

Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

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13 December 2022

Excellency,

I have the honour to address you in my capacity as Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, pursuant to Human Rights Council resolution 50/10.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received in relation to the "Gender Recognition Reform (Scotland) Bill" ("the Bill").¹ The Bill provides for the elaboration of new regulations relevant to the granting of a gender recognition certificate ("GRC"), which legally recognises a person's gender identity when the latter differs from the gender that they were assigned at birth. The current process for obtaining a GRC in Scotland is set out in the Gender Recognition Act 2004 of the Parliament of the United Kingdom of Great Britain and Northern Ireland ("the UK"). The Bill amends the Gender Recognition Act 2004 to introduce a new process to obtain a GRC in Scotland. I presented expert testimony on the conformity of the Bill with international human rights standards in June 2022 to the Equalities, Human Rights and Civil Justice Committee of the Scottish Parliament.²

According to the information available to me, deliberations are still ongoing in relation to the Bill, and there are suggestions to postpone its consideration and/or weaken its contents. I am concerned that these efforts may respond to erroneous information based on the stigma and prejudice that have long permeated efforts to deny legal recognition to persons based on their gender identity, and thereby deny them equal access to services and the full enjoyment of their human rights. I have also observed exclusionary narratives in the public discourse surrounding the consideration of the Bill, and against trans persons more generally.

In that context, I am particularly concerned about misrepresentation of the existing consensus within the bodies and entities of the UN Human Rights System about the international human rights imperative of legal recognition of gender identity, and the principle of self-identification.

I am therefore writing to restate and amplify my advice. Within the United Nations Human Rights System, there is consensus on the imperative of legal recognition of gender identity and on the related standard of self-identification; it is my opinion that the Bill brings the Scottish system closer to conformity with those standards and, therefore, it is an act of compliance with obligations incumbent upon the State under international human rights law.

¹ Official Report of The Scottish Parliament, Equalities, Human Rights and Civil Justice Committee, Session 6, Tuesday 21 June 2022, pp. 19-49:

<https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=13837>

² Bill on the website of the Scottish Parliament: <https://www.parliament.scot/bills-and-laws/bills/gender-recognition-reform-scotland-bill>

International human rights law and gender-based frameworks, including legal recognition of gender identity

In 2021, in furtherance of the mandate given to me by the UN Human Rights Council, I carried out an inquiry into gender-based frameworks that led to two reports that were presented to the Council and the UN General Assembly. They were entitled, respectively, “The Law of Inclusion”³ and “Narratives of Exclusion.”⁴ The year-long consultation process of these reports included an extensive literature review of hundreds of peer-reviewed articles, dozens of expert consultations, and a call for inputs, in response to which 529 submissions were received:⁵ 42 from member states and 484 from non-state actors, including 202 from organisations and 282 from individuals. That process gathered specific information from all regions in the world, with specific information from 88 UN member states, thus covering a significant proportion of the world’s populations, cultures, legal traditions, and religions.

Four main conclusions arose from this process:

- a) gender identity is recognized by a vigorous *corpus juris* of international human rights law as a trait that must be protected from discrimination and violence in law, policy, and practice;
- b) legal recognition of gender identity is key to further deconstruct institutional and social drivers of discrimination and violence that affect trans, non-binary and other gender diverse persons around the world; global, regional, and domestic jurisdictional and parliamentary mechanisms have recognised standards that guide the process requirements applicable to legal gender recognition, including self-identification; and
- c) global, regional, and domestic jurisdictional and parliamentary mechanisms have recognised standards that guide the process requirements applicable to legal gender recognition, including self-identification; and
- d) narratives and practices seeking to exclude trans, non-binary and other gender diverse persons from legal recognition of their gender identity exploit preconceptions, stigma, and prejudice to artificially create an atmosphere of panic and moral concern and perpetuate the risk of violence and discrimination.

³ [A/HRC/47/27](#).

⁴ [A/76/162](#).

⁵ Submissions to the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (IE SOGI) in the process of preparation of 2021 reports. The process was a micro-cosmos of the overwhelming interest in the public debate and reflected its haunting toxicity. Publication in my website is suspended until all submissions are scrutinized for hate speech as defined in the UN *Rabat Plan of Action*. Given that only submissions that did not contain hate speech and did not request confidentiality are cited in this opinion, these can be shared upon request.

*The UN consensus:
gender identity must be recognised by law, and implemented under a
standard of self-identification*

In 2018, I examined the full scope of the duty of the State to respect and promote respect of gender recognition as a component of a person's identity, and to dismantle systems of pathologisation, stigma and prejudice that negatively impact the human rights of trans and gender-diverse persons. My mandate concluded that self-determined or self-identified gender is a fundamental part of a person's free and autonomous choice in relation to roles, forms of expression and behaviours that are socially attributed to them, and a cornerstone of the person's identity.⁶ In that sense, the process of legal recognition of gender identity is one that directly relates to the human right to recognition before the law, enshrined in the Universal Declaration on Human Rights (art. 6) and human rights instruments at global⁷ and regional level.

