

HUMAN RIGHTS BODIES' ADJUDICATION OF TRANS PEOPLE'S RIGHTS: SHIFTING THE NARRATIVE FROM THE RIGHT TO PRIVATE LIFE TO CRUEL AND INHUMAN OR DEGRADING TREATMENT

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Trans people suffer severe violations of their human rights. Human rights bodies and institutions have only addressed these issues to a very limited extent under the right to private life, severely underestimating the harm imposed on trans people. This paper critically analyses the harm caused by the prohibition to obtain Legal Gender Recognition and the requirement to undergo coercive medical treatments to have their identities legally recognized. Through an analysis of regional and international human rights bodies' jurisprudence, the paper re-frames the treatments, and argues that both the pathologisation of trans individuals and the prohibition to obtain Legal Gender Recognition constitute cruel and inhuman or degrading treatment.

Keywords: Trans Rights, Transgender, Legal Gender Recognition, Pathologisation, Pathologization, CIDT

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I. INTRODUCTION

Trans people's rights are routinely violated throughout the world by both state and non-state actors. The life expectancy of a trans woman in Latin America is less than 35 years.¹ As a result of discrimination, one in four trans people in Europe have attempted suicide at least once in their lifetime.² In the Asia Pacific region, the vast majority of trans people lack access to basic healthcare.³

Throughout the past centuries, trans people's gender identities and expressions have been criminalised under laws that prohibit both homosexuality and cross-dressing.⁴ Even today, 69 countries continue to criminalise same-sex sex, and 15 explicitly criminalise cross-dressing.⁵ Only a small number of countries in the world do not require trans people to undergo any surgery, psychiatric diagnosis or hormonal therapy to access Legal Gender Recognition (LGR).⁶ The rest either prohibit trans people from

¹ Inter-American Commission of Human Rights, *Violence against LGBTI persons in the Americas* (OAS/Ser.L/V/II.rev.1 2015) 15.

² Adam Smiley et al, *Over Diagnosed but Underserved. Trans Healthcare in Georgia, Poland, Serbia, Spain and Sweden: Trans Health Survey* (Transgender Europe 2018) 21.

³ Health Policy Project, Asia Pacific Transgender Network, United Nations Development Programme, *Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities in Asia and the Pacific* (2015) 2.

⁴ Jonathon Egerton-Peters et al, *Injustice Exposed: The Criminalisation of Transgender People and Its Impact* (The Human Dignity Trust 2019) 13.

⁵ Ibid.

⁶ Grietje Baars, 'Queer Cases Unmake Gendered Law, or, Fucking Law's Gendering Function' (2019) 45 *Australian Feminist Law Journal* 22.

accessing LGR, or impose coercive medical treatments as a requirement to access legal recognition. Within this context, human rights bodies have severely underestimated the harm suffered by trans people when they are prohibited from accessing LGR, and when requiring trans people to undergo medical procedures in order to access LGR.⁷

This paper argues that when a state prohibits trans people from obtaining LGR or imposes coercive medical treatments, they violate trans people's right to be free from Cruel, Inhuman or Degrading Treatment (CIDT). The paper is divided in four sections.

First, the paper will analyse how and why human rights bodies have failed to challenge a system pathologising trans identities. This analysis will be conducted both through a review of the case-law concerning trans people's rights, and an analysis of the gendered structures of human rights law. The analysis will focus on both regional and international human rights systems. However, as the African system remains silent on transgender issues, it is not incorporated in the main analysis.⁸

Section III will analyse the requirements for a treatment to be considered as a Cruel, Inhuman or Degrading Treatment, and argue that trans-specific forms of suffering are severely underestimated. Through an analysis of case law and literature, this section will focus mainly on the evaluation of the subjective elements necessary for an assessment of whether a treatment constitutes CIDT.

The next part of the paper will analyse and re-frame human rights violations deriving from the denial of access to LGR and the imposition of medical treatments to have one's gender legally recognised. Section IV will argue that the prohibition to obtain LGR leads to human rights violations amounting to CIDT, both directly and indirectly. Section V will argue that coercive medical requirements, imposed as part of the pathologising medico-legal model, constitute CIDT. The paper specifically analyses the issues of coercive sterilisation, hormonal replacement therapy and psychiatric diagnoses. It argues that the adjudication of trans rights under the right to

⁷ See *Christine Goodwin v the UK*, Application no. 28957/95 (ECtHR July 11, 2002).

⁸ Zhan Chiam et al, *Trans Legal Mapping Report: Recognition Before the Law* (ILGA 2016) 17.

private life for the past thirty years has allowed the pathologising model to thrive and has enabled states to continue to violate trans people's fundamental rights.

II. HUMAN RIGHTS BODIES' CURRENT APPROACH TO TRANS RIGHTS

Even though trans rights violations are well documented by both non-governmental organisations (NGOs) and United Nations (UN) organs,⁹ the harm suffered by trans people continues to be severely underestimated by human rights bodies and institutions. In order to analyse the rights of trans people within the context of LGR, it is fundamental to first acknowledge the gendered structures present in the international legal system.

Feminist legal scholars argue that men's long-term domination of international institutions has led to the perception that men's issues are human rights issues, thus portraying women's issues as marginal.¹⁰ Celina Romany explains this paradigm, arguing that states are 'jurisprudentially male'. This is due to the fact that women are highly under-represented in such institutions, inducing the institutions to often take a male standpoint, continuing to perpetrate gender relations of subordination.¹¹ As a result, the state and its legal system cannot be considered genderless. Since international organisations are largely composed by states, these dynamics are not structurally challenged but instead transposed to the international level. Thus, international organisations perpetrate those gender relations of subordination perpetrated by states.

⁹ See Usha Jugroop, *Laws and Policies Affecting Transgender Persons in Southern Africa* (Southern Africa Litigation Centre 2016); Inter-American Commission of Human Rights (n 1); Smiley et al (n 2); European Union Fundamental Rights Agency, *Being Trans in the European Union: Comparative Analysis of EU Survey Data* (2014).

¹⁰ Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *The American Journal of International Law* 625.

¹¹ Celina Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in Rebecca J Cook (ed) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 93.

Feminist legal scholars have challenged the assumption in International Human Rights Law (IHRL) that women are passive objects of the law rather than active subjects, and that the legal 'standard' is male.¹² However, although the human rights law framework made it possible for them to start challenging the assumed hierarchy of gender, most scholars and advocates left the assumption of dualistic binary genders unquestioned and fundamentally unchallenged.¹³ As a result, trans people's needs and issues remain marginal to the human rights discourse. Dianne Otto argues that this also stems from certain feminists having opposed a disengagement of sex/gender from its biological moorings.¹⁴

As a consequence of this process and of widespread homo-transphobia, human rights bodies largely ignored LGBTI rights until the 1990s. The result was that the discourse surrounding the social construction of gender in human rights remained constricted to a binary gender model. Human rights institutions have not embraced the fact that gender is socially and culturally constructed. They have therefore failed to acknowledge the existence and rights of trans, gender non-conforming and intersex individuals.¹⁵

While women's oppression is maintained through a patriarchal model that shapes domestic and international institutions, trans people's oppression is maintained through a cis-normative¹⁶ binary gender model. This model rigidly classifies both sex and gender in two distinctive and separate categories, which in turn legitimises the institutional discrimination of trans, gender non-conforming and intersex individuals.¹⁷ The oppression of trans

¹² Dianne Otto, 'International Human Rights Law: Rethinking the Sex/Gender Dualism' in Margaret Davies, Vanessa E Munro (eds) *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013).

¹³ Dianne Otto, 'Queering gender [identity] in International Law' (2015) 33 *Nordic Journal of Human Rights* 302.

¹⁴ Otto (n 12) 205.

¹⁵ Wendy O'Brien, 'Can International Human Rights Law Accommodate Bodily Diversity?' (2015) 15 *Human Rights Law Review* 8.

¹⁶ Cisgender is the opposite of transgender and is a term used to define all people whose gender identity correspond to the sex they have been assigned at birth.

¹⁷ Silvan Angius and Christa Tobler, *Trans and Intersex People Discrimination on the Grounds of Sex, Gender Identity and Gender Expression* (European Commission Directorate-General for Justice 2011) 13.

people is thus perpetrated through both formal policies of criminalisation and pathologisation, and informal toleration of discrimination and exclusion.

