



Input for SR VAWG's report on violence against women and girls in sport

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1. **There is no basis in international law to say that individuals have right to social and legal recognition of their preferred sexual identity irrespective of their biological sexual identity**

Individuals who experience gender dysphoria should be treated with compassion, and their human rights must be respected like those of any other person. This does not mean that they have a right to social and legal recognition of their preferred sexual identity irrespective of their biological sexual identity, as some UN human rights special procedures and treaty bodies have misleadingly claimed in recent reports.

International human rights law does not recognize the concept of "gender." Not one UN human rights treaty even mentions the term "gender," nor is there any indication in the negotiating history and other preparatory materials of human rights treaties that the notion of "gender" as a legal concept separate from biological sexual identity was ever contemplated in relation to human rights.

Binding human rights instruments only ever mention the term "sex" when addressing the rights and relations of men and women. International law recognizes "sex" as a protected category, forbidding discrimination on the basis of sex (UDHR, Article 2; ICCPR, Articles 2,4,24, and 26; ICESCR, Article 2) and recognizing the equal rights of men and women in the context of marriage (UDHR, Article 16; ICCPR, Article 23; ICESCR, Article 10). Even the Convention on the Elimination of All Forms of Discrimination Against Women, a human rights treaty wholly dedicated to achieving the equality of men and women, does not mention the concept of "gender" anywhere in the text or negotiating history.

The only mention of gender in international law is in the context of the Rome Statute of the International Criminal Court. There, the concept of gender is strictly defined in reference to biological sexual identity. The Rome Statute of the International Criminal Court famously defined "gender" exclusively as a biological and binary concept in Article, 7, paragraph 3:

For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

This definition of gender is contained in the section of the Rome Statute that defines each of the crimes against humanity and their constituent elements. It was hard-fought over many months of difficult and tense negotiations. States expressly excluded "any meaning different from the above" before the treaty could be adopted, because theories of gender as a social construct were already circulating at high levels of academia and policy-making.

The strict understanding of sexual difference between men and women as an objective and legally relevant fact in international law is also reflected in the national laws of the vast majority of countries. Almost all countries understand sex as a social reality based in biological sexual identity, and with legal implications, they do not consider "gender" a mere social construct. Only seven countries allow gender change based on self-identification alone, according to Amnesty International, which supports this controversial position.¹ Furthermore, only a minority of countries legally recognize "gender identity" as a concept distinct from biological sexual identity at all.²

In light of this, any claims and representations by UN human rights special procedures and treaty bodies that individuals have a right to social and legal recognition of their preferred sexual identity irrespective of their biological sexual identity are false and should be dismissed as *ultra vires*. UN human rights special procedures and treaty bodies cannot create new human rights. Their views are neither authoritative nor binding. They only derive force if UN member states give their recommendations and observations any validity.

2. The special rapporteur should defend women's sports

Participation in sports has a wide range of benefits throughout people's lifetimes, and from casual to elite professional levels. Sports offer the health benefits of physical activity, opportunities for coaching and mentorship of young people, and occasions to engage in teamwork and cooperation with others. For some, sports offer employment and financial opportunities, while for others they provide an important recreational activity that improves mental and physical health and vital social connections with others.

The inclusion of women and girls in sports has been widely recognized as an important priority from the local to the international level. However, it is essential that such participation comes with appropriate safeguards against violence and harassment. One important and emerging area of concern involves the very definition of women's and girls' sports—indeed, of women and girls themselves.

The increasingly blurred lines around policies involving sex, gender, and gender identity in the context of sports create concerns in two ways. First, in certain sports, the separation of men's and women's teams and competitions reflects the basic biological differences between the sexes in order to create a fair playing field for both men and women. In sports that involve greater amounts of physical contact, these separations also have a protective effect for women and girls, who are, on average, smaller and less physically strong than their male counterparts. Erasing these distinctions and allowing biologically male athletes to compete on women's teams risks exposing female athletes to an increased likelihood of physical injury. Second, regardless of whether athletic teams are segregated by sex or not, locker rooms and bathrooms used by athletes often are. Again, recent shifts in policy around the definition of female identity have created situations where biologically male athletes are given access to female-only spaces, which may increase the risk of violence to women and girls who participate in sports.