Indeed, there is consensus among the UN Human Rights Treaty Bodies, UN Special Procedures, and the UN High Commissioner for Human Rights in relation to legal recognition of gender identity. UN Treaty Bodies and other mechanisms have consistently affirmed in their jurisprudence that, just like race, sex, colour or religion, gender and gender identity and expression are prohibited grounds for discrimination.⁸ In its General Comment No. 28 (2010) on core obligations of State parties, the Committee on the Elimination of Discrimination against Women emphasized that States must recognise, prohibit, and adopt policies and programmes to eliminate intersectional forms of discrimination, including, explicitly, on the basis of gender identity.⁹ The Committee further emphasized that the Convention on the Elimination of All Forms of Discrimination against Women applies to both gender and sex-based discrimination.¹⁰ In its General Comment No. 20 (2009) on the crosscutting principle of non-discrimination, the UN Committee on Economic, Social, and Cultural Rights observed that "gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace," a position reiterated in its General Comment No. 22.¹¹ Other sources include the UN Human Rights Committee,¹² the UN Committee on the Rights of the Child,¹³ and Special Procedures of the UN Human

⁶ This aspect of freedom was recognized by the ECHR in *Schlumpf v. Switzerland*, a case in which a waiting period for processes connected to legal recognition of gender identity were set without regard to the applicant's age; [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-90476%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-90476%22]})

⁷ International Covenant on Civil and Political Rights, art. 16; Convention on the Elimination of All Forms of Discrimination against Women, art. 15; Convention on the Rights of the Child, art. 8.

⁸ See, for example, Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on non-discrimination in economic, social, and cultural rights, E/C.12/GC/20, paras. 27 and 32; Committee on the Rights of the Child, general comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health, CRC/C/GC/15, para. 8; and Committee against Torture, general comment No. 2 (2008) on the implementation of article 2 by States parties, CAT/C/GC/2, para. 21.

⁹ Committee on the Elimination of Discrimination against Women, General Comment No. 28 (2010), par. 18

¹⁰ Committee on the Elimination of Discrimination against Women, General Comment No. 28 (2010), para. 5, 16, 17, 19.

¹¹ Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2009), par. 32; and Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the right to sexual and reproductive health, E/C.12/GC/22, paras. 23 and 40.

¹² CCPR/C/RUS/CO/7, par. 10; CCPR/C/KWT/CO/3, paras. 12 and 13; and CCPR/C/RUS/CO/7, para. 10.

¹³ Committee on the Rights of the Child, general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, CRC/C/GC/20, paras. 33 and 34.

Rights Council including the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. When expressing opinion on the issue of gender identity, all have expressed concern about human rights violations based on that trait, making in some cases explicit reference to gender expression; all have called on States to address such violations.¹⁴

Further, United Nations doctrine reflects a broad understanding of gender that is inclusive of gender-based discrimination impacting persons because of their real or perceived sexual orientation, gender identity and/or gender expression.¹⁵ The interpretations issued by UN Treaty Bodies indeed also suggest increasing acceptance that gender-based analysis transcends the male/female binary. The UN Committee on the Elimination of Discrimination against Women affirms that “[d]iscrimination 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;”¹⁶ the UN 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;”¹⁷ having analysed a State’s failure to allow change of gender markers on official documents, the UN 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;”¹⁸ and the UN Committee on the Rights of Persons with Disabilities uses the phrase “all genders”¹⁹, suggesting an understanding of gender that goes beyond gender binary. Further, the UN 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”.²⁰

The UN Working Group on Discrimination against Women and Girls has similarly highlighted the dangers of ignoring gender identity and diversity: it has observed that women who do not conform to gender stereotypes, including some who may identify as lesbians, bisexual and trans women, are particularly vulnerable to discrimination, violence and criminalization,²¹ and has noted, “in the 1990s queer theory also started using the term gender, challenging (what it perceived as) the binary understanding of gender, sex/gender dichotomy, and the heteronormative assumptions of some feminist approaches.” My mandate has already identified among the circumstances that can unduly restrict freedom the “male/female binary system on the basis of the sex assigned at birth [and the idea that] persons fall neatly and exclusively into that system”.²²

¹⁴ [A/HRC/29/33/Add.1](#), paras. 86 to 90 and 111 (q).

¹⁵ CREA *et al*, submission to the IE SOGI in the process of preparation of 2021 reports., p. 7 (citations omitted).

¹⁶ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW/C/GC/32, para 6.

