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Introduction

This submission from 23 organizations and individuals (see Annex 1] responds to the Special Rapporteur's call for inputs on the report, "Forms of Sex-Based Violence Against Women and Girls: New Frontiers and Emerging Issues". We also wish to link our concerns here to those raised in a separate submission to the simultaneous call on "The Concept of Consent in Relation to Violence Against Women and Girls" *(the "Addendum")*, with which many of us engaged. We understand these two thematic initiatives to be interconnected components likely to undermine existing human rights norms and standards essential to the global struggle to end gender-based violence against women in all their diversity. It may also hamper progress to address the underlying conditions that enable gender-based violence in all its forms.

The notion of "sex-based violence" undermines long-standing human rights protections for vulnerable groups, including rights to non-discrimination, bodily autonomy and freedom from torture or other ill- treatment, as well as efforts to address the root causes perpetuating gender-based violence. It is incompatible with established standards in international law, and violates the doctrine of non- retrogression, which prohibits deliberate steps that reduce the enjoyment of rights.

The deep concerns expressed in the submission echo recent scholarly critiques about the ethos of how evidence is deployed in rights advocacy (e.g., Fried et al., 2024). We fear it misuses legal, scientific, and testimonial evidence, ignoring established methodologies for interpreting human rights. Feminist ethics of how we engage with evidence, advocacy and established rules and good practices in meaning -making are crucial to the efficacy of human rights.

Problematic Framing of "Sex-Based Violence"

The term "sex-based violence" rests on the inaccurate premise that assigned '[biological] sex' is a clear, immutable, bounded and binary concept and that 'sex' is a category on which to base and interpret rights. First, the evolution of scientific research demonstrates that sex characteristics exist on a spectrum, encompassing diverse anatomical and chromosomal variations (Ainsworth, 2015; WHO, 2021). Any binary framing erases the nuanced realities of differently sexed and gendered bodies and risks reverting to outdated and harmful biologically essentialist stereotypes.

This reversion undermines decades of consensus that "gender-based violence" is a more appropriate analytical and operational framework to address violence against people of all genders.[1] This rigid definition also ignores intersectional understanding of how race, class, disability, sexual orientation, and gender identity compound experiences of discrimination and violence (Crenshaw, 1989).

The term 'gender' was adopted by advocates, human rights bodies and the UN for a reason: the necessity of clarity for naming and addressing the specificity of denials of rights linked to beliefs about the assigned gender roles for differently sexed bodies.[2] The increased use of 'gender' in an analytical framework has

[1] See for instance, CEDAW General Recommendation 35, ¶¶ 9 and 19.

[2] In 2009, the Committee on Economic, Social, and Cultural Rights noted that the concept of "sex" has expanded to include not only physiological traits but also gender stereotypes, prejudices, and societal roles (CESCR, 2009, General Comment No. 20). The Special Rapporteur on Right to Privacy notes that a contemporary understanding of gender, must be based on recognizing (i) Cisnormativity, biological sex, sexual orientation and expression, gender identity or expression, sex characteristics and

enhanced analysis and advanced more progressive and inclusive human rights claims in struggles for the dignity, equality, and freedom of women and all impacted by gender-based discrimination, inequality and oppression.[3] Gender fundamentally incorporates ideas about power dynamics and at its core takes into account social roles rather than simply biology.

The Importance of Gender Analysis

Just as the important work to name 'sex' in the Universal Declaration of Human Rights (UDHR) and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) facilitated recognition human rights violations against women, decades of work since has made visible barriers to rights based on ideas about sex and gender. This deepened understanding of how ideas about sexuality (beliefs and expectations about and related to a male/female binary including with regards to human physiology, sexual behaviors, expressions, and identities) underpins many adverse distinctions and abuses, including in relation to different bodies.[4] This, in turn, has enabled further conceptual distinctions between related terms (sex, gender, gender stereotype, gender identity). Failure to recognize the full range of women's identities and expressions, including their sexual orientation and gender identity, undermines all human rights infringing on dignity and bodily integrity.[5]