This long-term criminalisation and pathologisation have led to a systematic underestimation of harm perpetrated by states on trans people. The dehumanising effects of both the criminalisation and the pathologisation of trans identities not only normalise discrimination, but also have severe consequences for trans people's enjoyment of human rights.

Pathologisation consists in the formal identification of a group of people as inherently disordered. Rebecca Cook argues that in order to identify a human rights violation, the harm being inflicted has to be recognised and named as such.¹⁸ However, international institutions have sanctioned the pathologisation of trans people through instruments such as the International Classification of Diseases (ICD),¹⁹ and by failing to challenge the medico-legal pathologisation imposed by individual states. By sanctioning the pathologisation of trans people, international institutions have hindered the process of identification of harm caused by prohibitive requirements for LGR, such as coerced sterilisation and other medical treatments.

As a result of the deeply gendered structure of international law, the UN human rights mechanisms did not acknowledge in any significant way human rights violations on the basis of gender identity until the late 1990s.²⁰ The ECtHR started to adjudicate transgender cases concerning the right to obtain LGR in the early 2000s.²¹ However, it has not yet challenged the

¹⁸ Rebecca J Cook and Simone Cusack, *Gender Stereotyping* (University of Pennsylvania Press 2010) 38.

¹⁹ The World Health Organisation has pathologized trans identities through the International Classification of Diseases until late 2018, when the 11th version of the classification has been adopted. The 10th edition classifies "transsexualism" as a mental and behavioural disorder under the code F64.0.

²⁰ Melanie Bejzyk, 'Criminalisation on the Basis of Sexual Orientation and Gender Identity: Reframing the Dominant Human Rights Discourse to Include Freedom from Torture and Inhuman and Degrading Treatment' (2017) 29 *Canadian Journal of Women and the Law* 382.

²¹ ECHR, 'Gender Identity factsheet' (Council of Europe, 2019) available at <https://www.echr.coe.int/Documents/FS_Gender_identity_ENG.pdf> accessed on 30 August 2019.

systematic pathologisation of trans identities that continues to be enforced throughout Europe.

The Inter-American Court of Human Rights (IACtHR) published its first judgement on LGBTI rights in 2012.²² However, it has not yet adjudicated a case on trans rights, despite the fact that most states under its jurisdiction have either deeply discriminatory policies towards trans people, or fail to protect them from endemic violence.²³ In 2017, however, it published an Advisory Opinion on Costa Rica with highly progressive views on trans issues.²⁴ Notably, in the Advisory Opinion, the Court adopts a progressive model and calls for a depathologisation of trans identities. The IACtHR here argues that the imposition of medical requirements to obtain LGR would violate trans people's right to personal integrity to the extent of violating the right to be free from CIDT.²⁵

In the past thirty years, trans rights have mostly been litigated and advocated through the right to private life at the international level. The arguments under the right to private life were developed in the first successful trans rights cases argued before the ECtHR. In these cases, the court recognised trans people's right to LGR after acknowledging gender identity as an important aspect of one's personal identity, protected under the right to private life, along with one's sexual orientation, name and sexual life.²⁶

This paper argues that the right to private life does not adequately deal with transgender rights for a number of reasons. Under the right to private life, human rights bodies have left the structure of the pathologising model fundamentally unchallenged. Under pathologising systems, trans people who wish to undertake gender affirming medical procedures or obtain LGR are required to undergo coercive medical treatments. In most states adopting such models, trans people are required to obtain a diagnosis of gender identity disorder, regardless of the state of their mental health. Often, they

²² *Case of Atala Riffo and Daughters v. Chile*, Case 12,502 (IACtHR 2012).

²³ Inter-American Commission of Human Rights (n 1).

²⁴ Advisory Opinion OC-24/17 (IACtHR 2017).

²⁵ *Ibid* para 146.

²⁶ Pieter Cannoot, 'The Pathologisation of Trans Persons in the ECtHR's Case Law on Legal Gender Recognition' (2019) 37 *Netherlands Quarterly of Human Rights* 19.

are further required to undergo sterilisation and hormonal replacement therapy to access LGR.²⁷

The right to private life is a qualified right. This means that interferences with aspects of one's life protected under this right can be justified if they are non-arbitrary and provided by law.²⁸ Various human rights bodies have different tests to determine which interferences are deemed lawful and justified. However, under such provisions, the imposition of coercive medical treatments as requirements to obtain legal gender recognition has never been considered arbitrary. In most cases, the states' argument that the imposition of coercive medical treatments on trans people were necessary for the public interest, have been accepted as legitimate.²⁹

When the IACtHR challenged for the first time the pathologizing system in its Advisory Opinion, it did so under the right to humane treatment.³⁰ Under the right to private life, human rights bodies have failed to challenge the system of pathologisation, and left unhindered states' imposition of either sterilisation, hormonal therapy or a psychiatric diagnosis as requirements to obtain LGR. By accepting and leaving unquestioned the pathologisation of trans people by states, human rights bodies continue to sanction the definition of gender diversity as a mental illness. They further fail to recognise that defining gender diversity as a mental illness is 'unfounded, discriminatory and without demonstrable clinical utility'.³¹

The pathologisation of trans persons is one of the root causes behind many of the human rights violations trans people face.³² By imposing trans people

²⁷ Kara Sheherezade, *Gender Is Not an Illness: How Pathologizing Trans People Violates International Human Rights* (GATE 2017).

²⁸ American Convention on Human Rights, art 11; European Convention on Human Rights, art 8; Covenant on Civil and Political Rights, art 17.

²⁹ *A.P., Garçon and Nicot v France*, App no 79885/12 (ECtHR 2017) paras 136-144.

³⁰ Advisory Opinion OC-24/17 (IACtHR 2017) para 146.

³¹ Maria Elisa Castro-Paranza et al, 'Gender Identity: The Human Rights of Depathologization' (2016) 16 *International Journal of Environmental Research and Public Health*.

³² OHCHR, 'Being Lesbian, Gay, Bisexual and/or Trans Is Not an Illness - Joint Statement for International Day against Homophobia, Transphobia and Biphobia' (United Nations Human Rights Office of The High Commissioner, 12 May 2016)

to undergo medical and psychological procedures before LGR, states continue to actively violate trans people's personal autonomy and integrity.³³ The majority of trans rights cases concerning one's right to access LGR adjudicated under the right to private life have left the pathologisation system widely unchallenged.³⁴ They thus leave the medico-legal structure that led to the violations in place.

III. ASSESSMENT OF THE SEVERITY REQUIREMENTS FOR A TREATMENT TO BE CONSIDERED CIDT

On the basis of this overview, this paper argues that both the prohibition to obtain legal gender recognition and the pathologisation of trans people constitute inhuman or degrading treatment.

I. Legal Definitions of CIDT

Currently there is no universal definition of the scope of Cruel, Inhuman or Degrading Treatment (CIDT).³⁵ CIDT is usually defined in relation to the act of torture, as they are often protected under the same provision. The International Covenant on Civil and Political Rights (ICCPR) provides that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment'.³⁶ The European Convention on Human Rights (ECHR)'s definition similarly does not formally distinguish between the categories of Torture and CIDT.³⁷ The Human Rights Committee (HRC) has stated that the distinction between Torture, Cruel and Inhuman or Degrading treatment 'depends on the nature, purpose and severity of the treatment applied'.³⁸ Under Article 5 of the American Convention on Human Rights (ACHR), 'every person has the right to have his physical, mental and moral

available at <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956&LangID=E>> accessed 8 August 2019.

³³ Sheherezade (n 27) 8.

³⁴ O'Brien (n 15) 5.

³⁵ Rhona K. M. Smith, *Textbook on International Human Rights* (Oxford University Press 2012) 239.

³⁶ ICCPR art 7.

³⁷ ECHR art 3.

