

²⁴ Hungarian Parliament speaker's homophobic comments spark outrage, Kafka Desk, 19 May 2019, available at: <https://kafkadesk.org/2019/05/19/hungarian-parliament-speakers-homophobic-comments-spark-outrage/>

²⁵ Amnesty International, Hungarian Parliament must reject amendments further undermining the rights of LGBTI people (Index: EUR 27/3353/2020), 26 November 2020, available at: <https://www.amnesty.org/en/documents/eur27/3353/2020/en/>

²⁶ Amnesty International, NGOs stand together for children's right to grow up in a family, 20 November 2020, available at: <https://www.amnesty.hu/civil-szervezetek-egyutt-allnak-ki-a-gyermekek-jogaert-hogy-csaladban-nohessenek-fel/>

ban was successfully challenged in court.²⁷ Since then, far right groups have routinely disrupted the events of Pride Month. In 2017, a special law was adopted to allow expelling the Central European University (CEU) from Hungary. In 2018, the gender studies programme at a public university (Eötvös Loránd University) was also banned and thus gender studies programmes were removed from all universities.²⁸ In May 2020, the Hungarian parliament adopted a political declaration rejecting the Istanbul Convention on the grounds it defines "gender" as a social construct,²⁹ and passed a bill that denies access to legal gender recognition for transgender and intersex people.³⁰ The ban on legal gender recognition has a serious impact on the lives of trans people.³¹

In Bulgaria, the decision by the Constitutional Court declaring the Istanbul Convention incompatible with the Bulgarian Constitution on the grounds the Constitution recognizes biological sex but not gender (a spurious argument, not grounded in the actual text of the Constitution, as reflected in the dissenting opinion by four members of the Constitutional Court)³² had far reaching implications. This effort to limit protections against discrimination to sex, as if that category was biologically unquestionable, has created legal uncertainty around the country's human rights obligations under other treaties which recognize gender as a basis for discrimination, as well as in what way the Constitutional Court decision must be applied to what had been a settled practice of legal gender recognition of transgender persons. As a result, in March 2021 the Supreme Court of Cassation requested clarification from the Constitutional Court on the legal definition of gender/sex and how it is applicable in cases of legal recognition of transgender people in accordance with Bulgaria's international legal obligations under various treaties. The Constitutional Court decision came after a targeted campaign by a range of interest groups including local offshoots of US-based organizations campaigning against LGBTI rights. As part of this campaign, LGBTI people were severely stigmatized, and the word "gender", although lacking an equivalent in Bulgarian, was turned into an insult designating these communities,³³ while hate speech against LGBTI people and attacks on LGBTI organizations and activists became more frequent. The fact that a struggle over a convention addressing VAW turned into a site for restriction of transgender rights must be noted as evidence of the way gender rights claims are in fact, analytically and politically joined.

In some African countries, arguments around traditional values have similarly been employed to negate the reality of unequal gender power relations embedded in families and communities, social and cultural structures, and state institutions. With growing regularity, a number of African states have often relied on "African values and traditions" and public morality as a basis for their failure to respect, protect and fulfil the rights of LGBTI persons and women and girls.³⁴ Although they often use this rhetoric to retain laws that criminalize consensual same-sex sexual acts, notably, these same claims around "African values, traditions and public morality" have been regularly advanced to hinder efforts to intervene in and name intimate partner violence as a human rights violation, and take appropriate steps to end harmful practices including female genital mutilation and early, forced and child

²⁷ Speaker of Hungarian Parliament: Fighting for LGBT adoption is morally equivalent to paedophilia

https://index.hu/english/2019/05/17/speaker_of_hungarian_parliament_a_normal_homosexual_does_not_regard_himself_as_equal/

²⁸ Hungary's university ban on gender studies heats up culture war, Deutsche Welle, 18 October 201, available at: <https://www.dw.com/en/hungarys-university-ban-on-gender-studies-heats-up-culture-war/a-45944422>