With regard to the first concern, there is obviously a distinction between acts of physical aggression intended to cause bodily harm and intimidation and the type of unintentional injury

that can result from participation in sports, particularly those that involve a high degree of physical contact. However, policies that increase the exposure of women and girls to the likelihood of physical injury, or weigh this potential harm as less important than the priority of affirming the gender identity of transgender-identifying athletes, are a matter of concern. Arguing against the inclusion of male-to-female transgender athletes competing on female rugby teams, sport philosophy scholar Jon Pike writes:

There is a clear flaw, I think in most trans inclusive arguments: they seem to rest on claims that male physiological advantage does not matter. This is either (with radical implausibility) because it is entirely socially constructed, or (falsely) that it is, or can be, eliminated by Testosterone suppression, or for some other reason – that gender identity matters more than male advantage. But if male advantage does not matter, why have sex segregated sport in the first place?³

Other reports of serious injuries to female athletes caused by the inclusion of biologically male competitors have emerged in the context of basketball, volleyball, field hockey, soccer, and other sports.⁴ Again, while there is an important distinction between the types of physical violence that are an unavoidable component of certain sports and physical assault in other contexts, the harm to the bodies of women and girls and the requirement of medical care, physical therapy, and psychological recovery is real regardless. Providing adequate protection for women and girls in the context of sport requires policymakers to refrain from removing those safeguards in order to advance other, far more controversial, agendas.

The second area of concern involves intentional, rather than incidental, harm to women and girls as a result of what were formerly sex-segregated environments being used by biological males. While most transgender-identified people seeking to use women's facilities have not and would not perpetrate violence against the women using them, there have been disturbing instances of individuals taking advantage of extremely lax criteria for entry into women's spaces and causing harm.

The Special Rapporteur on violence against women and girls and its causes and consequences has raised concerns about the legal recognition of self-identification of gender identity, arguing that "a right to legal gender recognition does not imply a right to unregulated self-identification of gender identity without appropriate safeguarding and risk assessment."⁵ In the context of sport, consideration must be given to both the legal standard which governs how individuals are recognized on the basis of sex on official identity documents as well as the particular standards set by the governing bodies of various sports with regard to the criteria for participation, as these may or may not align exactly.

Advocacy groups of elite female athletes have argued that women's locker rooms should be restricted to biologically female athletes, citing not only the threat of physical assault, but also the discomfort that many women feel about undressing in the presence of biological males: "The goal of including those with transgender identities must not be accomplished at the expense of female athletes' rights to safety, privacy, and dignity."⁶

To the extent that transgender-identifying biological males are allowed access to women's facilities, a standard that requires only self-identification creates the additional concern that bad actors may take advantage of such a low barrier to entry by falsely asserting a female gender identity. In either case, the burden of distinguishing between men with genuine gender dysphoria and those cynically taking advantage of a lax standard falls on the women and girls whose privacy is given a lower priority.

Maximizing the access of women and girls to participate in sport while ensuring their protection from violence is an important priority that should be upheld at the local, national, and international level. Efforts to ensure that all people, regardless of their self-reported gender identity, enjoy the fulfillment of their basic rights should not come at the expense of women and girls who want to participate in sports at all levels, compete on an even playing field, and have their privacy, dignity, and physical and mental health respected and protected while doing so.

Endnotes

1 Amnesty International. LGBTI Rights overview. <https://www.amnesty.org/en/what-we-do/discrimination/lgbt-rights/>. It is also notable that most of the 40 or so countries where individuals are allowed to legally assume a transgender identity require a psychiatric determination of gender dysphoria and/or a surgical operation to mutate the sexual physiognomy of an individual. Some even require individuals to divorce their spouses and do not allow individuals with children to change their gender.

2 Equaldex, LGBT Equality Index. <https://www.equaldex.com/>

3 Jon Pike (2021) Safety, fairness, and inclusion: transgender athletes and the essence of Rugby, *Journal of the Philosophy of Sport*, 48:2, 155-168, DOI: 10.1080/00948705.2020.1863814

4 <https://www.heritage.org/gender/commentary/trans-athlete-injuries-multiple-girls-forcing-team-forfeit-with-er-thou-feminism>

5 <https://www.ohchr.org/sites/default/files/documents/issues/women/sr/activities/SR-VAWG-statement-response-SRI.pdf>

6 <https://championwomen.org/wp-content/uploads/2023/01/Locker-Rooms-Champion-Women-WSPWG-Final-2346.pdf>