³⁸ HRC, 'General Comment n. 20: Article 7 on Prohibition of Torture, or Other Cruel and Inhuman or Degrading Treatment' (1992) para 4.

integrity respected' and 'no one shall be subjected to torture or cruel, inhuman or degrading treatment'.³⁹

Sir Nigel Rodley has argued that, for the HRC, 'the threshold for entry into the scope of torture and ill-treatment was "degrading treatment", which grossly humiliated a person or drives him to act against his will or conscience'.⁴⁰ The ECtHR states that a treatment itself is not degrading 'unless the person concerned has undergone – either in the eyes of others or in his own eyes - humiliation or debasement attaining a minimum level of severity'.⁴¹ Therefore, in order to determine if a treatment constitutes CIDT, the severity of the treatment has to be analysed.

2. *The CIDT Minimum Severity Threshold: Recognition of Psychological Suffering*

Trans rights violations, arising from the prohibition to legally transition and/or the imposition of prohibitive requirements, result in both physical and mental suffering. In order to classify such treatments as breaches of the right to be free from CIDT, this section will analyse the physical and mental suffering standards adopted by human rights bodies.

Human rights bodies have been slow to fully recognise that mental pain and ill-treatment alone can constitute CIDT, since there is a tendency to consider them secondary to physical injuries.⁴² When classifying an act as torture or CIDT, consideration must be given not only to what is done to a person in terms of practical actions, but also to the overall situation and circumstances and individual susceptibilities and vulnerabilities.⁴³ This

³⁹ ACHR art 5.

⁴⁰ Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (Oxford University Press 2009) 86.

⁴¹ *Campbell and Cosans v. the United Kingdom*, Application no. 7511/76 (ECtHR 1982) para 28.

⁴² Katherine Mayall et al, 'Reproductive 'Rights Violations as Torture or Ill-Treatment' in Center for Human Rights and Humanitarian Law, Anti-Torture Initiative, *Gender Perspectives on Torture: Law and Practice* (Washington University College of Law 2017) 268.

⁴³ Hernan Reyes, 'The Worst Scars Are in the Mind: Psychological Torture' (2007) 89 *International Review of the Red Cross* 599.

means that the effects provoked on the person have to be considered as part of the assessment.

While conducting the analysis, one of the relevant issues to determine the severity of the act is the personal significance of the psychological maltreatment.⁴⁴ The ECtHR has defined a treatment to be degrading if 'it arouses feelings of fear, anguish and inferiority capable of breaking an individual's moral and physical resistance'.⁴⁵ In *Vuolanne v. Finland*, the HRC stated that the assessment of whether a treatment constitutes ill-treatment, depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical and mental effects as well as the sex, age and state of health of the victim.⁴⁶ In cases concerning the treatment of trans people, there are some trans-specific factors that should be taken into account.

The humiliation in the eyes of the victim or others can derive from treatment that is purely psychological or, as described by the ECtHR, has a strong 'symbolic' component.⁴⁷ Humiliation has been described as the state in which a person is being ridiculed, unjustly degraded and in particular when one's identity is demeaned or devalued.⁴⁸ Humiliation refers to the debasement of a person's identity rather than to practical actions.⁴⁹ To determine whether an act is humiliating towards a trans person, personal factors and vulnerabilities must be taken into account. For example, not having an identity document matching one's gender identity and expression, and thus having to explain one's gender history to strangers on a regular basis, is humiliating for many trans people. Not having a matching ID may also arouse feelings of anguish, fear and inferiority. It exposes trans people to a high risk of discrimination and violence on a daily basis when they are forced to reveal their trans status to strangers such as post officers, bank employees,

⁴⁴ Pau Pérez-Salez, *Psychological Torture: Definition, Evaluation and Measurement* (Routledge 2017) 78.

⁴⁵ *Pretty v. UK*, App no 2346/02, (ECtHR 2002) para 52.

⁴⁶ *Vuolanne v. Finland*, CCPR/C/35/D/265/1987 (HRC 1989).

⁴⁷ Pérez-Salez (n 44) 77.

⁴⁸ Linda M Hartling and Tracy Luchetta, 'Humiliation: Assessing the Impact of Derision, Degradation and Debasement' (1999) 19 *The Journal of Primary Prevention* 264.

⁴⁹ *Ibid* 263.

librarians, waiters, ticket controllers, club bouncers and public administrators .

Evaluating the subjective elements, various human rights bodies found that stripping a prisoner naked may constitute CIDT.⁵⁰ Whether this treatment reaches the severity threshold of CIDT, however, depends on the victim's cultural, religious and personal sensitivities. Forcing a person to act against their religion has also been found to constitute CIDT due to the humiliation provoked.⁵¹ Scholars agree that forced sterilisation often involves the destruction of an essential feature of a person's identity.⁵² This is dependent on the cultural importance of reproduction for women in today's society. The ECtHR further found that strip-searches by a person of the opposite sex can constitute a violation of a person's integrity and dignity and thus amount to CIDT, since it creates a feeling of humiliation.⁵³ In this case, the Court focused on the feeling of humiliation provoked in the victim and the solely psychological suffering which ensued.

For these reasons, the analysis of the severity of treatment cannot be narrowed down solely to a consideration of the objective elements, but must take into account the subjective experience of humiliation and degradation.

One of the elements often considered in the evaluation of the severity of treatment is its duration. The ECtHR found that even premeditated threat of ill-treatment for a short amount of time constituted CIDT, since the person was in a state of vulnerability.⁵⁴ There is therefore no established minimum time limit for a treatment or act to be considered a violation of the right to be free from CIDT.

⁵⁰ Reyes (n 43).

⁵¹ Ibid 596-599; Metin Basoglu et al, 'Torture vs Other Cruel, Inhuman and Degrading Treatment: Is the Distinction Real or Apparent' (2007) 64 Archives of General Psychiatry 281.

⁵² Ronli Sifris, 'Conceptualising Involuntary Sterilisation as "Severe Pain or Suffering" for the Purposes of Torture Discourse' (2010) 28 Netherlands Quarterly on Human Rights 537.

⁵³ Pérez-Salez (n 44) 77.

⁵⁴ *Gafeng v. Germany*, App no 22978/05 (ECtHR 2010) paras 101-108.

Physical forms of pain and suffering are more easily identified than psychological forms of suffering.⁵⁵ Some physical treatments or invasion of one's bodily integrity always reach the minimum severity threshold.⁵⁶ As will be seen in the next section, coerced sterilisation is one of such treatments. When analysing trans rights cases, it needs to be taken into consideration that the definitions of torture and CIDT have been written having in mind the politically motivated act of torture against cisgender heterosexual men.⁵⁷ As a result, such definitions have excluded for a long time grave violations of women's rights. Today, they continue to exclude acts perpetrated against trans individuals.

Feminist legal scholars have engaged in a long battle to have human rights bodies recognise female-specific forms of pain and suffering as serious human rights violations.⁵⁸ The battle to recognise rape as torture stems from this analysis. For a long time, human rights bodies refused to recognise the severity and instrumental use of largely female-specific forms of suffering such as rape. However, the recognition of severity of a certain treatment is fundamental to obtain both guarantees of non-repetition and redress. Trans rights are still at the beginning of a similar process of recognition. The Special Rapporteur on Torture in a recent report stated that 'gender stereotypes play a role in downplaying the pain and suffering that certain practices inflict on women, girls, and lesbian, gay, bisexual and transgender persons'.⁵⁹

Currently, trans-specific forms of suffering are not recognised as political or severe enough for constituting torture or CIDT by most human rights bodies. As will be argued later, even when trans people are subjected to non-trans specific violations, such as coercive sterilisation and other forms of coercive medical treatment, their suffering is underestimated and classified

⁵⁵ Reyes (n 43) 596.

⁵⁶ Hilary Charlesworth and Christine Chinkin 'The gender of *Jus Cogens*' (1993) 15 Human Rights Quarterly 70.

⁵⁷ Alyson Zurieck, '(En)Gendering Suffering: Denial of Abortion as a Form of Cruel, Inhuman or Degrading Treatment' (2015) 38 Fordham Journal of International Law 101.

⁵⁸ Ibid 103

⁵⁹ United Nations General Assembly, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (A/HRC/31/57 2016) para 9.

under a qualified right. This paper wants to highlight how such exclusion actively sanctions the violation of trans people's fundamental rights. The lack of recognition of the severity of psychological suffering of trans people as a consequence of coercive medical treatments or prohibition to access LGR is therefore influenced by systematic discrimination. This must be changed in order to guarantee trans people their fundamental rights.