¹⁷ UN Committee on Economic, Social and Cultural Rights, General Comment 20: Non-Discrimination (2009), E/C.12/GC/20, para. 20. In the same comment, the CESCR observed that both “sexual orientation” and “gender identity” are prohibited grounds of discrimination under the Covenant (para 32).

¹⁸ UN Human Rights Committee, *G.v.Australia*, CCPR/C/119/D/2172/2012, 28 June 2017, at 7.14.

¹⁹ UN Committee on the Rights of Persons with Disabilities, General Comment 5: On Living Independently and Being Included in the Community (2017), CRPD/C/GC/5, para. 23..

²⁰ UN Committee Against Torture, General Comment 2: Implementation of Article 2 by States (2008), CAT/C/GC/2, para 21.

²¹ [A/HRC/29/40](#), para. 21.

²² [A/73/152](#), para. 6.

Over time, these pronouncements of the protection machinery have increasingly linked the phenomena of stereotypes, intersectionality, and women's oppression. The UN Human Rights Committee has explicitly adopted gender-based frameworks in finding that the right to life "must be respected and ensured without distinction of any kind", expressly forbidding distinctions based on gender identity; acknowledging "multiple and intersectional forms of discrimination;" these approaches place the victim's gender in the wider social context, acknowledging how social constructions of gender may mean that femicide and rape takes on a particularly egregious or discriminatory character, and have concrete implications for the analysis of cases brought to the consideration of Treaty Bodies.²³

Gender identity is also a conceptual cornerstone of my mandate: UN Human Rights Council Resolutions 32/2, 41/18 and 50/10 strongly deplore acts of violence and discrimination committed against individuals in all regions of the world because of their gender identity; they created and gave continuity to that mandate to assess the implementation of existing international human rights instruments and raise awareness in relation to said violence and discrimination, identify its root causes, and foster the implementation of measures that contribute to the protection of all persons against it.²⁴

The European Court of Human Rights has incorporated gender identity in its jurisprudence since 1992, first in connection with privacy and family life,²⁵ and notably in 2003 through the recognition of gender identity as one of the most intimate aspects of a person's private life.²⁶ The European Court of Justice has repeatedly held that the European Union framework against sex discrimination protects persons who have sought or are planning to seek legal recognition of their gender identity in areas such as employment, access to employment-related social benefits (widower's insurance) and pensions.²⁷

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention)²⁸ thoroughly integrates gender theory,²⁹ distinguishes between sex and gender, and defines gender as "the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men."³⁰ Additionally, the Convention

²³ In the *Nepomnyashchiy* case, the UN Human Rights Committee drew on the damaging implications of stereotypes based on sexual orientation and gender identity (CCPR/C/123/D/2318/2013, 23 August 2018), while in *Fulmati Nyaya v. Nepal* it considered how sexual violence may have different social constructions and meanings depending on the gender identity of the victim (CCPR/C/125/D/2556/2015, 11 June 2019).

²⁴ A/HRC/RES/32/2; operative paragraph 2 (emphasis added).

²⁵ European Court of Human Rights, *B. v. France*, application no. 13343/87, Judgment, 25 March 1992.

²⁶ European Court of Human Rights, *Van Kück v. Germany*, application no. 35968/97, Judgment, 12 June 2003.

²⁷ M. van den Brink, P. Dunne, A. Timmer, European Commission und Directorate-General for Justice and Consumers, *Trans and intersex equality rights in Europe: a Comparative Analysis*, 2018, pp. 49–52, http://publications.europa.eu/publication/manifestation_identifier/PUB_DS0618129ENN (Zugegriffen 25. August 2020); in TGEU, submission to the IE SOGI in the process of preparation of 2021 reports., p. 2.

²⁸ M. van den Brink, P. Dunne, A. Timmer, European Commission und Directorate-General for Justice and Consumers, *Trans and intersex equality rights in Europe: a Comparative Analysis*, 2018, pp. 49–52, http://publications.europa.eu/publication/manifestation_identifier/PUB_DS0618129ENN (Zugegriffen 25. August 2020); in TGEU, submission to the IE SOGI in the process of preparation of 2021 reports., p. 2.

²⁹ The Ad Hoc Committee (CAVIO) responsible for writing the Convention used the term from the start of its work drafting the document. See Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO), Report of the 1st Meeting, Strasbourg, 6-8 April 2009.