Over the past decade, the concept and application of gender in human rights have evolved beyond the fixed male/female binary to include an analysis of how notions of masculinity and femininity apply to all bodies (Radačić and Miller, 2023). There is increasing recognition that binary understanding of gender is an intrinsic expression of patriarchal structures, of which control over women's reproductive and bodily autonomy and enforcing compulsory scripts of gender roles and heterosexuality are crucial elements (UN Human Rights Council (HRC), 2024, para. 17-18). This undermines progress in gender equality in areas like sexuality, reproduction, and gender-based violence (UN HRC, 2024, para 2). It is rooted in and maintains

societal norms are elements of gender; (ii) Gender, for some individuals, can change throughout their lives; (iii) Gender identity is integral to personality and important to self-determination, dignity and freedom; (iv) Gender intersects with ethnicity, indigeneity, age, disability, health, migration and marital or family status, among others, to heighten the importance of human rights to dignity and quality of life. (UN Special Rapporteur on the Right to Privacy, Report, 24 March 2020, UN Doc. A/HRC/43/52, para. 20(d)). The Special Rapporteur on Health, similarly, articulates an intersectional, non-discriminatory, and non-binary approach to gender-based violence, encompassing sexual orientation, gender identity, and sex characteristics, emphasizing its basis in international human rights law (UNHRC, 2022, UN Doc. A/HRC/50/28).

[3] *See, e.g.*, Human Rights Committee, General Comment 28, 2000 ¶ 8; Committee on on Economic, Social and Cultural Rights, General Comment 4, 1991 ¶ 6;; CEDAW Committee, General Recommendation 28, 2010; and General Recommendation 35, 2017 ¶ 5; Committee on the Elimination of Racial Discrimination, General Recommendation 25, 2000 ¶¶ 2, 4; General Recommendation 25, 2000 ¶¶ 2, 7; Committee on the Rights of Persons with Disabilities, General Comment 1, 2014 ¶¶ 32, 35;; Committee on the Rights of the Child, General Comment 1, 2001 ¶ 10; General Comment 3, 2003 ¶ 8;Committee Against Torture, General Comment 2, 2008 ¶ 22; Committee on Enforced Disappearances, General Comment 1, 2023 ¶ 45; Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families, General Comment 1, 2011 ¶¶ 7, 60-61; G; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Committee on the Rights of the Child, Joint General Comment 3/22, 2017 ¶¶ 3, 21

[4] The Human Rights Committee broadly interpreted sex to include sexual orientation in the Human **R**ights Committee. *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (31 March 1994). See also CEDAW, *Rosanna Flamer-Caldera v. Sri Lanka*, Communication No. 134/2018, CEDAW/C/81/D/134/2018, 21 February 2022

[5] CEDAW Gen. Comment 25, para. 9; CESCR Gen.Comment No. 22, paras. 35-36; UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Working Group on discrimination against women and girls, and UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Intervention to the Case of Mokgadi Caster Semenya v. Switzerland case, para. 16S; Semenya v. Switzerland Submission to the European Court of Human Rights [amicus on behalf of the GHJP/WMA 10/2022]

colonial practices. Prior to colonization processes, many communities recognized diverse expressions of gender and sexuality. (Tamale, 2013; Schields and Herzog, 2021).

UN and regional human rights mechanisms and bodies have increasingly recognized that a person's sexual orientation, gender identity and expression and sex characteristics (SOGIESC) helps shape and exacerbate their experiences of gender-based violence. The CEDAW Committee acknowledges intersecting forms of discrimination against lesbian, bisexual and transgender women and intersex persons in General Recommendation No. 35. The UN High Commissioner for Human Rights has indicated that transphobic violence "constitute[s] a form of gender-based violence, driven by a desire to punish those seen as defying gender norms" (Office of the UN High Commissioner for Human Rights, 2011, para 20). The Inter-American Court of Human Rights in the case of the transgender activist *Vicky Hernandez v. Honduras* further noted that "violence against persons based on gender identity or expression, and specifically against trans women, is also based on gender, as a social construct of the identities, attributes and roles that society assigns to women and men" (Inter-American Court of Human Rights, 2021, para 128).

In light of the developing understanding and use of 'gender' and 'gender analysis', the concept of gender-based violence must remain central to addressing violence against women and girls. Excluding gender from this framework is not only legally and substantively inaccurate, it jeopardizes substantive equality and further justifies a protectionist approach at the cost of achieving more transformative outcomes.

Furthermore, by focusing narrowly on sex (as a binary category), the Special Rapporteur's framing risks entrenching outdated stereotypes and denying protections to all women and individuals whose experiences fall outside the binary framework. It further ignores decades of progress in understanding how sex and gender intersect in the lived realities of violence and discrimination (Butler, 1990) and contributes to a "system of domination and an individual expression formed in the social context of gender inequality and other systems of inequality" (UN HRC, 2024, para. 16).