IV. PROHIBITION TO OBTAIN LEGAL GENDER RECOGNITION: SHIFTING THE NARRATIVE TOWARDS CIDT

When trans people are unable to obtain Legal Gender Recognition, they are *de facto* not recognised before the law and therefore more exposed to human rights violations. As stated by the IACtHR, the 'non-recognition of [gender] identity may mean that a person has no legal record of his or her existence, which makes it difficult to fully exercise his or her rights'.⁶⁰ However, throughout the past twenty years, human rights bodies have failed, or rather refused, to recognise the severity of the harm provoked by states when not allowing trans people to access LGR.

Both the HRC and the ECtHR argued that the prohibition to obtain LGR only constituted a violation of the right to private life. The first successful trans rights cases were litigated before the ECtHR in the early 2000s, and challenged states' prohibition to change legal sex on documents and birth certificates.⁶¹ Those first cases aimed at establishing two legal concepts: first, that gender identity is a central aspect of a person's identity and second, that gender identification, name and sexual life should be protected from undue state interferences under the right to privacy.⁶²

When the ECtHR challenged the prohibition to transition through the right to private life, it did so through the endorsement of a highly pathologising discourse. In the early 2000s, the Court was mainly concerned with the analysis of whether or not the impermissibility to change one's legal sex was proportionate with regards to the public interest.⁶³ In 2002, for the first time,

⁶⁰ Advisory Opinion OC-24/17 (IACtHR 2017) para 98.

⁶¹ *Christine Goodwin v. the UK* (n 7).

⁶² *Van Kuck v. Germany*, App no 35968/97 (ECtHR 2003) para 69.

⁶³ *Ibid* para 56.

the ECtHR said that states had to provide trans people with the possibility of obtaining LGR.⁶⁴ In *Christine Goodwin v. The United Kingdom*, the Court applied the principle of proportionality and argued that

no concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from the change of status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate certain inconvenience to enable individuals to live in dignity and worth [...]⁶⁵

However, this case only mentions 'post-operative transsexuals', *de facto* endorsing the state's refusal to recognise those trans people who had not been coerced to undergo surgical sterilisation.

From this case onwards, human rights bodies continued to use the right to private life to adjudicate trans cases.⁶⁶ The right to private life is a qualified right. This means that human rights bodies weigh the individual's right against the public interest, to determine whether the limitations on their rights are proportionate. According to the reasoning adopted under the right to private life, coercing a trans person to be surgically sterilised or undergo hormonal therapy for a fixed number of years, may be justified by the public interest and will thus be proportional.

In 2007 the ECtHR stated that the impossibility to obtain LGR 'left the applicant in a situation of distressing uncertainty vis-à-vis his private life'.⁶⁷ However, defining it as a 'distressing uncertainty' under a qualified right further demonstrates the ECtHR's unwillingness to grant trans people their fundamental rights. As will be argued below, the impossibility to change one's documents in order to match one's gender identity and expression exposes trans people to severe violence, discrimination and humiliation, and therefore amounts to ill-treatment.

⁶⁴ *Christine Goodwin v. the UK* (n 7) para 90.

⁶⁵ Ibid.

⁶⁶ *S.V. v. Italy*, App no 55216/08 (ECtHR 2019); *L. v. Lithuania*, App no 27527/03 (ECtHR 2007); *A.P., Garçon and Nicot v. France* App no 79885/12 (ECtHR 2017).

⁶⁷ *L. v. Lithuania*, App no 27527/03 (ECtHR 2007) para 57.

The HRC has similarly framed trans people's right to obtain LGR as a matter falling under the right to private life, rather than an absolute right.⁶⁸ The IACtHR, on the other hand, only recognised trans people's rights in 2017 with an Advisory Opinion on Costa Rica.⁶⁹ In the Advisory Opinion, the Court was the first to recognise the severity of violations and partially framed them under the right to be free from ill-treatment.

This paper argues that not being allowed to legally transition gives rise to two main issues which, alone or cumulatively, constitute a violation of the right to be free from CIDT. First, the non-recognition before the law *per se* provokes psychological suffering of a severity that may constitute CIDT. Second, not being recognised before the law exposes trans people to further human rights violations.

1. Non-Recognition Before the Law Constitutes CIDT per se

The IACtHR in its Advisory Opinion on Costa Rica stated that the lack of juridical personality deriving from the impossibility to obtain LGR 'harms human dignity because it is an absolute denial of a person's condition as a subject of rights'.⁷⁰ An act or policy constitutes CIDT if it humiliates and debases a victim 'in their own eyes or in the eyes of others'.⁷¹ As previously stated, the evaluation of the severity of the violation must take into consideration the individual's vulnerabilities and the overall circumstances.⁷²

When a state prohibits trans people from obtaining LGR, it actively denies the existence of trans people. With this, it deprives trans people of the possibility of ever being able to be officially recognised as themselves. The consequences of this systematic delegitimization of trans people's identity are extremely profound. Through this prohibition, states actively discredit trans people and deprive them of legal protections. They are forced to continuously expose intimate aspects of their lives, as well as their status as

⁶⁸ See Human Rights Committee, *Concluding Observations of the Human Rights Committee: Ireland* (CCPR/C/IRL/CO/3 2008) para 8.

⁶⁹ Advisory Opinion OC-24/17 (IACtHR 2017) para 98.

⁷⁰ *Ibid* para 102.

⁷¹ *Campbell and Cosans v. the United Kingdom*, App no 7511/76 (ECtHR 1982) para 28; *Tyrer v. the United Kingdom*, App no 5856/72 (ECtHR 1978) para 30-32.

⁷² Reyes (n 43) 599.

individuals not recognised by the law. This constant exposure leads to severe humiliation.

Contextually, the UNHCR states that 'being compelled to conceal one's gender identity may result in significant psychological or other harm'.⁷³ As stated in section II, due to systematic discrimination, trans people's suffering is severely underestimated by human rights bodies. Several studies on trans people's mental health further shows that being unable to live in their true gender induces severe psychological suffering.⁷⁴ As a result of transphobia, the evaluation of the severity of psychological suffering continues to be underestimated and considered to not reach the minimum standard for degrading treatment.

Human rights bodies have further argued that when a person is forced to act against their religion or their will, the treatment can constitute inhuman or degrading treatment.⁷⁵ Not being able to ever obtain official documents representing one's gender identity and expression coerces one into either hiding one's gender identity or revealing one's gender history on a daily basis. This *de facto* forces trans people to continuously act against their will, in order to justify their existence as trans individuals and navigate the world. Forcing a person to act against their will is comparable to forcing a person to act against their religion and thus reaches the minimum threshold required for degrading treatment.

2. Violation of Other Human Rights Obligations

A gradual understanding of the severity of the psychological harm inflicted on trans people when they are unable to have matching documents is slowly emerging. However, human rights bodies continue to fail to clearly establish that the prohibition to obtain LGR violates trans people's personal integrity to the extent of inhuman and degrading treatment.

Trans people's lives are severely hindered when states do not allow LGR. Without matching documents and social security number or without a bank card with the appropriate name, participation in society becomes very

⁷³ UNHCR, *Guidelines on International Protection n. 9* (HRC/GIP/12/09 2012) para 33.

⁷⁴ European Union Fundamental Rights Agency (n 9) 78.

⁷⁵ Nigel Rodley and Matt Pollard (n 40) 86.

difficult.⁷⁶ The prohibition to obtain LGR also leads to the violation of civil, political, economic and social rights. The amount and severity of human rights violations of trans people stemming from the impossibility of obtaining LGR is not compatible with the use of the right to private life. As previously stated, within the context of CIDT, humiliation has been described as the state in which a person is being ridiculed, unjustly degraded and in particular when one's identity is demeaned or devalued.⁷⁷ Amongst other reasons, the use of the right to private life to argue for trans people's right to obtain LGR is inadequate because it does not take into account the cumulative effects of all the violations that may result from having unmatching documents.

Trans people are often suspected of identity fraud when performing essential activities such as opening a bank account or paying with a credit card, because their legal name does not match their gender.⁷⁸ Having matching documents is often a decisive factor when applying for a job. In countries that do not provide LGR, trans people have much lower chances of employment.⁷⁹ Trans rights organisations argue that equal access to employment is not a reality for trans people across much of the world.⁸⁰ Endemic employment discrimination leads trans people into a cycle of poverty that further exacerbates societal discrimination.