³⁰ Istanbul Convention Article 3, C.

recognizes the harms of gender roles and stereotypes and acknowledge the way “gender-based violence” is a mechanism “by which women are forced into a subordinate position compared with men.”³¹ The Convention includes anti-discrimination obligations that require States to implement the provisions of the treaty without discrimination on any ground, including sex, gender, sexual orientation, or gender identity.”³² In addition, in 2014 the Council of Europe established a thematic unit covering, among other, gender identity concerns. On 9 December 2022, the Commissioner for Human Rights of the Council of Europe published the report from her visit to the UK in June 2022. The Commissioner found that increasingly harsh political and public discourse “fuelled by ignorance of the issues around gender diversity” in relation to trans persons is on the rise in the UK and that narratives “that frame trans people as a threat to others are particularly egregious examples [... of] deeply discriminatory stereotypes of trans and gender diverse persons based on ideas of predatory determinism.”³³ The Commissioner also observed that

[b]oth government officials and certain parliamentarians have actively contributed to an intolerant and stigmatising discourse. In line with her previous warnings about the increasing political manipulation of intolerance against LGBTI people in Europe, the Commissioner is particularly concerned by the apparently deliberate attempts by some politicians to turn the situation of trans people into ‘culture wars’ or ‘wedge’ issue for electoral purposes. The Commissioner is also concerned that this has led to a loss of trust by significant parts of the LGBTI community in the government as a protector of their rights, and that it has damaged relations between the UK government and a range of civil society organisations which have traditionally been important partners in advancing the UK government’s LGBTI rights agenda at home and abroad.”³⁴

A plethora of European Union documents relate to gender identity, among them EU Directive 2006/54/EC that states 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 of a person.”³⁵

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 1994,³⁶ a broad regional commitment to

³¹ Preamble, para 11. The explanatory report that accompanied the Convention additionally highlights the danger of gender roles and stereotypes that perpetuate harmful practices against women, Explanatory Report, para. 43, p. 8.

³² Istanbul Convention Article 4, part 3.

³³ Commissioner for Human Rights of the Council of Europe, Report following her visit to the United Kingdom from 27 June to 1 July 2022, CommDH(2022)27, <https://rm.coe.int/report-on-the-visit-to-united-kingdom-from-27-june-to-1-july-2022-by-d/1680a952a5>; para. 52.

³⁴ Commissioner for Human Rights of the Council of Europe, Report following her visit to the United Kingdom from 27 June to 1 July 2022, CommDH(2022)27, <https://rm.coe.int/report-on-the-visit-to-united-kingdom-from-27-june-to-1-july-2022-by-d/1680a952a5>; para. 52.

³⁵ Directive 2006/54/EC of the European Parliament of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, preamble, para. 3.

³⁶ 32 of 35 OAS member states are party to the Convention of Belém do Pará, by far the most widely ratified of the OAS human rights treaties.

action to address ongoing deeply rooted challenges. The most widely ratified of any of the region's human rights treaties, the Convention has driven advances in law, policy, and practice at the national level throughout the region.³⁷ In the Inter-American System, a series of yearly OAS General Assembly Resolutions since 2008 recognise violence and discrimination based on gender identity, and the Inter-American Commission and Court of Human Rights have repeatedly held that the core state obligation of non-discrimination set forth in Article 1.1 of the American Convention on Human Rights covers the ground of gender identity,³⁸ and that the Convention of Belém do Pará applies to trans women on the basis of self-identification.³⁹

In the African System, the 2014 Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity (Resolution 275) of the African Commission on Human and Peoples' Rights⁴⁰ is based on the premise that gender identity is a ground for protection from violence and other human rights violations including discrimination, under the African Charter. Since the adoption of Resolution 275, the African Commission on Human and Peoples' Rights has incorporated reference to sexual orientation and gender identity in several interpretative instruments of the African Charter.⁴¹

The processes of recognition of gender, and gender identity and expression in international human rights law have been described in the Yogyakarta Principles,⁴² a set of standards identified between 2009 and 2018. At the date of preparation of this opinion, the Yogyakarta Principles have been referenced in UPR proceedings, reports, and position papers of the UN High Commissioner for Human Rights,⁴³ reports of UN Special Procedures, concluding observations of

³⁷ The IACHR has tracked judicial decisions in the region reflecting an interpretation and application of the prohibition of gender-based discrimination and violence consistent with international human rights law. See Legal Standards Related to Gender Equality and Women's Rights in the Inter-American Human Rights System: Development and Application, OEA/Ser.L/V/II.143, Doc. 60, 3 Nov. 2011; republished in 2015 with Updates from 2011 to 2014, OEA/Ser.L/V/II., Doc. 11, 26 Jan. 2015. The IACHR has also tracked good practices in terms of laws, policies, practices, and judicial decisions, as well as deep and persistent rights violations, in IACHR, Violence and Discrimination against Women and Girls: Best Practices and Challenges in Latin America and the Caribbean, OAS/Ser.L/V/II., Doc. 233, 14 Nov. 2019; Annex 1: Standards and Recommendations; Annex 2: Impacts of Cases. Other thematic reports concerning the rights of women are available on the IACHR's website under the categories of the Rapporteurship on Women's Rights and Thematic Reports; in Elizabeth Abi-Mershed, submission to the IE SOGI in the process of preparation of 2021 reports, *in extenso*.