Misuse of Evidence and Flaws in Analysis

In the call for inputs, the Special Rapporteur justifies her interpretation of "sex" as a biological category by citing some sources that are inaccurately referenced. For example, while the call for inputs cites 1992 CEDAW commentary edited by Christine Chinkin: this 1992 document could not be located in any reputable source. In 2012, Chinkin co-edited a commentary on CEDAW.[6] This Commentary as well as other work by Chinkin examines how misuse of authority and misinterpretations of treaties can undermine trust in human rights mechanisms and distort treaty applications (Freeman, et.al., 2012, Chinkin and Yoshida, 2020).

The call for inputs reinstates an obsolete and narrow framing of 'sex-based violence' grounded in a binary understanding of 'sex', in contravention to an established consensus of 'gender-based violence' in international human rights law. While 'sex' is referred to in the UDHR, CEDAW and many other treaties, it is not defined. The Special Rapporteur uses this gap to offer her own definition, ostensibly drawing

[6] The 2012 CEDAW Commentary, edited by Freeman, Chinkin and Rudolk, with a reference on p. 15, (Section 2, Gender) notes that while UN Charter, UDHR, ICCPR, and ICESCR, do make reference to discrimination based on sex "understood as a biological category." This phrase appears as descriptive, not an endorsement. Moreover, the authors note the evolution of the term gender in human rights standards, "clarifies that the term is not to be equated with women (as is often the case) but is concerned with relations, notably those of distribution of power, between women and men. The Committee seeks to address the adverse practical consequences for women of discrimination rooted in gender as a social construct, for example, the role of women as carers, or the violence that is committed against women who deviate from their assigned gender role." This section stresses the evolving and relational understanding of sex and gender. (Freeman, et. al., 2012)

upon rules of treaty interpretation as set out in Article 31 of the Vienna Conventions on the Law of Treaties (1969). She invokes the Convention's statement that treaty language should be interpreted "...in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose…" and with regard to "any relevant rules of international law…and any subsequent practice" (Vienna Convention).

The implication here is that the meaning of 'sex' and sex-based discrimination has not changed since 1948,[7] contrary to the evolution of human rights law and standards, jurisprudence and scholarly work cited above. The reference to the Vienna Convention suggests authoritative use of a classic legal interpretation but this is wrong in three ways: first, in the claims about subsequent practice (including to an incorrect citation to and misinterpretation of a well regarded feminist international legal scholar); second in the understanding that the Vienna Convention is the sole mode of determining human rights treaties' evolving scope[8]; and third in the absolute silence regarding the subsequent thirty years of practice in which CEDAW and other core human rights treaties, has built a gender analysis generally, and in particular expanded the frame of gender to include gender identity in treaties' remit for protection (Otto, 2019).[9]

Contrary to the Special Rapporteur's claims, international law has long treated treaties as living documents, evolving in light of contemporary conditions (Vienna Convention on the Law of Treaties, 1969 CEDAW General Recommendation 25[10]). Human rights bodies, including the CEDAW Committee, have explicitly integrated gender analysis in their work to address structural inequalities and forms of violence.[11] The evolution of the work on gender analysis is evident, for instance, in the adoption of gender- related concepts in the text of the Convention of the Rights of Persons with Disabilities, in 2006, and now adopted by 186 Member States.

The principle that human rights instruments are living documents to be interpreted in light of present day conditions and dynamically evolving to address the ever-changing challenges and concerns of our time, has been long recognized by human rights bodies and experts.[12] Human rights are grounded in the principles of universality, equality, and non-discrimination. This foundation is enshrined in the UDHR, which proclaims the inherent freedom, equality, and dignity of all persons (UDHR, 1948). For example, CEDAW does not include an express textual provision prohibiting violence against women, yet the CEDAW Committee has interpreted the Convention to include protection from gender-based violence, including

[7] One of the key advances in human rights law has been forthrightly working with the promise and the contradiction of treaties drafted when large parts of the world were under colonial control (only 58 countries could vote in 1948 at the UN.

[8] International human rights development is generally governed by international law, but experts increasingly argue that, because it directly impacts individuals under state control, human rights law evolves uniquely to provide greater protections. (Tobin, 2010)

[9] See e.g. CEDAW General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women which explicitly includes 'gender identity' (¶18) as a concern under the convention.

[10] Vienna Convention on the Law of Treaties at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. GR 25 para 3: 'The Convention is a dynamic instrument.'

[11] For instance, the CEDAW Committee in General Recommendation 35 notes that the expression 'gender-based violence against women', is "a more precise term that makes explicit the gendered causes and impacts of the violence. This expression further strengthens the understanding of this violence as a social - rather than an individual- problem, requiring comprehensive responses, beyond specific events, individual perpetrators and victims/survivors." (General Recommendation 35, 2017, ¶ 9)

[12] Daniel Moeckli & Nigel D. White, Treaties as 'Living Instruments,' in CONCEPTUAL AND CONTEXTUAL PERSPECTIVES ON THE MODERN LAW OF TREATIES 136 (Michael J. Bowman & Dino Kritsiotis eds., 2018) citing Chinkin.

against lesbian, bisexual, transgender women or intersex persons, which must be addressed through appropriate legal and policy responses (CEDAW General Recommendation No. 35, 2017).

Relevant New and Emerging Issues

While failing to recognize developments in human rights law and standards and jurisprudence that have progressively grounded the language of 'gender', the Special Rapporteur's call for input goes on to suggest that the trope of "sex-based violence" may be utilized as a category to delve into 'new and emerging issues' in this or future reports. The issue of surrogacy is one such issue that the Special Rapporteur has previously indicated interest in (UN Special Rapporteur on Violence against women and girls, its causes and consequences, 2024).

Contrary to what the 'sex-based violence' retrogression suggests, we wish here to strongly affirm that reproductive and bodily autonomy includes the right to choose to be a surrogate (in particular gestational surrogacy). Indeed, gestational surrogacy is an important method of family formation for many individuals and couples and should not be equated with a form of gender-based violence, violence against women or sale of children. Upholding rights to bodily autonomy and sexual and reproductive self-determination is paramount: every person has the right to make decisions about their reproductive life and access comprehensive, unbiased, evidence-based information and services.[13] The rights to bodily autonomy and sexual and reproductive health and rights are indispensable for gender equality and dignity. Criminalizing or restricting these rights perpetuates gender stereotypes and places women, trans, and non-binary individuals at greater risk of violence and exploitation (UN Human Rights Council, 2018). These rights are of "central importance to human dignity of personal autonomy" (Human Rights Committee, 2018) and the realization of the rights to equality and privacy.

Conclusion

Replacing gender analysis with a narrow focus on sex as a reductive biologically deterministic binary category represents a dangerous retrogression particularly, but not only, in the context of addressing violence. It undermines decades of feminist advocacy, scientific evidence and legal advances, and risks excluding vulnerable populations from essential protections. Violence against women and girls must be addressed through an intersectional and inclusive gender-based framework, as laid down in several international human rights law instruments. Excluding this framework is incompatible with international human rights law and jeopardizes hard-fought gains in equality and dignity for all.

We call on the Special Rapporteur and other UN bodies to recommit to inclusive, evidence-based, and intersectional approaches to human rights, and to addressing gender-based violence against women and girls in all their diversity, as well as men and boys, trans and non-binary people, through a structural, holistic and transformative lens.

[13] See, e.g. CESCR Committee, Gen. Comment No. 22, para. 9; CEDAW Committee, Gen. Rec. No. 24, supra note 37, para. 22

Annex 1: **Signatories**

- Amnesty International
- Canadian Alliance for Sex Work Law Reform
- Center for Reproductive Rights
- Count Me In! consortium, consisting of AWID, CREA, JASS, Mama Cash, UAF for Feminist Activism and UAF-Africa.
- EATHAN - East Africa Trans Health & Advocacy Network
- European Sex Workers Rights Alliance (ESWA)
- GAATW (Global Alliance Against Trafficking in Women)
- Jaime M. Gher, JD, LL.M, University of Toronto, Reproductive and Sexual Health Law Program
- Global Health Justice Partnership of the Yale Schools of Public Health and Law
- ILGA World (The International Lesbian, Gay, Bisexual, Trans, and Intersex Association)
- International Planned Parenthood Federation (IPPF)
- International Service for Human Rights (ISHR)
- Just Futures Collaborative
- Profamilia Colombia
- Dr Ivana Radačić, research advisor, Ivo Pilar Institute of Social Sciences Zagreb
- Realizing Sexual and Reproductive Justice
- Cynthia Rothschild, UN Program, Occidental College
- Sama Resource Group for Women and Health
- Patricia Schulz, ICJ Commissioner
- SekswerkExpertise
- Sexuality Policy Watch - ABIA, Brazil
- Vecinas Feministas por la Justicia Sexual y Reproductiva en América Latina
- Women Deliver
- WO=MEN Dutch Gender Platform