The suspicion of identity fraud arising from the un-matching documents also hinders trans people's freedom of movement. When trans people without matching IDs attempt to cross a border or board a plane, they are often stopped and questioned by authorities, whom again suspect identity fraud.⁸¹ When trans people are stopped and questioned concerning the un-matching documents, authorities often engage in lengthy interrogations and invasive

⁷⁶ European Union Fundamental Rights Agency (n 9) 19.

⁷⁷ Hartling and Luchetta (n 48) 264.

⁷⁸ Jugroop (n 9) 10; Jack Byrne, *License to Be Yourself: Responding to National Security and Identity Fraud Arguments* (Open Society Foundations 2016) 10.

⁷⁹ Sam Winter et al, *Denied Work: An Audit of Employment Discrimination on the Basis of Gender Identity in South East Asia* (Asia Pacific Network and United Nations Development Programme 2018) 18.

⁸⁰ Ibid.

⁸¹ Byrne (n 78) 10.

body searches.⁸² It needs to be taken into account that trans people are at a high risk of being subjected to ill-treatment when subjected to body searches.⁸³ The high level of discrimination and difficulties encountered by trans people when travelling *de facto* limits their right to freedom of movement as protected by Article 12 ICCPR.

Trans people are also particularly vulnerable when in detention settings. The general population's risk of being exposed to ill-treatment rises in cases of deprivation of liberty;⁸⁴ the risk for trans people of ill-treatment when their legal gender does not match their gender identity and expression is even higher. In such situations, it is well established that the proper identification of the individual is the first guarantee to state accountability. Therefore, having a form of identification and being recognised before the law are fundamental elements for the protection from arbitrary arrest and detention, torture and ill-treatment.⁸⁵

Furthermore, when deprived of their liberty, trans people with un-matching documents are often placed in the section of their sex assigned at birth.⁸⁶ In these situations they are at heightened risk of violence, rape and sexual victimisation.⁸⁷ Violence, sexual abuse and rape are conducted both by fellow prisoners with the acquiescence of the authorities, and at the hands of the guards themselves.⁸⁸ In particular, trans women with un-matching

⁸² Paisley Currah and Tara Mulqueen, 'Securitizing Gender: Identity, Biometrics, and Transgender Bodies' (2011) 78 *Social Research* 562.

⁸³ United Nations General Assembly, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (A/HRC/31/57, 2016) para 36.

⁸⁴ Ilias Bantekaas and Lutz Oette, *International Human Rights Law and Practice* (Cambridge University Press 2013) 323.

⁸⁵ United Nations General Assembly, *Report of the Independent Expert on Sexual Orientation and Gender Identity* (A/73/152 2018) para 24.

⁸⁶ OHCHR, 'Living Free and Equal: What states are doing to tackle violence and discrimination against LGBTI people' (United Nations Office of the High Commissioner for Human Rights, 2016) available at <<https://www.ohchr.org/Documents/Publications/LivingFreeAndEqual.pdf>> 43.

⁸⁷ Inter-American Commission of Human Rights (n 1) 99.

⁸⁸ Redress and Amnesty International, *Gender and Torture Conference Report* (2011) 29.

documents are routinely placed in male detention facilities without regards for their safety.⁸⁹

Trans people without matching documents encounter discrimination when attempting to access healthcare and social security schemes. In the Asia Pacific region, where few countries provide for LGR, trans people face significant barriers in exercising their human rights. Social exclusion and the difficulty in finding employment lead to a situation where trans people often lack an adequate standard of living, and do not have access to adequate healthcare.⁹⁰ In South-East Asia, as a direct or indirect result of having un-matching documents, in the vast majority of countries, trans people lack access to basic healthcare.⁹¹ Having un-matching documents often provides a justification for discrimination in healthcare settings, leading to refusal of care and discriminatory treatments.⁹² Furthermore, trans people unable to obtain LGR are often discriminated against when trying to access social security systems.⁹³ In particular, they face heightened levels of discrimination when accessing pension schemes and other gender-segregated services.⁹⁴ The IACHR has further emphasised that the discrimination affecting LGBTI persons places them in a cycle of exclusion that tends to culminate in poverty due to lack of services, opportunities and social benefits.⁹⁵

Given the interdependence and indivisibility of rights, grave violations of economic, social and cultural rights can lead to a violation of civil and political

⁸⁹ Ibid 102; Cristina Castagnoli, *Transgender Persons' Rights in the EU Member States* (European Parliament Directorate-General for Internal Policies 2010) 13.

⁹⁰ Health Policy Project, Asia Pacific Transgender Network and United Nations Development Programme (n 3) 2.

⁹¹ Ibid.

⁹² Michele Lanham et al, 'We're Going to Leave You for Last Because of How You are: Transgender Women's Experiences of Gender-Based Violence in Healthcare, Education and Police Encounters in Latin America and the Caribbean' (2019) 1 *Violence and Gender* 41.

⁹³ European Union Agency for Fundamental Rights, *Being trans in the European Union: Comparative analysis of EU LGBT survey* (2014) 79.

⁹⁴ Peter Dunne and Marjolijn van der Brink, *Trans and Intersex Equality Rights in Europe – A Comparative Analysis* (European Commission Directorate-General for Justice and Consumers 2018); *Christine Goodwin v. The United Kingdom* (n 7) para 62.

⁹⁵ Inter-American Commission of Human Rights, *Advances and Challenges Towards the Recognition of the Rights of LGBTI Persons in the Americas* (2018) 13.

rights.⁹⁶ In the *Xamok Kasek Indigenous Community v. Paraguay*, the IACtHR argued that the severe deprivation of the right to health, underlying determinants of health and right to education, violated the right to life of the indigenous community.⁹⁷ In those cases, the state was deemed responsible for the violations because it was aware of the situation, and failed to protect and fulfil its duty concerning the indigenous community's rights. Similarly, numerous violations of trans people's economic, social and cultural rights may lead to severe mental and physical suffering to such an extent that it reaches a level of suffering sufficient to constitute degrading and inhumane treatment.

As seen in this section, the possibility of accessing Legal Gender Recognition is fundamental for trans people in order to have a dignified life and have their basic human rights respected. The prohibition to obtain LGR in most cases leads to multiple and continuous violations of trans people's rights and severely limits their possibility to live a dignified life. Human rights bodies must acknowledge that not allowing trans people to have their gender identity legally recognised exposes them to a level of psychological suffering and forces them to act against their will to an extent that it reaches the minimum threshold for degrading treatment. The extent of psychological and physical suffering resulting from this policy cannot be encompassed within the right to personal integrity as protected by the right to private life. When human rights bodies frame it as a private life issue, they are thus purposefully excluding trans people from the protection of human rights law.

V. PATHOLOGISATION AND IMPOSITION OF COERCIVE MEDICAL REQUIREMENTS AS CIDT

Most of the countries that allow LGR require trans people to undergo several medical procedures and to undergo a psychiatric diagnosis in order to change their legal name and gender.⁹⁸

⁹⁶ Ioana Cismas, 'The Intersection of Economic, Social and Cultural Rights and Civil and Political Rights' in Gilles Giacca et al (Eds) *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014) 455.

⁹⁷ *Xamok Kasek Indigenous Community v. Paraguay*, Series C.124 (IACtHR 2010) para 192 -193.

⁹⁸ Chiam et al (n 8) 3.

Until very recently, human rights bodies left most of the prohibitive requirements unchallenged. The pathologisation of trans identities creates a dependency on a psychiatric diagnosis to access both LGR and gender affirming medical procedures.⁹⁹ The World Health Organisation (WHO) defined 'transsexualism' as a mental and behavioural disease until 2018.¹⁰⁰ However, the pathologisation of trans identities continues to legitimise the imposition of coercive medical treatments as requirements to obtain LGR.