³⁸ Inter-American Court of Human Rights, Case of *Karen Atala Riffo and daughters v. Chile*. Merits, Reparations and Costs. Sentence of February 24, 2012. Ser. C No. 239.
Inter-American Court of Human Rights, Case of *Karen Atala Riffo and daughters v. Chile*. Merits, Reparations and Costs. Sentence of February 24, 2012. Ser. C No. 239.

³⁹ Inter-American Court of Human Rights, Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 78.

⁴⁰ Adopted at the 55th Ordinary Session of the African Commission in Luanda, Angola, 28 April - 12 May 2014.

⁴¹ Resolution 376 on the Situation of Human Rights Defenders in Africa, ACHPR/Res. 376(LX)2 017; General Comment No. 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (article 5). See also para. 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

⁴² <https://yogyakartaprinciples.org/principles-en/>

⁴³ See OHCHR, *Born Free and Equal* (2nd Edition), 2019, pp. 67-68;

https://www.ohchr.org/sites/default/files/Documents/Publications/Born_Free_and_Equal_WEB.pdf;

Treaty Bodies,⁴⁴ Judgements and Advisory Opinions of the Inter-American Court of Human Rights,⁴⁵ as well as cases and thematic reports of the Inter-American Commission of Human Rights. The process that led to the Yogyakarta Principles was not one of obligation-setting (as some narratives erroneously argue) but rather of standard identification, from an interdisciplinary basis, of the acknowledgement of sexual orientation, gender identity, gender expression and sex characteristics within treaty law, international customs, national practice, judicial decisions, and doctrine, some of which are described in this report and all of which comprise sources of international law.⁴⁶

*Legal recognition of gender identity:
standards*

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.⁴⁷ The UN High Commissioner for Human Rights⁴⁸ recommends that legal recognition:

- a. be based on self-identification by the applicant;
- b. be a simple administrative process;
- c. not require abusive requirements, such as medical certification, undergoing surgery, treatment, sterilization or divorce;
- d. acknowledge and recognize non-binary identities, such as gender identities that are neither “man” nor “woman;” and
acknowledge and recognize non-binary identities, such as gender identities that are neither “man” nor “woman;” and
- e. ensure that minors have access to recognition of their gender identity. Safeguards for minors should not be discriminatory or disproportionate and should respect the rights enshrined in the Convention on the Rights of the Child.

⁴⁴ CAT: CAT/C/MNG/CO/1, 20 January 2011 and CAT/C/MNG/CO/2, 5 September 2016; CEDAW: CEDAW/C/81/D/134/2018, 24 March 2022.

⁴⁵ In addition to the above referenced OC24, see for example Inter-American Court of Human Rights, Case of *Ángel Alberto Duque v. Colombia*. (See, Preliminary exceptions, Merits, Reparations and Costs. Judgment of February 26, 2016. Series C No. 310. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_310_esp.pdf.)

⁴⁶ In my opinion, recognition of an instrument by the United Nations is not a matter of a binary classification of binding/not binding on the sole basis of whether the instrument is a treaty. The Statute of the International Court of Justice presents a catalogue of sources of international law. In addition, best practice such as the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“the Istanbul Protocol”) or the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016) are examples of other widely recognised best practice and doctrine that over time and UN-based processes has evolved through different stages of recognition. The Yogyakarta Principles are justly cherished around the world as a major achievement of activism in the field of sexual orientation and gender identity. As proven by the reference made to them by global and regional bodies, they hold a singular value as a doctrinal source that has done great service to the furtherance of the human rights of lesbian, gay, bisexual, trans, non-binary and other gender diverse persons.

⁴⁷ A/73/152, par. 21.

⁴⁸ <https://www.ohchr.org/sites/default/files/Documents/Publications/LivingFreeAndEqual.pdf>; p. 121.

Those criteria have also been identified, in full or in part, by several international and regional human rights bodies, including the UN Human Rights Committee,⁴⁹ the UN Committee on the Elimination of Discrimination against Women,⁵⁰ as well as UN Human Rights Special Procedures and Treaty Bodies, and Inter-American and European human rights bodies.