Annex 2: References

- Ainsworth, C. (2015). *Sex redefined*. Nature, 518(7539), 288-291.
- Antić, M and Radačić, I. The evolving understanding of gender in international law and 'gender ideology' pushback 25 years since the Beijing conference on women. *Women's Studies International* 2020; 83:102421.
- Butler, J. (1990). *Gender Trouble: Feminism and the Subversion of Identity.* Routledge.
- CEDAW Committee. (2017). General Recommendation No. 35 on Gender-Based Violence Against Women.
- Chairman of the Study Grp. of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 487, U.N. Doc. A/CN.4/L.682 A (Apr. 13, 2006)
- Chinkin, C and Yoshida, K. (2020). *40 Years of the Convention on the Elimination of All Forms of Discrimination Against Women*. Centre for Women, Peace and Security, London School of Economics.
- Connell, R. W. (1987). *Gender and Power: Society, the Person and Sexual Politics.* Polity Press.
- Crenshaw, K. (1989). *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics.* University of Chicago Legal Forum.
- Crenshaw, K. (1991). *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color.* Stanford Law Review.
- Freeman, M, Chinkin, C. and Rudolf, B, eds. (2012). *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary*. Oxford University Press.
- Fried, S. T., Miller, A. M., Mallik, R., Radačić, I., & Restrepo-Saldarriaga, E. (2024). *The (mis)use of evidence in contested rights: the UN Special Rapporteur on violence against women and girls' report on "prostitution and violence."* Sexual and Reproductive Health Matters, 32:1. https://www.tandfonline.com/toc/zrhm21/current.
- Human Rights Committee. (2018). General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life (CCPR/C/GC/36). United Nations.
- Inter-American Court of Human Rights. (2021). *Vicky Hernández et al. v. Honduras* (Judgment of June 28, 2021). Retrieved from https://www.corteidh.or.cr/cf/jurisprudencia2/index.cfm
- Moeckli, D & White, N.G. Treaties as 'Living Instruments,' in Conceptual and Contextual Perspectives on the Modern Law of Treaties 136 (Michael J. Bowman & Dino Kritsiotis eds., 2018) citing Chinkin. See also: Sondre Torp Helmersen, *Evolutive Treaty Interpretation: Legality, Semantics and Distinctions*, 6 EUR. J. LEGAL STUD., 161 (2013). Kerstin Melcham, 42 *Treaty Bodies and the Interpretation of Human Rights*, Vanderbilt J. Transnat'l L 919 (2009)
- OHCHR/Office of the United Nations High Commissioner for Human Rights. (2011). *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity* (A/HRC/19/41). United Nations
- OHCHR/Office of the United Nations High Commissioner for Human Rights. (2012). *Born free and equal: Sexual orientation and gender identity in international human rights law.* United Nations. Available here: https://www.ohchr.org/sites/default/files/Documents/Publications/Born_Free_and_Equal_WEB.pdf
- Otto, Dianne. "Gender, violence and human rights." In *Handbook on gender and violence*, pp. 357-376. Edward Elgar Publishing, 2019.

- Radačić, I & Miller, A, Gender Entry in Elger Encyclopedia of Human Rights (ed. C. Binder, M. Nowak, J.A. Hofbauer and P. Janig, 2023) online at: https://www.elgaronline.com/display/book/9781789903621/9781789903621.xml
- Schields, C and Herzog, D., The Routledge Companion to Sexuality and Colonialism. London: Routledge, 2021 Vienna Convention on the Law of Treaties. (1969). United Nations.
- Tamale, Sylvia. "Confronting the Politics of Nonconforming Sexualities in Africa." African Studies Review, vol. 56, no. 2, 2013, pp. 31–45. DOI: 10.1017/asr.2013.44.
- UN Human Rights Council. (2018) Working Group on Discrimination against Women and Girls,. *Report on Women's Rights and Gender Equality.*
- UN Human Rights Council. (2024) Working Group on Discrimination against Women and Girls,. *Report on Women's Rights and Gender Equality.*
- Tobin, John. "Seeking to persuade: A constructive approach to human rights treaty interpretation." Harv. Hum. Rts. J. 23 (2010): p. 1.
- United Nations General Assembly. *Universal Declaration of Human Rights*. 10 Dec. 1948, www.un.org/en/about-us/universal-declaration-of-human-rights.
- UN Human Rights Council. (2024) Working Group on Discrimination against Women and Girls: Gender equality and gender backlash - Guidance document of the Working Group on Discrimination against Women and Girls (A/HRC/WG.11/41/2*).* United Nations
- UN Human Rights Council. (2018). Working Group on Discrimination Against Women and Girls. Report on Women's Rights and Gender Equality. United Nations.
- UN Special Rapporteur on Violence against women and girls, its causes and consequences (2024) Report of the Official visit to the United Kingdom of Great Britain and Northern Ireland 12 - 21 February 2024. United Nations.
- WHO. (2021). *Gender and Health: Policy Brief.* World Health Organization.