The prohibition of non-consensual medical interventions is one of the core concepts entrenched in the prohibition of torture and CIDT. Under Article 7 of the ICCPR, 'no one shall be subjected without his free consent to medical or scientific experiments'.¹⁰¹ The Oviedo Convention on Biomedicine further states that 'an intervention in the health field may only be carried out after the person concerned has given free and informed consent to it'.¹⁰² The Special Rapporteur on Health further argued that patients have to give free and informed consent even for medically necessary treatments, unless the situation is life-threatening and the patient is unconscious.¹⁰³ Coercive treatments that are not physically irreversible may well reach the threshold of mental suffering required to be considered CIDT under human rights law.¹⁰⁴ When considering whether a treatment constitutes CIDT, elements such as the long-term impact on a victim's

⁹⁹ Sheherezade (n 27) 6.

¹⁰⁰ Maria Elisa Castro-Peranza et al, 'Gender Identity: the Human Right to Depathologization' (2019) 16 *International Journal of Environmental Research and Public Health* 3; International Classification of Diseases, section V, F.64.0 <<https://icd.who.int/browse10/2016/en#/V>> accessed 29 September 2020.

¹⁰¹ ICCPR art 7.

¹⁰² The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997) ETS N. 164, art 5.

¹⁰³ United Nations General Assembly, 'Report of the Special Rapporteur on the Highest Attainable Standard of Physical and Mental Health' (A/64/272 2009) para 12.

¹⁰⁴ Herman Reyes, 'The Worst Scars are in the Mind: Psychological Torture' (2007) 89 *International Review of the Red Cross* 597.

physical and psychological well-being and effects on their ability to pursue life goals must be taken into account.¹⁰⁵

Consent is only valid when provided voluntarily and without coercion, undue influence or misrepresentation.¹⁰⁶ In this context, coercion includes conditions of duress and undue influence includes 'situations in which the patient perceives there may be an unpleasant consequence associated with refusal of consent'.¹⁰⁷ Thus, when the alternative to undergoing medical intervention is not being able to obtain LGR, the consent provided by trans people cannot automatically be considered to be valid. The Special Rapporteur on Torture has also stated that intrusive and irreversible medical treatments that lack a therapeutic purpose and are administered without free and informed consent may constitute CIDT.¹⁰⁸

As previously argued, not being able to obtain LGR constitutes CIDT. Therefore, when a medical procedure is required by the state in order to obtain LGR, there is no free consent because the consequences of refusing treatment amount to CIDT. On this issue, the IACtHR stated that the procedure to obtain LGR

cannot require supporting evidence of total or partial surgery, hormonal therapy, sterilisation, or bodily changes in order to grant the request or to prove the gender identity in question because this could be contrary to the right to personal integrity recognised in Article 5(1) and 5(2) [right to humane treatment].¹⁰⁹

States throughout the world impose different medical requirements. However, due to space constraints, this paper will focus on the most common ones.

¹⁰⁵ UNGA, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) A/HRC/31/57.

¹⁰⁶ UNGA, 'Report of the Special Rapporteur on the Highest Attainable Standard of Physical and Mental Health' (2009) A/64/272, para 13- 14.

¹⁰⁷ Ibid.

¹⁰⁸ HRC, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Mèndez' (2013) A/HRC/22/53, para 32.

¹⁰⁹ Advisory Opinion OC-24/17 (IACtHR 2017) para 146.

I. Coercive Sterilisation

Some states specifically require trans people to be unable to procreate in order to change their legal gender, while other states only have a general requirement to undergo medical treatments.¹¹⁰ Coercive sterilisation gives rise to both mental and physical suffering. The physical pain derives from the surgeries necessary to remove one's reproductive organs. The severe mental distress comes from the imposition of a coercive medical procedure and invasion of a person's physical and moral integrity.¹¹¹ Furthermore, while sexual and reproductive rights are often not considered when evaluating the consequences of coercive sterilisation for trans people, it is important to note that trans people may want to have biological children. In such cases, coercive sterilisation would destroy their life plans.¹¹² In the past thirty years, human rights bodies have expanded the scope of the right to be free from CIDT to include rape, domestic violence, coercive sterilisation, female genital mutilation and corporal punishment of children.¹¹³ These are acts or treatments that were once not considered to be violations of the right to be free from CIDT, but which are now accepted as such.¹¹⁴

As a result, some human rights bodies have recently argued that the suffering imposed on trans people as a result of coerced sterilisation may amount to CIDT.¹¹⁵ This is a result of a long process not based on trans people's rights, but rather on women's rights.

Feminist scholars have for a long time argued for the classification of enforced sterilisation as a violation of CIDT, given the severity of violations of women's right to moral and bodily integrity in cases of coerced sterilisation.¹¹⁶ The classification of sterilisation as CIDT therefore is not the

¹¹⁰ Chiam et al (n 8) 3, 39.

¹¹¹ Sifris (n 52) 537.

¹¹² UNGA, 'Report of the Independent Expert on Sexual Orientation and Gender Identity' (2018) A/73/152, para 31.

¹¹³ Zurieck (n 57) 102; *Selmouni v. France*, Application n. 25803/94 (ECtHR 2000) para 100.

¹¹⁴ See *Selmouni v. France* (n 113) para 100.

¹¹⁵ See *A.P., Garçon and Nicot v. France* (n 66).

¹¹⁶ World Health Organisation, *Eliminating Forced, Coercive and Otherwise Involuntary Sterilisation. An Interagency Statement of the OHCHR, UN Women, UNAIDS, UNDP, UNICEF and WHO* (2014).

result of a recognition of the suffering imposed on trans people by pathologising their identities, but rather the application of a pre-existing reasoning to trans cases. Otherwise, other coercive medical treatments would have been classified as CIDT alongside sterilisation. As will be seen later, this is not the case.

The Special Rapporteur on Torture stated that invasive and irreversible medical treatments lacking a therapeutic purpose performed without free and informed consent, may constitute torture or ill-treatment.¹¹⁷ He further acknowledged that in many countries transgender persons are required to undergo coercive sterilisation to obtain LGR, and called on states to outlaw forced or coerced sterilisation in all circumstances.¹¹⁸ In its concluding observation on Hong Kong, the United Nations Committee Against Torture (UNCAT) expressed concerns about the sterilisation requirement to obtain LGR. It further urged the territory's authorities to respect trans people's autonomy and psychological integrity by removing the sterilisation requirement.¹¹⁹

The IACtHR argued that the requirement of sterilisation violates trans people's autonomy to the extent of violating trans people's right to be free from CIDT.¹²⁰ The ECtHR on the other hand only partially recognised the harm done to trans people when coercing them to undergo sterilising surgeries, and only found this requirement to violate the right to private life.¹²¹ In *S.V. v. Slovakia*, the ECtHR stated that

[i]n order for treatment to be 'inhuman' or 'degrading', the suffering or humiliation involved must in any event go beyond the inevitable element of

¹¹⁷ HRC, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez' (2013) A/HRC/22/53, para 32.

¹¹⁸ Ibid paras 78, 88.

¹¹⁹ UNCAT, 'Concluding Observations of the Fifth Periodic Report of China with respect to Hong Kong, China' (2016) CAT/C/CHN-HKG/CO/5, paras 28-29.

¹²⁰ Advisory Opinion OC-24/17 (IACtHR 2017) para 146.

¹²¹ See *A.P., Garçon and Nicot v. France* (n 66); *G. v. Australia*, App no 2171/2012 (HRC 2017).

suffering or humiliation connected with a given form of legitimate treatment.¹²²

In the same case, the ECtHR stated that coercive sterilisation constitutes a major interference with a person's health status and therefore found that the coercive sterilisation of a cisgender woman amounted to CIDT.¹²³ However, when assessing the requirement to undergo sterilisation to obtain LGR, the ECtHR found that the coercive sterilisation of a trans person only amounted to a violation of the right to private life.¹²⁴ Therefore, the ECtHR adopted a double standard when discussing cases concerning the coercive sterilisation of trans individuals.

Similarly, the HRC has repeatedly framed the issue of coercive sterilisation of women under the right to be free from CIDT.¹²⁵ When encountering the issue of coerced sterilisation of trans people, however, the HRC only recognised it as a violation of the right to private life, *de facto* adopting a double standard.¹²⁶

Coercive sterilisations as a requirement to obtain LGR constitute inhuman or degrading treatment, since the medical treatment is not consensual and is of an invasive and irreversible nature. Framing coercive sterilisation of trans people as a matter falling under the right to private life implies that according to human rights law, trans people's impossibility to reproduce could be deemed proportionate and necessary for the public interest and/or the protection of other people's rights.