The international consensus in the process of obtaining gender recognition based on self-identification includes the recommendation of complete abolishment of psychiatric diagnosis or medical certifications or interventions. As recommended by Resolution 2048 (2015) of the Parliamentary Assembly of the Council of Europe, countries should “abolish sterilization and other compulsory medical treatment, as well as a mental health diagnosis, as a necessary legal requirement to recognize a person’s gender identity in laws regulating the procedure for changing a name and registered gender.”⁵¹ The World Health Organization’s “International Statistical Classification of Diseases and Related Health Problems”, ICD-11, adopted by the World Health Assembly in May 2019 officially removes trans categories from mental and behavioural disorders. A new category was created instead called “Conditions related to sexual health.” The category of transsexualism was removed and replaced with a new category called “gender incongruence of adolescence and adulthood.” That was a milestone in the process of depathologisation and countries like Argentina, Belgium, Brazil, Colombia, Denmark, Iceland, Ireland, Malta, Norway, Portugal, Switzerland, and Uruguay have introduced successful practices in this respect. Most of them have completely abolished medical certificates, interventions, or psychological diagnoses in favour of self-identification.

In relation to persons younger than 18 years old, the request for gender recognition procedure based on self-identification is most of the times carried through their legal representatives and with explicit agreement by the minor, considering the best interests and rights of the child. In many countries, such as Argentina, Malta, Norway, Uruguay, and in some cases New Zealand people below the age of 18 are allowed to change their gender marker. In Iceland, Norway, Malta, or Argentina, when the consent of any of the minor’s legal representatives is denied or impossible to be obtained, the case can be presented to the judicial or expert committee, that will consider the evolving capacities and best interests of the child. In Malta, even the children below 16 have a right to self-identify. In this case, parents must apply to the Court of Voluntary Jurisdiction on behalf of their children who are less than 16. In Norway, children from 6-16 years old can apply for the procedure with parental consent.

Some of the elements included in the Bill bring the Scottish system closer to conformity with those standards:

- a. lowering of the age criteria for legal gender recognition based on self-identification that is applicable to minors;

⁴⁹ CCPR/C/UZB/CO/5; par. 11.(d), CCPR/C/CZE/CO/4; par. 13.(b), CCPR/C/CZE/CO/4 (CCPR 2019); par. 13.

⁵⁰ CEDAW/C/AUS/CO/8; par. 50.

⁵¹ Parliamentary Assembly of the Council of Europe, Resolution 2048 (2015), Discrimination against transgender people in Europe, <https://pace.coe.int/en/files/21736/html>

- b. a complete abolishment or prohibition of psychiatric diagnosis or medical evidence/intervention in favour of “self-declaration;”
- c. facilitation of the process through a shift towards an administrative procedure; and
- d. simplified and accelerated procedure with less waiting periods.

*Human right to equal recognition before the law:
framework for restrictions*

Risk-management is an argument that may be put forward to justify mechanisms of gatekeeping in relation to access to legal recognition of gender identity, often in connection with alleged concerns regarding gender and sexual violence against women. The imperative of protecting women in all their diversity from violence is firmly established in international human rights law and policy. Indeed, in that context, multiple UN bodies, including the Committee on the Elimination of Discrimination against Women, the Special Rapporteur on Violence against Women, the UN High Commissioner for Human Rights, and my own mandate, have identified a concerning pattern of violence that is specifically targeted at trans women, and that is often brutal in nature, and have explicitly called for urgent measures to tackle such violence, including ensuring access of trans women to shelters and other services.⁵²

There is a connection between that imperative and recognition of the gender identity of trans women, trans men, non-binary, and other gender diverse persons: ensuring legal recognition under the standards recognised internationally is an effective mechanism to better ensure their protection from violence and discrimination. In other words, efficient and efficacious safeguards for violence against women are part of the State’s duty of prevention, but international human rights law and evidence available in all comparable settings lead to the conclusion that arbitrary obstacles to legal recognition of gender identity are not among them.

There are several reasons for this. Under international human rights law, targeting all members of a particular population or minority for establishing limits to its the enjoyment of human rights is a measure of authoritarian nature. Within democratic, rule of law-based settings, general restrictions or suspensions of human rights must always be carried out within the strictest framework to respond to states of emergency or disaster and, in all cases, restriction or suspension of human rights cannot discriminate based on any prohibited ground, a list that includes gender identity. As noted by the Commissioner on Human Rights of the Council of Europe when informing her findings about distortions of human rights between different communities or populations in the UK,

[a]nother worrying feature of the current discourse is the framing of the protection of the rights of trans people as diametrically opposed to, and incompatible with, the protection of the rights of women, or of lesbians, gays or bisexuals. The Commissioner is of the opinion that such distortions of human rights as a zero-sum game between different

⁵² CEDAW/C/GC/35, para. 12, 23, A/HRC/44/52/ADD.2, para 84, 103, A/HRC/32/42/Add.2 paras 72, 84(k), A/HRC/38/47/ADD.2, para 23, OHCHR, “Born Free & Equal (2nd Edition)”, page. 15

groups must be vigorously rejected. In this context, the Commissioner highlights in particular that trans people and cis-gender women, rather than being groups in competition with each other for the realisation of their human rights, are far more likely to have a shared experience of prejudice, gender inequality, harmful stereotyping, and a higher vulnerability to violence. These human rights issues must be tackled urgently across the board and, in the Commissioner's view, attempts to artificially pit these groups against each other will only undermine these efforts.⁵³