²⁹ Hungarian Parliament refuses to ratify the Istanbul Convention for its asylum provisions and inclusion of gender, Index, 5 May 2020, available at: https://index.hu/english/2020/05/05/istanbul_convention_rejected_parliament_hungary_fidesz_kdnp/?fbclid=IwAR3XJAcUNaw7cfMniUrg

³⁰ Amnesty International, Hungary: Decision to strip trans people of the right to legal gender recognition is "step back into the dark ages", 19 May 2020, <https://www.amnesty.org/en/latest/news/2020/05/hungary/>

³¹ Amnesty International, The reality for trans people in Hungary, 1 June 2020, available at: <https://www.amnesty.org/en/latest/campaigns/2020/06/the-reality-for-trans-people-in-hungary/>

³² Smilova, R. (2018, August 22), Promoting 'Gender Ideology': Constitutional Court of Bulgaria Declares Istanbul Convention Unconstitutional, Oxford Human Rights Hub, available at: <https://ohrh.law.ox.ac.uk/promoting-gender-ideology-constitutional-court-of-bulgaria-declares-istanbul-convention-unconstitutional/>

³³ Stojanovski, F. (2019, May 10), How the word 'gender' became a slur in Bulgaria, Global Voices, available at: <https://globalvoices.org/2019/05/10/how-the-word-gender-became-a-slur-in-bulgaria/>

³⁴ See, for instance, *Letsweletse Motshidiemang v The Attorney-General* (LEGABIBO as amicus curiae) MAHGB-000591-16) para 72. Esterhuizen T. 'Decriminalisation of consensual same-sex sexual acts and the Botswana Constitution: *Letsweletse Motshidiemang v The Attorney-General* (LEGABIBO as amicus curiae)' (2019) *African Human Rights Law Journal*, Vol. 19, No. 2, 843-861, p. 857. See *Attorney General v Rammoge and 19 Other* Court of Appeal of the Republic of Botswana, Civil Appeal No. CACGB-128-14 (2016) and *Non-Governmental Organizations Co-Ordination Board v EG & 5 others* [2019] eKLR (EG)

marriage, and ensure access to sexual and reproductive rights.³⁵ This is despite specific obligations on states to address gender stereotypes and “remove socio-cultural structures and norms that promote and perpetuate gender-based inequality” under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) and other international human rights instruments. This failure of states in the African context is clearly applicable to the work to end discrimination against lesbians, for example, for whom barriers to equality include intersectional discrimination based on gender and sexual orientation, as well as notions of femininity, patriarchal ideas about reproduction and women's responsibility and natural role.

The 2018 decision by the African Commission on Human and Peoples' Rights (African Commission) to heed the African Union's (AU) request to withdraw the observer status of the Coalition of African Lesbians (CAL) is an example.³⁶ The decision came after the Executive Council of the AU asked the African Commission to withdraw the status given to CAL, in order to “take into account the fundamental African values, identity and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values”.³⁷

The African Commission's decision to withdraw the observer status of CAL on these bases, raises concerns around adverse impact and far-reaching implications it may have for LGBTI rights as well as women's rights more generally on the African continent, including rights to freedom of expression, association and assembly. The decision, at least in part, reinforces an existing anti-gay rhetoric and negative attitude towards civil society. It may fuel homophobia and transphobia based on real or perceived sexual orientation and gender identity and expression. On a national or domestic level, it may demonstrate to many African states that denial and violations of rights and freedoms of women and LGBTI persons on the basis of public morality or African values and traditions, are justified.

In Zambia, in February 2019, the Zambian Minister of Religious Affairs and National Guidance, Rev Godfridah Sumaili, advised Multichoice Zambia to discontinue a TV reality show called Lusaka Hustler - where one of the lead characters is an openly gay man - on the perception that it promotes homosexuality and immoral behaviour. According to reports, Rev Godfridah Sumaili proclaimed that “Our stand as a Christian nation is clear and the laws of the land speak louder”.³⁸