2. Other Medical Requirements

In addition to sterilisation, states often impose other medical requirements that, according to the present analysis, violate the right to be free from CIDT. The two main requirements are (A) psychiatric diagnosis of gender identity disorder, and (B) having undergone irreversible changes through

¹²² *V.C. v. Slovakia*, App no 18968/07 (ECtHR 2011) para 104.

¹²³ *Ibid* para 120.

¹²⁴ *A.P., Garçon and Nicot v. France* (n 66) paras 127-135.

¹²⁵ HRC, 'General Comment No. 28: Article 3 on the Equality of Rights Between Men and Women' (2000) CCPR/C/Rev.1/Add.10, para 11.

¹²⁶ See for example HRC, 'Concluding Observations on the Fourth Periodic Report of the Republic of Korea' (2015) CCPR/C/KOR/CO/4, para 14.

hormonal replacement therapy.¹²⁷ Invasive medical exams are also imposed on trans people (C).

The severity of the harm procured by coercive medical requirements that do not involve sterilisation is severely underestimated by human rights bodies. In cases that do not involve sterilisation, human rights bodies have systematically failed to recognise the physical and psychological harm provoked.

Only in a few cases have human rights bodies found that coercive medical treatments for trans people violate human rights law. In its observation on Hong Kong, UNCAT used a general language requiring the authorities to remove abusive preconditions for legal gender recognition so as to respect trans people's autonomy and psychological integrity.¹²⁸ At the time of the recommendation, Hong Kong required trans people to undergo surgical sterilisation to obtain LGR. The requirements to undergo hormonal replacement therapy and psychiatric diagnosis should be considered abusive regardless of their partial reversibility, due to the coercive nature of their imposition.

The IACtHR argued that the procedures for the rectification of one's gender 'should not require evidence of surgery and/or hormonal therapy',¹²⁹ and that coercive medical treatments amount to CIDT. The ECtHR, while to some extent recognising that the harm caused by coerced sterilisation, failed altogether to recognise the harm provided by the requirement of psychiatric diagnosis and other medical treatments.¹³⁰ Indeed, the Court stated that the requirement to undergo a psychiatric diagnosis did not affect a person's physical integrity, and therefore did not constitute a human right violation.¹³¹

¹²⁷ Kara Sheherezafé, *Gender is Not an Illness: How Pathologizing Trans People Violates International Human Rights Law* (GATE 2017) 6.

¹²⁸ UNCAT, 'Concluding Observations on the Fifth Periodic Report of China with respect to Hong Kong, China' (2016) CAT/C/CHN-HKG/CO/5, paras 28-29.

¹²⁹ Advisory Opinion OC-24/17 (IACtHR 2017) para 160.

¹³⁰ *A.P., Garçon and Nicot v. France* in Chiam et al (n 8) 4.

¹³¹ *A.P., Garçon and Nicot v. France* (66) para 139.

A. Psychiatric Diagnosis

Most states continue to require trans people to undergo a psychiatric diagnosis to access gender affirming medical care and LGR. Legal and medical transitions should be accessible to trans people and based on an informed consent system, rather than on a mental illness diagnosis.¹³² The requirement to obtain a psychiatric diagnosis violates trans people's rights for two reasons.

First, it violates trans people's moral integrity because it is imposed on them through coercive means. In the evaluation of state practice, the coercive nature of a psychiatric diagnosis which entails that one's identity is pathological, has not even been recognised as a violation of the right to privacy. Any coercive medical treatment that is not necessary to save a person's life violates the right to personal and bodily integrity and may amount to CIDT. Second, the requirement to obtain a psychiatric diagnosis humiliates trans people since it entails that one's gender identity is a pathology. In 2018, the Council of Europe's bioethics committee recognised that gender identity disorder diagnosis should never constitute a justification for imposing involuntary medical treatment.¹³³ . The absolute necessity of informed consent even for medically necessary treatments has been reiterated by the Special Rapporteur on Health.¹³⁴ As a result, without free consent, the requirement to submit oneself to a coercive psychiatric diagnosis constitutes a coerced medical treatment, and therefore violates the right to be free from CIDT

At the moment of writing, the vast majority of states continue to require a psychiatric diagnosis of gender dysphoria to access legal gender recognition.¹³⁵ Coercive psychiatric diagnosis to obtain LGR have only been considered to amount to CIDT in the most extreme situations. In Ukraine,

¹³² Advisory Opinion OC-24/17 (IACtHR 2017) para 171.

¹³³ Council of Europe Committee on Bioethics, *Draft Explanatory Report to the Additional Protocol on the Protection of the Human Rights and Dignity of Persons with Mental Disorders with Regards to Involuntary Placement and Involuntary Treatment* (2018) 3.

¹³⁴ UNGA, 'Report of the Special Rapporteur on the Highest Attainable Standard of Physical and Mental Health' (2009) A/64/272, para 12.

¹³⁵ Chiam et al (n 8) 3.

to obtain the required diagnosis, trans people are interned in a psychiatric institution for up to 45 days.¹³⁶ The HRC argued that the compulsory confinement in a psychiatric institution has to be replaced by a less invasive measure, and that the state should respect the principle of informed consent.¹³⁷ In less extreme cases, human rights bodies failed to acknowledge the severity of the harm provoked.

The HRC, in the concluding observations on states that require a coercive psychiatric diagnosis without internment, found that the coercive diagnoses do not constitute a violation of either the right to private life or CIDT.¹³⁸ When considering laws regulating legal gender recognition, the Committee failed to mention the coercive nature of psychiatric diagnoses as an element worth addressing.

The ECtHR, in *A.P., Garçon and Nicot v. France*, did not find any violation when analysing the requirement to undergo medical treatments in order to obtain LGR other than sterilisation.¹³⁹ Again, the Court failed to address the fact that trans people are coerced to undergo a number of medical treatments. The IACtHR on the other hand, in its recent Advisory Opinion stated that the requirement of a psychiatric diagnosis would violate a person's moral integrity as protected by the right to be free from CIDT.¹⁴⁰

The requirement to obtain a psychiatric diagnosis of gender identity disorder entails that trans people are mentally ill. This has both discriminatory and dehumanising effects on trans people.¹⁴¹ The diagnosis required by most countries is that of Gender Identity Disorder, and it classifies trans people as having a disorder of personality and behaviour. Other personality and behavioural disorders featuring in the International Classification of Diseases currently adopted by most countries, include pathological

¹³⁶ HRC, 'Concluding Observations on the Seventh Periodic Report Ukraine' (2013) CCPR/C/UKR/CO/7, para 10.

¹³⁷ Ibid para 10.

¹³⁸ See for example the absence of any mention of transgender rights violations from the concluding observations on pathologising countries such as Italy, France, Japan and many other states.

¹³⁹ *A.P., Garçon and Nicot v. France* (n 66).

¹⁴⁰ Advisory Opinion OC-24/17 (IACtHR 2017) paras 132, 146, 160.

¹⁴¹ Smiley et al (n 2) 24; Advisory Opinion OC-24/17 (IACtHR 2017) para 130.

gambling, exhibitionism, voyeurism, and paedophilia.¹⁴² To contextualise the discriminatory power of such diagnosis, until the 1980s, the International Classification of Diseases classified homosexuality as a mental illness under the same chapter used to pathologise trans people today. When trans people are required to obtain a gender identity disorder diagnosis, it means that one of the most fundamental aspects of their identity is considered to be a disorder. Being coerced to obtain such a diagnosis severely violates trans people's personal and psychological integrity.

To conclude, requiring trans people to obtain a psychiatric diagnosis of gender identity disorder to access LGR should be classified as constituting CIDT. Both the right to private life and the right to be free from discrimination are not adequate to cover this violation. By defining trans people as inherently ill, notwithstanding the actual state of their mental health, the diagnosis itself dehumanises and profoundly humiliates them. Such humiliation produces a level of harm and severe psychological suffering that reaches the minimum level to be classified as inhuman or degrading treatment. As previously stated, a treatment is considered inhuman or degrading if, for example, it humiliates a person, forces them to act against their own will or religion, and if it provokes severe psychological harm. The classification under the right to private life is thus inadequate due to its nature as a qualified right.

The requirement to obtain a psychiatric diagnosis of gender identity disorder is not only a violation of one's own psychological integrity, but also hinders the enjoyment of other rights. Many states require trans people to accept a psychiatric diagnosis not only to obtain LGR, but also to access medical transition.¹⁴³ As a result of this process, trans people's access to healthcare is severely hindered by the diagnostic process.¹⁴⁴ Lack of access to medical and legal transition also hinders their access to basic and non-trans-specific

¹⁴² See chapter five of the ICD-10, available at <<https://icd.who.int/browse10/2016/en#/F64>>.

¹⁴³ Sheherezade (n 127) 6.

¹⁴⁴ Smiley et al (n 2) 25.

medical services, because of the fear of discrimination, overall social exclusion and distrust in the medical profession.¹⁴⁵

B. Hormonal Replacement Therapy

Some states require trans people to undergo irreversible changes as a result of hormonal replacement therapy in order to obtain LGR.¹⁴⁶ The decision to undertake a gender transition is motivated by one's desire to affirm one's gender identity. Gender transitions are not composed by a singular event, but rather they are a social, medical and legal process that unfolds over time.¹⁴⁷ Trans people may want to undergo only some gender affirming treatments or no medical treatment, and this should not prevent them from being recognised before the law.

Many trans people want to undergo hormonal replacement therapy in order to align their gender identity with their appearance. However, if this is not a free choice based on informed consent, but a coerced choice made in order to access legal gender recognition, it constitutes CIDT.¹⁴⁸ The full severity of the psychological suffering that follows from being coerced to undergo a medical treatment, must be considered by human rights bodies even when it entails supporting the auto-determination of trans people. The same reasoning used in sterilisation cases based on the inviolability of one's bodily integrity and the consequences of such violation, should be adopted also in trans-specific cases not involving sterilisation. As previously stated, medical requirements imposed by the state in order to obtain LGR are coercive and therefore may constitute, alone or cumulatively, CIDT.

¹⁴⁵ Ibid 6; Health Policy Project, Asia Pacific Transgender Network, United Nations Development Programme (n 3) 2.

¹⁴⁶ UNGA, 'Report of the Independent Expert on Sexual Orientation and Gender Identity' (2018) A/73/152, para 28.

¹⁴⁷ Lisa R Millner and Eric A Grollmen, 'The Social Costs of Gender Non-Conformity for Transgender Adults: Implications for Discrimination and Health' (2015) 30 *Sociological Forum* 810.

¹⁴⁸ Advisory Opinion OC-24/17 (IACtHR 2017) para 160.

C. Compulsory Medical Examinations

When a country imposes medical requirements to obtain LGR, trans people are often forced to undergo invasive medical examinations to prove that they have undergone a specific surgery or treatment.

In *A.P., Garçon and Nicot v. France*, one of the applicants claimed that the court-mandated genital examinations, to prove that she had been sterilised by a court-appointed doctor, breached her moral and physical integrity. The ECtHR did not find any violation of either the right to private life or the right to be free from CIDT.¹⁴⁹ The coercive element of the court-mandated exam was not analysed by the Court. Coercive medical examinations of trans people, for the purpose of LGR, can be compared to body searches, as they are not medically necessary and involve close bodily examinations for legal purposes.

Human rights bodies agree that when conducted in a disproportionate, humiliating or discriminatory manner, body searches may amount to CIDT.¹⁵⁰ In *X. and Y. v. Argentina*, a woman and her daughter had to undergo invasive vaginal searches as a condition to visit their husband and father in prison. The IACHR argued that this type of search may be legal only if absolutely necessary, proportionate and carried out in a humane manner.¹⁵¹ The search was not absolutely necessary and inevitable, and therefore violated the right to be free from CIDT.¹⁵² The ECtHR also stated that non-strictly-necessary invasive body searches constitute CIDT.¹⁵³ In *X and Y. v. Argentina*, the applicants were not forced to submit to an invasive body search. However, as this was a precondition to visit a family member in a prison they were in practice coerced. Similarly, trans people are not forced in the strict sense to submit themselves to unnecessary and invasive medical exams, but as this is a precondition towards LGR it is *de facto* coercive. Coercive medical examinations, especially those involving genital

¹⁴⁹ *A.P., Garçon and Nicot v. France* (n 66) para 153.

¹⁵⁰ UNGA, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) A/HRC/31/57, para 23.

¹⁵¹ *X and Y v. Argentina*, Case n. 10.506 (IACtHR, 1996) paras 69- 73.

¹⁵² *Ibid* para 89.

¹⁵³ See for example *El Shennawy v. France*, App no 28541/95 (ECtHR 1999).

examinations, can be equated with invasive body searches and therefore amount to CIDT.

Personal vulnerabilities have to be taken into account when considering the severity of harm inflicted on a person. Trans individuals are particularly vulnerable in situations that involve body searches.¹⁵⁴ Trans people are routinely discriminated against in healthcare settings and often encounter difficulties in accessing such services.¹⁵⁵ Furthermore, the extremely elevated number of trans people that are physically and sexually attacked, or threatened with sexual violence increases their vulnerability to genital examinations.¹⁵⁶ In countries that criminalise homosexuality, men suspected of same-sex sexual activity are subjected to non-consensual anal examination intended to obtain physical evidence of homosexuality.¹⁵⁷ The UNCAT has stated that such practice is medically worthless and constitutes torture or CIDT, given its humiliating nature.¹⁵⁸

The same reasoning should be applied to coercive medical examinations for trans people. When trans people are coerced to undergo medical exams to prove whether they have undergone a sterilising procedure or to determine whether one's genitals match their legal gender, their right to bodily integrity is violated. Considering personal vulnerabilities, the fact that the procedure is not medically necessary, that it includes examination of one's genitals, and that it is coercive, it can be concluded that such examination may amount to CIDT.

¹⁵⁴ OHCHR, 'Living Free and Equal (n 86) 43.

¹⁵⁵ European Union Fundamental Rights Agency (n 9) 41- 43; Asia Pacific Transgender Network, 'Blueprint for the Provision of Comprehensive Healthcare for Trans People and Trans Communities in Asia and the Pacific' (Futures Group: Health Policy Project 2015) 2.

¹⁵⁶ European Union Fundamental Rights Agency (n 9) 51.

¹⁵⁷ UNGA, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) A/HRC/31/57, para 36.

¹⁵⁸ *Ibid.*

VI. CONCLUSION

In the past thirty years, the adjudication of trans rights under the right to private life has allowed the pathologising model to thrive. It has enabled states to further violate trans people's rights.

Trans people's physical and psychological integrity are severely violated by restrictive and pathologising laws and policies. The prohibition to obtain LGR amounts to ill-treatment for two main reasons. First, not having the possibility of being equally recognised before the law severely violates a person's psychological integrity. The lack of recognition before the law negates trans people's condition as subjects of rights. Secondly, non-recognition before the law gives rise to a number of other human rights violations, including freedom of movement, ill-treatment in detention, right to health, social security and adequate standards of living.

The severe violation of civil, political, economic, social and cultural rights has such effects that the non-recognition of one's gender violates the right to be free from CIDT. When a state requires medical treatments as a condition for LGR, it *de facto* coerces trans people to undergo such treatments and therefore violate the right to be free from CIDT. In the past, human rights bodies have stated that coercive medical treatments constitute CIDT. However, when adjudicating cases regarding trans people, they have mostly failed to recognise the coercive nature of such medical treatments. Human rights bodies must therefore recognise the severity of harm inflicted not only by states, but also the re-perpetration of harm caused by their unwillingness to uphold trans people's fundamental rights.

The analysis presented in this paper is far from complete. However, it aims to highlight that trans people's fundamental rights have been disregarded for an extremely long time by human rights bodies. For decades, the trans community has called for depathologisation, trying to shed light on the harm provoked by this system. Only in the past few years, some academics have started arguing for depathologisation. However, these critiques have not focused on the role of human rights bodies, which continue to be influenced by structural transphobia. In order to uphold the fundamental rights of trans people, human rights bodies have to embrace the call for depathologisation

as the only means to fully apply human rights treaties, and uphold trans people's rights.