Some of the arguments that seek to restrict the human rights of trans women (or gender-diverse persons in general) focus on the hypothetical risk that predatory men may abuse systems of recognition of gender identity to perpetrate gender and sexual violence against women, notably through the requirement of scrutiny, often through judicial, medical, or psychological assessment. As noted by the Commissioner of Human Rights of the Council of Europe,

the concerns being raised often appeal to unfounded fears and prejudices against trans people and [...] are not supported by evidence. If there are real cases of competing interests, these must be resolved through a careful balancing of those interests on a case by case basis, but with a view to preserving each group's rights to the greatest extent possible, rather than on the basis of notions of the rights of one group overriding the rights of another group.⁵⁴

Indeed, when case-by-case considerations of competing interests are found to exist, within a democratic, rule of law-based society, a decision requires a particular analysis of lawfulness, proportionality, necessity, and less restrictive approaches. Interference with a human right (e.g., the right to equality in the form of access to spaces, for example) is only acceptable if a reasonable justification can be provided through that analysis, which concerns the relationship between the aims of a measure and the means or instruments that have been chosen to achieve these aims. This analysis cannot be a generalised restriction against all members of a community or minority and cannot be based on stigma or prejudice; rather, it must be the result of an individual, evidence-based decision process. In those cases, when an interference with a right proves to be unsuitable or superfluous, either because the aims pursued cannot be achieved by it in any case, or because less intrusive means were available, there is no reason to justify such an interference.

In the current matter, there is no credible evidence supporting the submission that requirements currently in place in Scotland for legal gender recognition are effective or efficacious safeguards to prevent sexual and gender-based violence, or that these requirements are even remotely connected to it; there is also no credible evidence supporting the idea that maintaining them in whole or part or devising other gatekeeping mechanisms will serve that preventive purpose either. The only

⁵³ Commissioner for Human Rights of the Council of Europe, Report following her visit to the United Kingdom from 27 June to 1 July 2022, CommDH(2022)27, <https://rm.coe.int/report-on-the-visit-to-united-kingdom-from-27-june-to-1-july-2022-by-d/1680a952a5>; par. 54.

⁵⁴ Commissioner for Human Rights of the Council of Europe, Report following her visit to the United Kingdom from 27 June to 1 July 2022, CommDH(2022)27, <https://rm.coe.int/report-on-the-visit-to-united-kingdom-from-27-june-to-1-july-2022-by-d/1680a952a5>; par. 54.

connection between undue obstacles to legal recognition for trans women and freedom of all women from gender and sexual-based violence is based on an erroneous perception of trans women as being males and, specifically, predatory males.

Further, these arguments, which seek to limit the human rights of trans, non-binary and other gender diverse persons by artificially connecting them to the emotional charge of a global and urgent human rights concern -women's freedom from violence- are not only misinformed: these narratives, which often exist under the conceptualisation of "sex-based rights,"⁵⁵ usually rest on the notion of sex as a fixed and binary biological given (defined by genitalia, reproductive organs, or chromosomes, or a combination thereof). One core argument of this discourse is that women are oppressed based on sex, not gender, hence the self-identification of those promoting this discourse as 'gender critical'. This argument disregards the complexity of what makes up gender identity, mimics patriarchal reduction of women to biological reproductive functions, and it ignores feminist scholarship that conceptualises sex as assigned and as more complex and diverse in biological reality than the male/female binary.⁵⁶ Such arguments are also incorrect with regards to the body of work of the Committee on the Elimination of Discrimination against Women, which emphasizes that the Convention of the Elimination of All Forms of Discrimination against Women "covers gender-based discrimination against women," and that State parties to the Convention have the obligation to not only legally recognise and prohibit discrimination on the basis of sex and gender, but also on the basis of gender identity, and adopt and pursue policies and programmes designed to eliminate such forms of discrimination.⁵⁷ The Committee on the Elimination of Discrimination against Women has also explicitly called for States to respect the "rights of transgender women to bodily integrity, autonomy and self-determination,"⁵⁸ and to actively take measures to address gender-based violence against trans women, and ensuring that supports measures and services for survivors are accessible to all women, in particular, those facing intersecting forms of discrimination, such as trans women.⁵⁹

Finally, some of these arguments appear to require that, to be able to enjoy their human rights, gender-diverse persons must produce absolute evidence that no predatory man will ever attempt to abuse the system of legal recognition of their gender identity. This would not only be an unreasonable burden; it would be a measure of discriminatory, anti-democratic and authoritarian nature. A democratic government would not restrict the human rights of a certain religious minority answering to the argument that there is hypothetical risk that non-members could disguise themselves