In several other cases, national courts have contributed to advancement of the rights of LGBTI persons by adopting an inclusive understanding of gender and by upholding values such as the dignity of every human being. In 2019, the High Court of Zimbabwe affirmed that human rights apply to all people, and that transgender people are part of society and are equally entitled to have their constitutional rights protected and respected.³⁹ Botswana's Court of Appeal expressed a similar view and rejected the government's contention that registering, Lesbians, Gays, and Bisexual of Botswana (LEGABIBO) as the country's first public LGBTI organization, would disturb public peace and was contrary to public morality or religious views. Instead, the Court stressed, “members of the gay, lesbian and transgender community...form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity”.⁴⁰ In response to arguments around morality

³⁵ African Commission on Human and Peoples' Rights, General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, para 22 <https://www.achpr.org/legalinstruments/detail?id=13>

³⁶ The African Commission, meeting at its 24th Extraordinary Session held 30 July–8 August 2018 in Banjul, The Gambia, adopted a decision on the withdrawal of the Observer Status granted to CAL and notified the latter thereof by letter referenced ACHPR/STC/OBSWID/1181/18 and dated 8 August 2018. See also 45th Activity Report of the African Commission on Human and Peoples' Rights, 10 May–13 November 2018, para 61. Available at: https://www.achpr.org/public/Document/file/English/45th%20Activity%20Report_ENG.pdf

³⁷ Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights, Doc.EX.CL/921 (XXVII). See also, The African Commission, meeting at its 24th Extraordinary Session held 30 July–8 August 2018 in Banjul, The Gambia, adopted a decision on the withdrawal of the Observer Status granted to CAL and notified the latter thereof by letter referenced ACHPR/STC/OBSWID/1181/18 and dated 8 August 2018. See also 45th Activity Report of the African Commission on Human and Peoples' Rights, 10 May–13 November 2018, para 61. Available at: https://www.achpr.org/public/Document/file/English/45th%20Activity%20Report_ENG.pdf.

³⁸ 'Reality TV show banned for 'promoting gayism'', *Mamba Online*, 7 February 2019. <https://www.mambaonline.com/2019/02/07/zambia-reality-tv-show-banned-for-promoting-gayism/>

³⁹ *Ricky Nathanson v Farai Mteliso and Commissioner of General Police and others* HB 176/1 HC 1873/14.

⁴⁰ *Attorney General v Rammage and 19 Other* Court of Appeal of the Republic of Botswana, Civil Appeal No. CACGB–128–14 (2016) para 60.

and religion and the right of LGBTI persons to freely associate, Kenya's Court of Appeal also emphasized that in a diverse society such as Kenya, there is a need for tolerance of difference.⁴¹

In Latin America and the Caribbean, a range of interest groups including Catholic and evangelical faith-based groups have been campaigning to roll back progress made on gender equality and sexual and reproductive rights and have been gaining momentum and political clout. These groups have united to mount a coordinated assault against what they call "gender ideology", which we described above as a catch-all term that has served as the basis for a rallying cry to attack everything from abortion to gender equality, LGBTIQ+ rights and comprehensive sexuality education across the region as in other contexts.

With the support of both Catholic and evangelical churches across the region, as well as, in many cases, international Christian lobby groups composed principally of fundamentalist evangelical elites based in the USA,⁴² these groups have made progress for their agenda on multiple fronts and in numerous countries across the region. To highlight just a few examples, in 2017, the Minister of Education in Paraguay removed all materials from the national curriculum related to "gender" in response to proactive campaigning by anti-gender groups.⁴³ These groups also played a key role in the rejection the Peace Agreement in Colombia in 2016 after claiming that "gender ideology" had been "encrypted" into the Agreement,⁴⁴ and they led effective litigation strategies, including one in Peru where they challenged the inclusion of a gender perspective ("enfoque de género") in the new school curricula, which made it all the way to the Supreme Court (who ultimately rejected it).⁴⁵

The surge of this movement against gender equality and sexual and reproductive rights is part of a regional trend of intensifying discourses against human rights, demonizing and blaming entire groups of people, including ethnic minorities, refugees and migrants, feminists, LGBTIQ+ people, and human rights defenders, for raising social or economic grievances.

2. THE IMPACT OF ANTI-GENDER / ANTI-RIGHTS NARRATIVES AND MOBILIZATION ON SEXUAL AND REPRODUCTIVE RIGHTS OF PEOPLE REGARDLESS OF THEIR REAL OR PERCEIVED SEXUAL ORIENTATION, GENDER IDENTITY AND/OR GENDER EXPRESSION

Feminist thinking, informed by scholarship on how SOGI rights are connected to the same assembly of gender stereotyped assumptions that govern sexuality and gendered conduct, has guided our analysis of how the concept of gender pertains to everyone, and must be applied so as to identify all forms of gender-related violence and discrimination. As our organizations have previously jointly expressed to the Special Rapporteur on violence against women, our analysis also stresses the importance of a broad understanding of "gender-based violence" that is inclusive of violence targeting persons because of their real or perceived sexual orientation, gender identity and/or gender expression.⁴⁶

⁴¹ *Non-Governmental Organizations Co-Ordination Board v EG & 5 others* [2019] eKLR, pp 80 -81. According to Makhandia JA that "[o]nce we, as a society understand there are people, whose sexual orientation is different from the norm and human rights belong to all persons by virtue of them being human beings, it will be easier to respect their fundamental rights and freedoms."

⁴² See <https://transnacionalesdelafe.com/>; <https://www.opendemocracy.net/en/5050/from-the-us-to-peru-these-parent-groups-targeting-sex-education-are-all-backed-by-the-christian-right/>; <https://www.opendemocracy.net/en/5050/revealed-trump-linked-us-christian-fundamentalists-pour-millions-of-dark-money-into-europe-boosting-the-far-right>

⁴³ Cariboni, D. (2021, January 28), How Paraguay became a 'lab for anti-rights ideas', Open Democracy, available at: <https://www.opendemocracy.net/en/5050/how-paraguay-became-a-lab-for-anti-rights-ideas/>, <https://www.opendemocracy.net/en/5050/how-paraguay-became-a-lab-for-anti-rights-ideas/>

⁴⁴ Schmidt, R., What battles over "gender ideology" mean for Colombia's women human rights defenders, Open Global Rights, available at: <https://www.openglobalrights.org/gender-ideology-and-colombias-women-human-rights-defenders/>

⁴⁵ El Comercio (2019), *Corte Suprema declara infundada demanda contra enfoque de género en currículo*

⁴⁶ See CREA, Amnesty International, RESURJ, IWRAP-AP, Yale Global Health Justice Partnership, Joint Submission to the UN Special Rapporteur on Violence against Women Thematic Report on "Rape as a grave and systematic human rights violation and gender-based violence against women", www.amnesty.org/en/documents/ior40/2390/2020/en/

Existing criminal legal systems tend to rely on binary understandings and privilege addressing certain harms and certain victims/survivors over others, thus having a discriminatory impact, and leaving large groups of people unprotected from violence. Many laws, policies and practices are sex-specific and/or are enforced in a manner that presumes men are perpetrators and victims are women, leaving men and boys (and gender non-conforming/non-binary people) who are at risk of or have been subjected to GBV in precarious situations. These legal approaches can also invisibilize particular forms of GBV and other human rights violations faced by men and boys (and potentially gender diverse and non-binary individuals).

Lack of women's equal legal protection can be exacerbated when law enforcement authorities fail to respond effectively when women from marginalized groups facing intersectional discrimination, such as ethnic minority women, lesbian or bisexual women, women with disabilities, or trans people, sex workers and women who use drugs, report human rights violations.

As decades of analytic work on the gendered insufficiency of criminal law has revealed, there can be a complete failure or gender-biased unwillingness in the law itself to acknowledge that any rights violation has occurred at all. This is the case, for example, in countries where the criminal code fails to criminalize rape within marriage or when sexual assault of men is not regarded as rape but prosecuted as a "crime against the order of nature."⁴⁷ Sexual assault of transgender people can be invisibilized twice, when the assault is not considered gender-based violence or rape, as such crimes are often interpreted as only occurring against cisgender women, and many transgender women are not recognized as women in police or official records.⁴⁸

3. CONCLUSION AND RECOMMENDATIONS

The work of the human rights, LGBTIQ+ rights and feminist movements have provided some lessons learned which can help close the protection gaps and [strengthen the work on gender by UN human rights mechanisms and bodies](#).⁴⁹ We welcome the opportunity to include some of them in the current submission to the Independent Expert's thematic report:

1. The concept of gender, including individual's gendered identities, must be understood as pertaining to everyone. This is a key concept, which enables us to identify all forms of gender-related violence and discrimination. All rights holders, both those who hold privileged or marginalized gender identities, are subject to the gender stereotypes that are culturally and socially dominant in their specific contexts, and the gendered impacts following from them.

It is important that the human rights bodies and experts' efforts to address gendered human rights abuses recognize that the gender identities/expressions that are conventionally regarded as fixed and those that are treated as variable are nonetheless equally culturally determined.

State obligations to eliminate harmful gender stereotypes require changing the systems that privilege certain gender identities, as well as promoting the full humanity of stigmatized gender identities/expressions. For example, gender-based violence in all its forms needs to be eliminated: persons conventionally deemed 'women' (as with conventionally deemed 'men') are often disciplined to remain in their culturally assigned gender roles (e.g. through gendered violence in the home) and disciplined if they attempt to step outside (e.g. violence against those transgressing gender norms, whether through refusal to marry, demanding same-sex marriage, assumption of a lesbian identity, or claiming of a trans* identity).

While the specifics of the human rights violations suffered by marginalized gender identities must be directly and immediately addressed, clear links must be made between these violations and the mainstream institutions, legal

⁴⁷ See generally ILGA, Lucas Ramón Mendos, *State-Sponsored Homophobia*, 2019, available at: https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019.pdf

⁴⁸ See *id.* at p. 95, 63.

⁴⁹ See Miller, A., Otto, D., et al. "Why The UN Needs a Broader Concept of Gender", <https://law.yale.edu/ghjp/projects/gender-sexuality-and-rights/why-un-needs-broader-concept-gender>

and policy frameworks, practices and customs that reinforce generally applicable gender stereotypes, to ensure equal enjoyment of human rights for all.

2. Measures to address human rights violations based on gender identity and expression must connect with and build on both feminist and LGBTI understandings of gender as embodied, as well as socially constructed and relational, and recognize that gender systems link with but are distinct from systems that organize sexuality and sexual orientation.

We believe it is important that the concept of gender used in the work of human rights bodies and experts (including on SOGI) must engage with the social and cultural aspects of gender that have underpinned rights-based feminist efforts to eliminate stereotyped and unequal gender norms and rules. Consequently, we urge that all human rights bodies and experts adopt a broad and open-ended concept of gender that recognizes that it is embodied within a social and relational context, and therefore engages with those contexts. This will also enable the identification of gendered human rights abuses that often remain invisible within a specific identity framework. While individuals must be able to claim formal recognition of their deeply felt individual experience of gender identity and expression, a universal, rights-based analysis of gender should also focus on the institutions, practices and ideologies that constrain gender and seek to determine its meaning for all individuals.

3. Every individual's gender self-determination must be valued and recognized, free from coercion, violence and discrimination. The capacity for self-determination needs to be located and examined within its social context, so that social constraints and limits can also be identified and addressed. The work on gender by human rights bodies and experts needs to promote and protect gender self-determination, including decisions around formal identity recognition. However, this capacity for self-determination needs to be located and examined within its social context, so that social constraints and limits can also be identified and addressed. This means that human rights work needs not only to promote self-determination, but also promote social change that expands the space of freedom for self-determination. In practice, this means significant attention to, and documentation of, the economic, social, political and cultural conditions that promote or constrain gender identities. All human rights mechanisms must be able to address the institutions and material conditions that present barriers to individuals freely determining their gender expression and identity, and document abuses and obstacles connected to the practices of both state and non-state actors.