⁵⁵ The expression "sex-based rights" is not, to the extent of my knowledge, accepted or uniform language under international human rights law, and is also not part of the conventional language under CEDAW. Non-discrimination naturally implies enjoyment of rights without distinction of any kind, including sex (cf. UDHR, art. 2). While "sex-based rights" is not a concept that I can recognize in international human rights law sources, I am aware of advocacy that claims that certain rights need to be understood under the exclusive light of sex and differentiated from gender. As a result, this line of thought would appear to promote differentiated implications in the enjoyment of rights between women who were assigned as such as birth, and women who were not (in particular, trans women). I am of the opinion that this line of thought is not supported by international human rights law.

⁵⁶ Freya Schiwy (2007) Decolonization and the Question of Subjectivity. *Cultural Studies*, 21:2-3, 271-294; SRI AWID, joint submission to the IE SOGI in the process of preparation of 2021 reports, p. 8.

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⁵⁷ Committee on the Elimination of Discrimination against Women, General Comment No. 28 (2010), par. 5, 6, 17, 18, 19

⁵⁸ CEDAW/C/AUS/CO/8; par. 50.

⁵⁹ CEDAW/C/GC/35, para. 12, 23, 31(b)

as such and perpetrate crime (applicable *mutatis mutandis* to every minority in every society). Similarly, the human rights of trans women are not dependent on the hypothetical risk that predatory men could disguise themselves as such and perpetrate crime. I am therefore of the opinion that political consideration of legal recognition of gender identity does not require absolute proof that no person will ever attempt to abuse that system. In democratic societies, the possibility of abuse of rights must be foreseen, and addressed, through appropriate, evidence-based preventive, prosecution, and accountability mechanisms which, as I have expressed above, do not include arbitrary obstacles to legal recognition of gender identity.

*Legal recognition of gender identity based on self-identification:
comparative perspectives*

As of the date of preparation of this opinion, more than a 250 million persons live in countries with a legal gender recognition based on self-identification: namely Argentina, Belgium, Brazil, Colombia, Denmark, Iceland, Ireland, Malta, New Zealand, Norway, Portugal, Switzerland, and Uruguay.

Some 100 million are added by several regional entities from Australia (Tasmania), Canada (Alberta, British Columbia, Newfoundland and Labrador, Northwest Territories, Quebec, Yukon), Mexico (Baja California, Baja California Sur, Coahuila, Colima, Mexico City, Hidalgo, Jalisco, Michoacán, Morelos, Nayarit, Oaxaca, Puebla, Quintana Roo, San Luis Potosí, Sinaloa, Sonora, and Tlaxcala), Spain (Andalucía, Aragón, Cantabria, Cataluña, Valencian Community, Extremadura, Baleares, Canarias, La Rioja, Community of Madrid, Murcia, Navarra, and Basque Country) and the United States of America (California, Colorado, Idaho, Indiana, Kansas, Michigan, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, Washington, and Northern Mariana Islands, all of which have also approved procedures for legal gender recognition based on self-identification.

Additionally, Nepal and Pakistan allow self-identification for people who identify with a third gender or non-binary marker.⁶⁰

My mandate has not received any information of administrative or criminal judicial findings that the self-identification process has been used by predatory men for the purpose of perpetrating gender or sexual violence against women in gender-segregated spaces in any of those countries or regions; and desk and online research to that effect has not yielded any results. Similarly, there are no reported cases that would support the submission that crimes perpetrated by trans women, trans men or non-binary persons are the result of an abuse of the system of legal recognition for the purpose of gaining undue access to a segregated space or any gender-related differential treatment.

In other words, in the countries that have legal recognition of gender identity based on self-identification, there is no credible evidence to suggest systemic risk of predatory men using the process of identifying and living as a woman as an opportunity to perpetrate gender or sexual-based violence.

⁶⁰ See [Gender Recognition in the Rest of the World - Scottish Trans](https://www.scottishtrans.org/our-work/gender-recognition-act-reform-2022/gra-in-the-world/), <https://www.scottishtrans.org/our-work/gender-recognition-act-reform-2022/gra-in-the-world/>

Conclusions

Consensus on the imperative of legal recognition of gender identity and on the related standard of self-identification exists within the United Nations Human Rights System; it is my opinion that the Bill brings the Scottish system closer to conformity with those standards and, therefore, it is an act of compliance with obligations incumbent upon the State under international human rights law.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

I would be grateful if the present letter could be shared with the Government of Scotland and the Chair of the Equalities, Human Rights and Civil Justice Committee of the Scottish Parliament.

Please accept, Excellency, the assurances of my highest consideration.

Victor Madrigal-Borloz
Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity