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Framing the prohibition to transition and the pathologisation of trans identities as cruel, inhuman or degrading treatment.

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DISSERTATION

Framing prohibitive requirements for legal gender recognition as cruel and inhuman and degrading treatment under human rights law.

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<b>Abbreviation</b>	<b>Meaning</b>
CEDAW	Committee on the Elimination of Discrimination Against Women
CIDT	Cruel and Inhuman or Degrading Treatment
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICD	International Classification of Diseases
ICESCR	International Covenant on Economic Social and Cultural Rights
IHRL	International Human Rights Law
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
LGR	Legal Gender Recognition
SOGI	Sexual Orientation and Gender Identity
UN	United Nations
UNCAT	United Nations Committee Against Torture
UNHCR	United Nations High Commissioner for Refugees
WHO	World Health Organisation

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## Introduction

Trans<sup>1</sup> people's rights are systematically violated in the many parts of the world. The life expectancy of a trans woman in Latin America is less than 35 years old.<sup>2</sup> As a result of marginalisation, violence and discrimination, in Europe, one in four trans people has attempted suicide at least once in their lifetime.<sup>3</sup> In the Asia Pacific region, the vast majority of trans people don't have access to basic healthcare.<sup>4</sup> In Southern Africa, trans people unable to change their documents are often suspected of identity fraud and unable to open bank accounts or seek employment.<sup>5</sup> Yet, until recently, trans rights were considered a controversial issue. Today, trans rights violations continue to be severely underestimated by most human rights bodies, and are classified under the right to private life. The analysis in the following chapters focuses on human rights violations stemming from laws and policies restricting or prohibiting access to legal gender recognition (LGR).

The aim of the paper is to shift the focus away from the right to private life, and highlight how restrictive policies induce mental and physical suffering that amounts to Cruel and Inhuman or Degrading Treatment (CIDT). This dissertation focuses on the violations arising from the impossibility to legally and medically transition and on the prohibitive requirements imposed on trans people by the state when they wish to undergo gender transition. The first chapter will provide an overview of the literature highlighting the gendered structures in law and society, and how those influence human rights bodies' approach to trans rights. The second chapter provides an overview of human rights bodies' case law on trans issues, and a criticism of such case law. The third chapter outlines the definition of CIDT, and the severity of treatment required to reach such threshold. The last and fourth chapter analyses trans rights violations stemming from prohibition of LGR and impositions prohibitive requirements to obtain LGR.

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<sup>1</sup> This paper will use the term 'trans' as an umbrella term encompassing transgender, transsexual and other people who may not identify with the sex they have been assigned at birth such as people who identify as Two Spirit, Fa'afaine and others.

<sup>2</sup> "Violence against LGBTI persons in the Americas" OAS/Ser.L/V/II.rev.1 (IACHR, 2015), p.15

<sup>3</sup> Adam Smiley et al. "Over diagnosed but underserved. Trans healthcare in Georgia, Poland, Serbia, Spain and Sweden: trans health survey" (Transgender Europe 2018), p.21

<sup>4</sup> "Blueprint for the provision of comprehensive care for trans people and trans communities in Asia and the Pacific" (Asia Pacific Trans Network., 2015), p.2

<sup>5</sup> Usha Jugroop "Laws and Policies Affecting Transgender Persons in Southern Africa" (Southern Africa Litigation Centre, 2016), p.10

## Chapter 1: Trans people's interaction with the State

This chapter provides the theoretical background necessary to understand and analyse why basic rights of transgender people are often not recognised by human rights institutions.

### 1.a. Trans identities

In every country, to transcribe a birth, the new-born's sex has to be declared as either female or male.<sup>6</sup> Such classification in a binary registration system, is the prerequisite to legal recognition of the new-born. The sex assigned at birth has many permanent consequences throughout a person's life. Many states do not allow trans people to legally transition, and the vast majority of the countries that do allow legal gender recognition (LGR), require invasive medical interventions and lengthy administrative or judicial processes.<sup>7</sup> Such processes show how sex and gender are often conceived as natural and biologically determined. However, these are "socially constructed systems of classification, changing over time and varying across cultures."<sup>8</sup> Sex continues to be understood by most legal systems and scholarship in terms of biological differences between male and female.<sup>9</sup> Such strictly binary categorisation however does not reflect the more diverse biological reality, and is merely a legal construct.<sup>10</sup> This system, for example, ignores the existence of intersex individuals and forces them in binary sex categories. Gender on the other hand, is understood to represent the cultural and social constructions of masculinity and femininity.<sup>11</sup> The CESCR defines gender as referring to the "cultural expectations and assumptions about the behaviour, attitudes, personality traits, and physical and intellectual capacities of men and women, based solely on their identity as men

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<sup>6</sup> Daminan A. Gonzales-Salzberg, "The accepted transsexual and the absent transgender: a queer reading of the regulation of sex/gender by the European Court of Human Rights" *American University International Law Review* (2014,29)

<sup>7</sup> Zhan Chiam et al. "Trans legal mapping report: recognition before the law" (ILGA,2016)

<sup>8</sup> Laurel Westbrook "Transforming the sex/gender/sexuality system" in Nancy L. Fischer and Steven Seidman (eds) "Introducing the New Sexuality Studies" (Routledge, 2016), p. 33

<sup>9</sup> Daminan A. Gonzales-Salzberg, "The accepted transsexual and the absent transgender: a queer reading of the regulation of sex/gender by the European Court of Human Rights" *American University International Law Review* (2014,29)

<sup>10</sup> Wendy O'Brien "Can International Human Rights Law accommodate bodily diversity?" *Human Rights Law Review* (2015,15), p. 5

<sup>11</sup> Lars D. Christiansen, Nancy L. Fisscher "Working in the (social) Construction zone" in Nancy L. Fischer and Steven Seidman (eds) *Introducing the New Sexuality Studies* (Routledge, 2016), p.9

or women.”<sup>12</sup> While this approach is strictly binary, it reflects how International Human Rights Law (IHRL) currently understands the social and cultural construction of gender.

A correct understanding of the differentiation between sex and gender is fundamental when discussing trans rights. Trans persons are those individuals whose gender identity does not match with the sex they have been assigned at birth. Gender identity is each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the sense of the body and other expressions of gender, including dress, speech and mannerism.<sup>13</sup> The word ‘trans’ is a western and modern term, originally based on a medical categorisation of gender identities. Many cultures around the world adopt different words to describe gender non-conformity in the context of their cultures.<sup>14</sup>

### **1.b Gender structures in society**

To have a better understanding of why trans people are systematically discriminated, trans people need to be contextualised in a wider gender structure. The patriarchal structure of today’s society is one of the main factors that has led to the systematic discrimination of trans people. Feminist legal scholars argue that men’s long-term domination of domestic and international institutions led to the perception that men’s issues are human rights issues, while women’s issues are marginal.<sup>15</sup> Together with women’s issues, LGBTI<sup>16</sup> people’s needs and issues remain marginal to the human rights discourse. Such structure of oppression is maintained by the exclusion of women and LGBTI people from the institutions where human rights decisions are made.<sup>17</sup> Celina Romany argues that States are ‘jurisprudentially male’. This is due to the fact that they take a male standpoint of power in society, thus continuing to

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<sup>12</sup> CESCR general comment 16 §14

<sup>13</sup> “The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity” International Commission of Jurists (2007), p.6

<sup>14</sup> “Injustice exposed: the criminalisation of transgender people and its impact” The Human Dignity Trust (2019), p.12

<sup>15</sup> Hilary Charlesworth, Christine Chinkin, Shelley Wright “Feminist approaches to international law” *The American Journal of International Law* (1991,85), p. 625

<sup>16</sup> The choice to use the acronym LGBTI instead of LGBTQ+, is due to its use in a variety of international legal documents and the necessity to include Intersex people.

<sup>17</sup> Hilary Charlesworth “What are Women’s International Human Rights?” in Rebecca J. Cook (ed) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994), p.63

perpetrate gender relations of subordination.<sup>18</sup> As a result, the State and its legal system cannot be considered genderless.<sup>19</sup> While gender dynamics and the specific mechanisms through which oppression of women and LGBTI people are perpetrated may be culturally specific, gender inequality is a global system with both universal and culture-specific repercussions.<sup>20</sup>

It is fundamental to acknowledge the gendered nature of domestic and international institutions to analyse how human rights bodies have adjudicated trans rights cases.<sup>21</sup> Feminist legal scholars have exposed the gendered structure of international law and its reliance on the binary logic of male self and female other.<sup>22</sup> Early feminist scholars challenged the assumption in IHRL in which women were portrayed as passive objects of the law rather than active subjects, and the assumption that the legal 'standard' is male.<sup>23</sup>

The human rights law framework made it possible to start challenging the assumed hierarchy of gender, but left the assumption of dualistic binary genders unquestioned and fundamentally unchallenged.<sup>24</sup> While feminist movements challenged the biological determinism of 'sex' and adopted the language of socially constructed gender roles, usually, to speak of gender in international law, is to speak of women.<sup>25</sup> Dianne Otto argues that this is a result of the fact that "certain feminists are afraid that fully disengaging sex/gender from its biological moorings will mean the loss of the precarious spaces that have been carved out for attention to be paid to women's rights issues."<sup>26</sup> Otto further argues that CEDAW reinforces gender binarism in IHRL by recognising women and men as the only two possible genders in

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<sup>18</sup> 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), p.93

<sup>19</sup> Catherine A. McKinnon "Are women human? And other international dialogues" (Harvard University Press, 2006), p.13

<sup>20</sup> Catherine A. McKinnon "Are women human? And other international dialogues" (Harvard University Press, 2006), p.13

<sup>21</sup> 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), p.93

<sup>22</sup> Wendy O'Brien "Can International Human Rights Law accommodate bodily diversity?" *Human Rights Law Review* (2015, 15), p.4

<sup>23</sup> 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)

<sup>24</sup> Dianne Otto "Queering gender [identity] in International Law" *Nordic Journal of Human Rights* (2015, 33), p.302

<sup>25</sup> Wendy O'Brien "Can International Human Rights Law accommodate bodily diversity?" *Human Rights Law Review* (2015, 15), p.13

<sup>26</sup> Dianne Otto "International Human Rights Law: Rethinking sex/gender dualism" in Margaret Davies, Vanessa E. Munro (eds) *The Ashgate Companion to Feminist Legal Theory* (Ashgate, 2013), p. 205



the international legal framework.<sup>27</sup> As a result of this process and of widespread homo-transphobia, human rights bodies have ignored LGBTI rights until the 1990s, and the discourse surrounding the social construction of gender in human rights remained constricted to a binary gender model. Human rights institutions haven't fully understood that gender is socially and culturally constructed, and therefore failed to acknowledge the existence and rights of trans, gender non-conforming and intersex individuals.<sup>28</sup>

McKinnon argues that "legally, one is less than human when one's violations do not violate human rights that are recognised [...] when and where this denial is overcome and rights against the extreme and the normal are recognised, the treatment is defined as inhuman and the victims human."<sup>29</sup> This process recognition has just begun for trans people. Women's oppression is maintained through a patriarchal model that shapes domestic and international institutions, trans people's oppression is maintained through a cis-normative<sup>30</sup> binary gender model. This model rigidly classifies both sex and gender in two distinctive and separate categories and therefore legitimises the institutional discrimination of trans, gender non-conforming and intersex individuals.<sup>31</sup> The oppression of trans and gender non-conforming people has been perpetrated through both formal policies such as criminalisation and pathologisation, and informal policies of tolerance of discrimination and exclusion. Many states have either laws that criminalise the expression or activities of trans and gender-diverse people, or general laws used by state officials to target trans people.<sup>32</sup> Such laws include the prohibition of cross-dressing, the criminalisation of homosexuality and general public order, misdemeanour and vagrancy laws.<sup>33</sup> At the time of writing, approximately 15 countries impose criminal sanctions against persons whose gender expression does not align with their sex assigned at

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<sup>27</sup> Dianne Otto "Queering gender [identity] in international law" *Nordic Journal of Human Rights* (2015, 33), p.303

<sup>28</sup> Wendy O'Brien "Can International Human Rights Law accommodate bodily diversity?" *Human Rights Law Review* (2015, 15), p.8

<sup>29</sup> Catherine McKinnon "Are women human? And other international dialogues" (Harvard University Press, 2006), p.2

<sup>30</sup> 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.

<sup>31</sup> Silvan Angius, Christa Tobler "Trans and Intersex people discrimination on the grounds of sex, gender identity and gender expression" *European Commission Directorate-General for Justice* (2011), p.13

<sup>32</sup> "Injustice exposed: the criminalisation of transgender people and its impact" The Human Dignity Trust (2019), p.14

<sup>33</sup> "Injustice exposed: the criminalisation of transgender people and its impact" The Human Dignity Trust (2019), p.14

birth, and 69 countries criminalise homosexuality.<sup>34</sup> Many other countries used to have such laws and continue to embrace discriminating policies today.

Gender stereotypes and prejudices are particularly resilient, pervasive and persistent, and continue to affect societal attitudes towards trans people.<sup>35</sup> Following the decriminalisation of homosexuality and cross-dressing in several countries throughout the 1970s, being trans has been classified as a mental and behavioural disease. The World Health Organisation (WHO) develops the International Classification of Diseases (ICD), upon which most states base their medical protocols. In 1980, the ICD introduced 'transsexualism' and other 'gender identity disorders' in its chapter on 'mental and behavioural disorders'.<sup>36</sup> Trans activists have been challenging the reduction of trans identities to a medicalised narrative in the early 1990s.<sup>37</sup> Trans identities however, have only been depathologised by the WHO in late 2018 with the entry into force of the ICD-11. As a result of the prolonged pathologisation of trans identities, most countries continue to work under the pathologising model. Contextually, homosexuality was also classified as a mental and behavioural disease by the WHO, and de-classified in 1973.<sup>38</sup> As it can be deduced from a reflection on the pathologisation of homosexuality and a comparison with the current situation, the pathologisation of trans individuals has no clinical benefit, and continues to perpetrate discrimination. While the problematic nature of pathologisation of trans people is overlooked by IHRL, such pathologisation perpetrates the idea that being trans is a mental illness.<sup>39</sup> The dehumanising effects of both the criminalisation and the pathologisation of trans identities has severe consequences on trans people's enjoyment of human rights, and normalise discrimination. Rebecca Cook argues that in order to classify something as a human rights concern or violation, a specific harm against a person or a group must be identified and named.<sup>40</sup> However, international institutions have sanctioned

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<sup>34</sup> Injustice exposed: the criminalisation of transgender people and its impact" The Human Dignity Trust (2019), p.13

<sup>35</sup> Rebecca J. Cook, Simone Cusack "Gender Stereotyping" (University of Pennsylvania Press, 2010), p.22

<sup>36</sup> Maria Elisa Castro-Peranza et al. "Gender identity: the human right to depathologization" *International Journal of Environmental Research and Public Health* (2019, 16), p. 3

<sup>37</sup> Andrew Sharpe "Transgender Jurisprudence, dysphoric bodies of law" (Cavendish Publishing Limited, 2002), p. 35

<sup>38</sup> Maria Elisa Castro-Peranza et al. "Gender identity: the human right to depathologization" *International Journal of Environmental Research and Public Health* (2019, 16), p. 3

<sup>39</sup> Wendy O'Brien "Can International Human Rights Law accommodate bodily diversity?" *Human Rights Law Review* (2015, 15), p. 5

<sup>40</sup> Rebecca J. Cook, Simone Cusack "Gender Stereotyping" (University of Pennsylvania Press, 2010), p.38

the pathologisation of trans people, and have therefore hindered the process of identification of harm caused by prohibitive requirements for Legal Gender Recognition (LGR) such as coerced sterilisation and other medical treatments.

Thus, it becomes clear that international institutions are also deeply gendered and reflect structural inequalities present in the domestic system.<sup>41</sup> Violation of trans people's human rights have been formally recognised for the first time by a UN mechanism in 2001,<sup>42</sup> and by the ECtHR in 2002.<sup>43</sup> The IACtHR only recognised them in 2017.<sup>44</sup> Such delay in the recognition of trans rights violation is descriptive of the approach that most human rights institutions have maintained towards trans people for a long time. As a result of pathologisation, trans people do not enjoy full equality before the law in any country of the world. McKinnon argues that "becoming a human in both the legal and lived sense is a social, legal and political process. It requires prohibiting or otherwise delegitimising all acts by which human beings as such are violated."<sup>45</sup> To achieve this goal for trans people, the current pathologising model has to be dismantled. If one's core identity is considered a mental and behavioural illness, their full humanity is not recognised. As it will be argued in the following chapters, this approach continues to hold significant influence on States and human rights bodies.

## **Chapter 2: Trans people's interaction with the law**

This chapter provides an overview of how human rights bodies have dealt with discriminatory state policies that regulate medical and legal gender transitions. Today trans people are subjected to discriminatory provisions in most countries.<sup>46</sup> When States prohibit Legal Gender Recognition (LGR) or impose prohibitive medical and administrative requirements, they violate

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<sup>41</sup> 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), p.93

<sup>42</sup> Dianne Otto "Queering gender [identity] in international law" *Nordic Journal of Human Rights* (2015, 33), p.308

<sup>43</sup> "Gender Identity Issues factsheet" European Court of Human Rights Press Unit (2019)

<sup>44</sup> Advisory Opinion OC-24/17 (IACtHR, 2017)

<sup>45</sup> Catherine A. McKinnon "Are women human? And other international dialogues" (Harvard University Press, 2006), p.2

<sup>46</sup> Rebecca Lee "Forced sterilisation and mandatory divorce: how a majority of Council of Europe member states' laws regarding gender identity violate the internationally and regionally established human rights of trans people" *Berkeley Journal of International Law* (33, 2015), p.117

trans people's right to moral and physical integrity.<sup>47</sup> Most of the countries that allow LGR, continue to impose such prohibitive requirements.<sup>48</sup>

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.<sup>49</sup> The Inter-American Court of Human Rights published its first judgement on LGBT rights in 2012,<sup>50</sup> and has not yet adjudicated a case on trans rights, despite the fact that most States under its jurisdiction have deeply discriminatory policies towards trans people. In 2017, however, it published an advisory opinion on Costa Rica with highly progressive views on trans issues.<sup>51</sup> The ECtHR started to adjudicate transgender cases concerning the right to obtain LGR in the early 2000s.<sup>52</sup> The African system continues to remain silent on transgender issues, and is therefore not incorporated in the main analysis.<sup>53</sup>

In the past thirty years, trans rights have been litigated and advocated at the international level mostly through the right to private life. This issue can be explained through the public/private divide. According to this theory, women's issues are relegated to the private sphere, where the State does not intervene and allows violations to take place unhindered. Celina Romany argued that the dichotomisation of the public and private sphere cripples women's citizenship and impairs their participation in democratic life.<sup>54</sup> The same can be said for trans people. Non-recognition of one's gender identity by the state and systematic discrimination inhibit trans people's recognition as persons with equal rights before the law. Therefore, both their recognition as legal subjects having human right, and their participation in the public life are impaired. Private life presupposes the non-intervention of the state, since it is understood to be a self-regulated arena and a space of non-intervention by the State.<sup>55</sup> However, as with women's rights, this border between public and private is highly permeable

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<sup>47</sup> Silvan Angius, Christa Tobler "trans and intersex people: discrimination on the grounds of sex, gender identity and gender expression" *European Commission, Directorate-General for Justice* (2011), p.13

<sup>48</sup> UNGA Report of the UN High Commissioner for Human Rights (2011) UN Doc A/HRC/19/41, par. 72

<sup>49</sup> Melanie Bezyk "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" *Canadian Journal of Women and the Law* (2017, 29), p.382

<sup>50</sup> *Case of Atala Riffo and Daughters v. Chile*, Case 12.502 (IACtHR, 2012)

<sup>51</sup> Advisory Opinion OC-24/17 (IACtHR, 2017)

<sup>52</sup> ECHR "Gender Identity factsheet" (Council of Europe, 2019) available at

[https://www.echr.coe.int/Documents/FS\\_Gender\\_identity\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Gender_identity_ENG.pdf) accessed on 30 August 2019

<sup>53</sup> Zhan Chiam et al. "Trans legal mapping report: recognition before the law" (ILGA, 2016), p.17

<sup>54</sup> Celina Romany in Rebecca Cook (ed) *Human Rights of Women*, p.94

<sup>55</sup> Ciara O'Connel *What private life means for women* (Intersentia, 2015), p. 636

when it comes to control of disempowered communities and women's reproductive lives.<sup>56</sup> As it will be seen towards the end of this chapter, the right to private life has failed to protect trans people from violations stemming from discriminatory and pathologising policies regulating trans livelihoods. While the arguments under the right to private life have been beneficial to the advancement of trans rights, they are also limited in scope and fail to recognise the severity of certain violations and states' positive obligation towards trans people.

## 2.a The right to private life

The right to private life is enshrined in all the main Civil and Political rights conventions, and protects individuals from unlawful or arbitrary interferences with their family, home or correspondence.<sup>57</sup> The Human Rights Committee (HRC) observed that the right to privacy also refers "to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone."<sup>58</sup> This includes a person's gender identity. The definition of the right to private life as included in the ICCPR, IACHR and ECtHR protects the 'family, home and correspondence'. However, it can be deduced that such list is not exhaustive, but indicative of the scopes of the right to private life. Amongst others, the right to private life has a decisional, relational and zonal scope.<sup>59</sup> Trans rights have been adjudicated under each of these three types of privacy.<sup>60</sup>

Decisional privacy concerns the right to make decisions about one's own life, including medical decisions.<sup>61</sup> It also protects a person's right to make decisions concerning their medical treatment, including psychiatric treatment.<sup>62</sup> In *Toonen v. Australia*, the HRC used this argument to argue that the right to privacy includes an adult's intimate decision to engage in sexual conducts with a same sex partner.<sup>63</sup> Decisional privacy includes decisions about how to

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<sup>56</sup> Donna Sullivan *The Public/private distinction in international human rights law*, p. 128

<sup>57</sup> see for example International Covenant on Civil and Political Rights (1966) 999 UNTS 171, art. 17, European Convention for the Protection of Human Rights and Fundamental Freedoms (1951), art.8

<sup>58</sup> *A.R. Coeriel and M.A.R. Aurik v. The Netherlands*, Communication No. 453/1991 (HRC, 1994), par. 10.2

<sup>59</sup> "Sexual Orientation, Gender Identity and International Human Rights Law: Practitioners' Guide n. 4" International Commission of Jurists (2009), p.52

<sup>60</sup> "Sexual Orientation, Gender Identity and International Human Rights Law: Practitioners' Guide n. 4" International Commission of Jurists (2009), p.52

<sup>61</sup> Jonathan Herring and P.L. Chau 'My body, your body, our bodies' in A.M. Viens (ed) *The Right to bodily integrity* (Ashgate, 2014), p.52

<sup>62</sup> *Herczegalvy v. Austria* (2012) ECtHR, Case 10533/83, par. 83-86

<sup>63</sup> "Sexual Orientation, Gender Identity and International Human Rights Law: Practitioners' Guide n. 4" (International Commission of Jurists, 2009), p.47

transition and which gender-affirming medical treatment to seek. Violations on the basis of decisional privacy have been found by human rights bodies when States require trans people to undergo sterilisation,<sup>64</sup> and/or divorce their spouse to obtain LGR.<sup>65</sup>

Relational privacy concerns the right to establish and develop relationships with others.<sup>66</sup> The ECtHR, in this regard stated that “Elements such as gender identity or identification, names, sexual orientation and sexual life fall within the personal sphere protected by [the right to private life].”<sup>67</sup> The first human rights cases concerning the right to obtain LGR, were adjudicated by the ECtHR under the relational privacy doctrine.<sup>68</sup>

Zonal privacy originally from State interferences in a person’s home, but developed to include actions such as invasive body searches. The IACtHR in *X and Y v. Argentina*, a case concerning invasive body searches to prison visitors, stated that “the right to privacy guarantees that each individual has a sphere into which no one can intrude, a zone which is wholly one’s own. In this sense, various guarantees throughout the [American] convention which protect the sanctity of the person create zones of privacy.”<sup>69</sup> The right to bodily integrity stems from the concept of zonal privacy that is every definition of the right to private life and from the philosophical idea of ownership of one’s body and its inviolability.<sup>70</sup> The right to bodily integrity is protected by both the right private life and the right to be free from CIDT, depending on the severity of the violation.<sup>71</sup> However, the pathologisation of trans people is contrary to this notion, since it strips trans people much of the decisional power concerning their identities and bodies.

## 2.b Human rights bodies and trans people

This section will analyse how human rights institutions have approached State policies that limit and violate trans people’s rights. For the purposes of this dissertation, such violations will be classified in two broad categories: prohibition of transition (both *de facto* and *de jure*),

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<sup>64</sup> A.P., *Garçon and Nicot v. France*, Application n. 79885/12 (ECtHR, 2017), Advisory Opinion OC-24/17 (IACtHR, 2017)

<sup>65</sup> *G. v. Australia*, Application n. 2171/2012 (HRC, 2017)

<sup>66</sup> Jill Marshall “Bodily and Moral integrity Rights” in A.M. Viens (ed) *The Right to bodily integrity* (Ashgate, 2014), p.23

<sup>67</sup> A.P., *Garçon and Nicot v. France*, Application n. 79885/12 (ECtHR, 2017), par. 92

<sup>68</sup> see *Christine Goodwin v. the UK*, Application n.28957/95 (ECtHR, 2002)

<sup>69</sup> *X and Y v. Argentina*, Case n. 10.506 (IACtHR, 1996), par. 91

<sup>70</sup> Jill Marshall “Bodily and Moral integrity Rights” in A.M. Viens (ed) *The Right to bodily integrity* (Ashgate, 2014), p.8

<sup>71</sup> A.M. Viens “The Right to bodily integrity” (Ashgate, 2014), p. XIII

and the imposition of prohibitive requirements (medical and administrative) by State authorities in order to complete a gender transition.

### **i. Prohibition to transition**

Gender identity is a fundamental aspect of a person's life. Being able to legally and medically transition is therefore fundamental for a trans person's wellbeing. This section deals with State policies that make it impossible for trans people to complete a legal transition. When transgender people are unable to obtain legal recognition of their preferred gender, they are *de facto* not recognised before the law and they encounter higher levels of discrimination and violence as well as many practical difficulties.<sup>72</sup> To allow LGR to take place, states have to introduce administrative processes in their domestic systems to allow people to amend their name and sex assigned at birth.

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.<sup>73</sup> 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.<sup>74</sup> While the ECtHR challenged the prohibition to transition through private life, it did so while endorsing a highly pathologising discourse. In the early 2000s, the Court was mainly concerned with the analysis of whether the impossibility to change one's legal sex was proportionate or not with regards to the public interest.<sup>75</sup> The pathologisation of trans identities on the other hand was left unchallenged. This is exemplified by the case of *Van Kuck v. Germany*, in which the Court stated that "given the numerous and painful interventions involved in gender reassignment surgery and the level of commitment and conviction required to achieve a change in social gender role, it cannot be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender reassignment."<sup>76</sup> In 2002, the ECtHR said that States had to provide trans people with the possibility of obtaining LGR since "In the twenty first

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<sup>72</sup> UNGA 'Annual Report of the United Nations High Commissioner for Human Rights' (2011) A/HRC/19/41, par. 71

<sup>73</sup> *Christine Goodwin v. the UK*, Application n.28957/95 (ECtHR, 2002)

<sup>74</sup> *Van Kuck v. Germany*, Application n. 35968/97 (ECtHR,2003), par. 69

<sup>75</sup> *Van Kuck v. Germany*, Application n. 35968/97 (ECtHR,2003), par. 56

<sup>76</sup> *Van Kuck v. Germany* Application n. 35968/97 (ECtHR,2003), par. 59

century the right of transsexuals to personal development and to physical and moral security [...] cannot be regarded as a matter of controversy”.<sup>77</sup> Previously, trans rights were considered too controversial. From these cases onwards, human rights bodies continued to use the right to private life.<sup>78</sup> While this argument may have been useful at the beginning, it has also hindered human rights bodies from understanding the mental suffering imposed on trans people by pathologisation.

In the concluding observations on the UK and Ireland, the HRC urged States to recognise the right of transgender people to legally change their gender.<sup>79</sup> In those concluding observations, the HRC framed it under the right to private life.<sup>80</sup>

In the early cases ECtHR and the HRC adopted similar reasoning to that used few years before in the cases challenging the criminalisation of homosexuality in *Dudgeon v. the UK* and *Toonen v. Australia*.<sup>81</sup> *Dudgeon* and *Toonen* suffered a disproportionate harm by living in fear of being arrested for their homosexuality. In the case of trans rights, the reasoning revolved around the disproportionality of the harm suffered by trans individuals as a result of having to declare their sex assigned at birth, compared to the public interest of allowing trans people to transition. The harm stems from exposure to discrimination and violence, lack of access to services and denial of one’s recognition before the law. The ECtHR stated that “the stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change in gender cannot [...] be regarded as a minor inconvenience arising from a formality.”<sup>82</sup> The Court found that the UK had violated the applicant’s right to private life by not allowing her to amend her birth certificate.<sup>83</sup> The reasoning was based on the interference of her private life that caused discrimination and harm.

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<sup>77</sup> *Christine Goodwin v. the UK*, Application n.28957/95 (ECtHR,2002), par. 90

<sup>78</sup> *S.V. v. Italy*, Application n. 55216/08 (ECtHR,2019), *L. v. Lithuania*, Application n. 27527/03 (ECtHR, 2007), *A.P., Garçon and Nicot v. France*, Application n. 79885/12 (ECtHR, 2017)

<sup>79</sup> See HRC ‘Concluding Observations of the Human Rights Committee: Ireland’ (2008) CCPR/C/IRL/CO/3, para. 8, and HRC ‘Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland’ (2008) CCPR/C/GBR/CO/6, para. 5.

<sup>80</sup> HRC ‘Concluding Observations of the Human Rights Committee: Ireland’ (2008) CCPR/C/IRL/CO/3, par. 8

<sup>81</sup> *Dudgeon v. the UK*, Application n. 7525/76 (ECtHR,1981), *Toonen v. Australia*, Application n. 488/1992 (HRC,1994)

<sup>82</sup> *Christine Goodwin v. the UK*, Application n.28957/95 (ECtHR,2002),par. 77

<sup>83</sup>*Christine Goodwin v. the UK*, Application n.28957/95 (ECtHR,2002), par. 108



Some states theoretically allow trans people to transition, but *de facto* have not adopted the necessary policies to make this possible. Trans people's right to transition should be not only theoretical, but also practical and enforceable. In Lithuania the State adopted a law allowing transgender people to legally change their documents if sterilised, but failed to implement a policy allowing trans people to undergo the required surgery. The ECtHR found a violation of the right to private life since the legislative gap "left the applicant in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity."<sup>84</sup> A similar violation was found in the case of *Y.Y. v. Turkey*, where the State failed to implement a system that *de facto* allowed trans people to access medical and legal transition.<sup>85</sup>

While both the ECtHR and HRC recognised some form of suffering induced by States when they prohibit trans people to transition, framing it as a violation of the right to private life demonstrates a lack of understanding of the severity of the consequences of such prohibition. The IACtHR in its recent Advisory Opinion on Costa Rica, recognised that gender identity is "both an integral and a determining component of the personal identity of the individual, [and] its recognition by the State is critical to ensuring that transgender persons can fully enjoy all human rights."<sup>86</sup> The Court then proceeded to recognise that the lack of recognition may amount to violations of the right to be free from CIDT and the right to be recognised before the law. The Advisory Opinion from 2017 is the first and only time that the IACtHR has expressed its views on trans rights. Even though several states under its jurisdiction continue to prohibit trans people to transition, a case concerning this issue has never successfully reached the Court.<sup>87</sup> As will be argued in chapter 4, the approach adopted by most human rights institutions fails to recognise the suffering imposed on trans people when not allowing them to transition.

## ii. Prohibitive requirements

Some states recognize the gender identity of trans persons, but establish requirements for such recognition that further their violate human rights.<sup>88</sup> Such requirements vary from state to state, but may include sterilisation, divorce and court mandated invasive medical exams. In

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<sup>84</sup> *L. v. Lithuania*, Application n. 27527/03 (ECtHR, 2007), par. 57

<sup>85</sup> *Y.Y. v. Turkey*, Application n. 14793/08 (ECtHR, 2015), par. 107

<sup>86</sup> Advisory Opinion OC-24/17 (IACtHR, 2017), par. 98

<sup>87</sup> Zhan Chiam et al. "Trans legal mapping report: recognition before the law" (ILGA, 2016), p.85

<sup>88</sup> UNGA 'Report of the Independent Expert on Sexual Orientation and Gender Identity' (2018) A/73/152, par. 28

additional to the requirements that directly lead to violations, other requirements unduly expose trans people to violence and discrimination. This section will examine how human rights bodies have dealt with this issue.

#### a. **Sterilisation and other medical requirements**

A large number of countries require trans individuals to undergo a sterilisation procedure in order to be able to change their legal sex and name. Some human rights bodies have recently stated that the suffering imposed on trans people as a result of coerced sterilisation may amount to CIDT. This is a result of a long process not based on trans people's rights, but rather on women's rights. Feminist scholars have argued for a long time to classify 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.<sup>89</sup> The classification of sterilisation as CIDT therefore is not the 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 seen in section b of this chapter, this is not the case.

The Special Rapporteur on Torture stated that "medical treatments of an intrusive and irreversible nature, when lacking a therapeutic purpose, may constitute torture or ill-treatment when enforced or administered without free and informed consent of the person concerned."<sup>90</sup> He further acknowledged that in many countries transgender persons are required to undergo often unwanted sterilisation surgeries to be recognised as their preferred gender, and called states to States to outlaw forced or coerced sterilisation in all circumstances.<sup>91</sup> In the concluding observation on Hong Kong, UNCAT expressed concerns about the fact that transgender persons had to undergo sterilisation in order to obtain legal recognition of their gender identity.<sup>92</sup> The Committee urged Hong Kong to take the necessary legislative and administrative measures "to guarantee respect for the autonomy and psychological integrity of transgender

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<sup>89</sup> "Eliminating forced, coercive and otherwise involuntary sterilisation. An interagency statement OHCHR, UN Women, UNAIDS, UNDP, UNICEF and WHO" (WHO, 2014)

<sup>90</sup> 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, par. 32

<sup>91</sup> 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, par. 78 and 88

<sup>92</sup> UNCAT 'Concluding observations on the fifth periodic report of China with respect to Hong Kong, China' (2016) CAT/C/CHN-HKG/CO/5, par. 28-29

persons [...] by removing abusive preconditions for the legal recognition of the gender identity of transgender persons, such as sterilisation”<sup>93</sup> The HRC in the communications did not find a violation of the right to be free from CIDT. The HRC, in its concluding observation on Australia argued that the state should “take measures necessary to remove surgery and marital status requirements for sex change on births, deaths and marriage certificates.”<sup>94</sup> In the concluding observations on the Republic of Korea, the HRC stated that in order to be in compliance with the right to private life, the restrictive requirements for legal gender reassignment should be modified.<sup>95</sup> Currently, in the Republic of Korea in order to legally transition, one is required to undergo gender reassignment surgery, and therefore sterilisation.<sup>96</sup>

The Special Rapporteur on Torture reinforced the idea that coerced sterilization amounts to CIDT and stated that “forced or otherwise involuntary gender reassignment surgery, sterilization or other coercive procedures [...] are rooted in discrimination on the basis of sexual orientation and gender identity, violate the rights to physical integrity and self-determination of individuals and amount to ill-treatment or torture.”<sup>97</sup> The IACtHR stated that “subjecting the recognition of a transgender person’s gender identity to an undesired surgical intervention or sterilisation would mean conditioning the full exercise of several rights, including the rights to privacy, and to choose freely the options and circumstances that give a meaning to his or her existence, and would lead to the refusal of the full and effective enjoyment of the right to personal integrity.”<sup>98</sup> It classifies personal integrity under the right to be free from CIDT. The Court recalled that the right to personal integrity includes the right to be free from inhuman and degrading treatment, and argued that the procedures for the rectification of one’s gender “should not require evidence of surgery and/or hormonal therapy.”<sup>99</sup> In its analysis, the IACtHR therefore recognised the harm provoked to trans individuals when required to undergo not only a sterilisation procedure, but also a medical procedures. The ECtHR on the other hand does

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<sup>93</sup> UNCAT ‘Concluding observations on the fifth periodic report of China with respect to Hong Kong, China’ (2016) CAT/C/CHN-HKG/CO/5, par. 28-29

<sup>94</sup> HRC ‘Concluding observations on the sixth periodic report of Australia’ (2017) CCPR/C/AUS/CO/6, par. 28

<sup>95</sup> HRC ‘Concluding observations on the fourth periodic report of the Republic of Korea’ (2015) CCPR/C/KOR/CO/4, par. 14

<sup>96</sup> Zhan Chiam et al. “Trans legal mapping report: recognition before the law” (ILGA, 2016), p.40

<sup>97</sup> UNGA ‘Report of the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’ (2016) A/HRC/31/57

<sup>98</sup> Advisory Opinion OC-24/17 (IACtHR, 2017), par.146

<sup>99</sup> Advisory Opinion OC-24/17 (IACtHR, 2017), par.160

not recognise that sterilisation amounts to CIDT and stated that “medical treatment cannot be considered to be the subject of genuine consent when the fact of not submitting to it deprives the person concerned of the full exercise of his or her gender identity and personal development”<sup>100</sup> The Court recognised that the sterilisation requirement violated the right to private life and full exercise of their right to respect for physical integrity as protected also by article 3 of the ECtHR.<sup>101</sup> However, it then proceeded to state that the sterilisation requirement only violated the right to private life of transgender individuals without providing a detailed analysis of the reasons for rejecting such argument.<sup>102</sup> The ECtHR therefore continues to endorse the pathologising model. In particular, the Court noted that transsexualism featured in the chapter of ‘Mental and Behavioural disorders’ of the ICD and that “the requirement to obtain a prior psychiatric diagnosis [did] not directly affect individuals’ physical integrity”<sup>103</sup> while it did not mention psychological integrity. In the same case, the Court argues that the French state did not violate the Convention by ordering an expert medical assessment entailing intimate genital examination as a condition to legally change documents.<sup>104</sup> The ECtHR has not contested the pathologisation of transgender identities or found a violation of the right to private life or of the right to be free from CIDT concerning the requirement of a psychiatric diagnosis and other medical examinations.

#### **b. Legal proceedings and other administrative requirements**

States that allow legal gender change, have to create a legal or administrative procedure to change the legal sex on a person’s birth certificate or identity documents. Most states impose on trans people both medical treatment requirements and administrative requirements. The specific act of changing one’s legal sex can be administrative or judicial. Some of the requirements to access legal transition have been found to violate trans people’s rights. In many countries, trans people are required to divorce their spouse in order to change their birth certificate. In 2011, the HRC found that such requirement is not proportionate or necessary, and therefore in violation of the trans people’s right to private life.<sup>105</sup> The ECtHR in the past has

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<sup>100</sup> A.P., *Garçon and Nicot v. France*, Application n.79885/12 (ECtHR,2017), par.130

<sup>101</sup> A.P., *Garçon and Nicot v. France*, Application n.79885/12 (ECtHR,2017), par.131

<sup>102</sup> A.P., *Garçon and Nicot v. France*, Application n.79885/12 (ECtHR,2017), par.135

<sup>103</sup> A.P., *Garçon and Nicot v. France*, Application n.79885/12 (ECtHR,2017), par.139

<sup>104</sup> A.P., *Garçon and Nicot v. France*, Application n.79885/12 (ECtHR,2017), par.152

<sup>105</sup> G. v. Australia, Application n. 2171/2012 (HRC,2017), par. 7.10

granted states a large margin of appreciation, given the fact that allowing trans people to remain married might have given rise to homosexual marriage in a number of countries. Restrictive legal requirements are often based and engrained in a pathologising model. In the case of *S.V. v. Italy*, the applicant was required to go to court twice in order to prove that she had fulfilled all the medical and judicial requirements. First, she had to obtain permission to undergo sterilisation surgery, and secondly after having undergone the sterilisation, to change her documents.<sup>106</sup> In this case, the ECtHR found that the fact that she had to wait more than two years between the two court rulings constituted a violation of the right to privacy.<sup>107</sup> Other requirements may be a result of states not regulating gender transition. In Poland for example, to change their legal sex, trans people have to first undergo sterilising surgery and then they have to sue their parents for assigning them the wrong gender at birth.<sup>108</sup> Prohibitive requirements for accessing legal transition have mainly been adjudicated under the right to private life, even though they often violate trans people's rights causing significant suffering that may amount to CIDT.

### iii. Critiques of the private life approach

The right to private life does not adequately deal with transgender rights for a number of reasons. The privacy argument has two main problems: first, it continues to endorse the pathologising model, second, it fails to recognise the severity of trans rights' violations.

Concerning the effects of the pathologising model, the independent expert on SOGI has recently stated that "pathologisation has had a deep impact on public policy, legislation and jurisprudence, thus perpetrating all realms of state action in all regions of the world and permeating the collective conscience. Eradicating the conception that some forms of gender as a pathology from everyday life will be a long and difficult process and [...] proactive measures will be required to that end."<sup>109</sup> The privacy argument has been criticised by feminist legal scholars for fundamentally requiring the non-intervention of the state in the sphere protected by

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<sup>106</sup> *S.V. v. Italy*, Application n. 55216/08 (ECtHR, 2019), par. 70

<sup>107</sup> *S.V. v. Italy*, Application n. 55216/08 (ECtHR, 2019), par. 72

<sup>108</sup> Zhan Chiam et al. "Trans legal mapping report: recognition before the law" (ILGA, 2016), p. 72

<sup>109</sup> UNGA 'Report of the Independent Expert on Sexual Orientation and Gender Identity' (2018) A/73/152, par. 14

this right.<sup>110</sup> In order to effectively advance trans rights, the system that pathologises trans people needs to be criticised, identified as a system of oppression and subsequently dismantled. The right to privacy as it has been used to protect and enforce trans rights has therefore demonstrated to be limited in scope, since it failed to challenge the underlying structure of oppression that leads to continuous violations.

When adjudicating trans rights, human rights bodies have largely accepted and left unchallenged a pathologising model, therefore failing to ensure the respect of trans people's physical and moral integrity. Under pathologising systems, trans people who wish to undertake gender affirming medical procedures, or change their legal name or gender, are forced to accept a mental illness diagnosis, regardless of the state of their mental health.<sup>111</sup> By accepting and leaving unquestioned the pathologisation of trans people by States, human rights bodies fail to recognise that defining gender diversity as an illness is "unfounded, discriminatory and without demonstrable clinical utility."<sup>112</sup> The pathologisation of trans persons is one of the root causes behind many of the human rights violations trans people face.<sup>113</sup> By imposing trans people to undergo medical and psychological procedures before LGR, States continue to actively violate trans people's personal autonomy and integrity.<sup>114</sup> Such principles are fundamental aspects of a person's bodily and moral integrity and therefore are protected under both the right to private life and the right to be free from CIDT. As a result, when human rights bodies and institutions fail to challenge the pathologisation of trans people, they are disregarding one of the fundamental principles of the right to private life, which they are applying in that moment.

The second problematic aspect under the right to private life, is that such framework fails to acknowledge the suffering imposed by states on trans people as a result of their policies. As explored in the first chapter, international law is a highly gendered system. As part of such

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<sup>110</sup> Catherine A. McKinnon "feminism unmodified: discourses on life and law" (Harvard University Press, 1987), p. 100

<sup>111</sup> Kara Shehrezade "Gender is not an illness: how pathologizing trans people violates international human rights" (GATE, 2017)

<sup>112</sup> Maria Elisa Castro-Paranza et al. "Gender Identity: the human rights of depathologization" *International journal of environmental research and public health* (2016,16)

<sup>113</sup> OHCHR "being lesbian, gay, bisexual and/or trans is not an illness- joint statement for international day against homophobia, transphobia and biphobia. Available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956&LangID=E> , last accessed 8 August 2019

<sup>114</sup> Kara Shehrezade "Gender is not an illness: how pathologizing trans people violates international human rights" GATE, 2017, p.8

gendered system, human rights bodies discredit and underestimate trans narratives and experiences of suffering. Feminist scholars have argued that human rights bodies' insistence in framing women's rights violations under the right to private life derived from a patriarchal system and as a result, it actively denied women's rights.<sup>115</sup> The definition of torture and CIDT have therefore been written with a specific understanding of politically motivated torture against cisgender heterosexual men.<sup>116</sup> Such definitions have excluded for a long time acts of torture and CIDT against women, and continue today to exclude acts 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.<sup>117</sup> McKinnon argues that in the legal framework, men's suffering has the dignity of politics and is called torture, while women as such are not seen as deserving of dignity or power therefore their suffering is not called torture.<sup>118</sup> The battle to recognise rape as torture stems from this analysis. Trans rights are still at the beginning of a similar process, in which trans suffering is not recognised as political or severe enough for constituting torture or CIDT. 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"<sup>119</sup> While adjudicating trans rights under the right to private life, human rights bodies have failed to understand the severity and the consequences stemming from prohibition of transition or imposition of prohibitive requirements. By accepting and not questioning the pathologising model, human rights institutions have allowed harm to be perpetrated. When a person's core identity is labelled as a mental illness, his or her personal integrity are violated to such an extent that it violates the right to be free from CIDT.<sup>120</sup>

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<sup>115</sup> Ciara O'Connel "What private life means for women" in Oswaldo Ruiz-Chiribog, Clara Burbano Herrera (eds.) *The Inter-American Court of Human Rights; Theory and Practice, Present and Future* (Intersentia, 2015), p. 639

<sup>116</sup> Alyson Zuriack "(En)Gendering suffering: denial of abortion as a form of cruel, inhuman or degrading treatment" *Fordham Journal of International Law* (2015,38), p.101

<sup>117</sup> Alyson Zuriack "(En)Gendering suffering\_ denial of abortion as a form of cruel, inhuman or degrading treatment" *Fordham Journal of International Law* (2015,38), p.103

<sup>118</sup> Catherine McKinnon "Are women human? And other international dialogues" (Harvard University Press, 2006), p.22

<sup>119</sup>UNGA 'Report of the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2016) A/HRC/31/57, par. 9

<sup>120</sup> Maria Elisa Castro-Paranza et al. "Gender Identity: the human rights of depathologization" *International journal of environmental research and public health* (2016,16), p.4

### Chapter 3: Torture and Cruel and Inhuman or Degrading Treatment of Trans people

When classified under the right to private life, certain violations of trans people's rights are clearly underestimated. In order to classify those state policies and acts as violating the right to be free from CIDT, this chapter will analyse various definitions of cruel and inhuman or degrading treatment, and the understanding of human rights bodies of mental suffering.

#### 3.a Definitions

Currently, there is no universal definition of the scope of inhuman or degrading treatment.<sup>121</sup> CIDT is usually defined in relation to the act of torture, as they are often protected under the same provision. The ICCPR provides that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment."<sup>122</sup> The ECHR's definition extends to both treatment and punishments, and similarly does not formally distinguish between the categories of Torture and CIDT.<sup>123</sup> The HRC has stated that the Covenant does not contain a definition of the prohibition of Torture and CIDT, "nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied."<sup>124</sup> However, in their case-law they sometimes emphasise that a case explicitly constitutes torture. The HRC further stated that the prohibition of Torture and CIDT relates not only to acts that cause physical pain, but also to acts that cause mental suffering to the victim.<sup>125</sup> Indeed, torture is one of the gravest human rights violations, due to the psychological consequences it has on victims.<sup>126</sup> Under Article 5 of the ACHR, "every person has the right to have his physical, mental and moral integrity respected" and "no one shall be subjected to torture or cruel, inhuman or degrading treatment."<sup>127</sup> Nigel Rodley argued that for the Human Rights Commission "the threshold for entry into the scope of torture and ill-treatment was 'degrading treatment', which grossly humiliated a person or drives him [or her] to act against

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<sup>121</sup> Rhona K. M. Smith "Textbook on International Human Rights" (OUP,2012), p.239

<sup>122</sup> ICCPR, art. 7

<sup>123</sup> ECHR art. 3

<sup>124</sup> HRC 'General Comment n. 20: Article 7 on Prohibition of torture, or other cruel and inhuman or degrading treatment' (1992), par. 4

<sup>125</sup> HRC 'General Comment n. 20: Article 7 on Prohibition of torture, or other cruel and inhuman or degrading treatment' (1992), par. 5

<sup>126</sup> Pau Pérez-Salez "Psychological torture: definition, evaluation and measurement" (Routledge, 2017), p.86

<sup>127</sup> ACHR, article 5



his [or her] will or conscience.”<sup>128</sup> The ECtHR stated 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.”<sup>129</sup> The measure to understand which treatments are humiliating or debasing, has both subjective and objective elements.

The elements of torture and the treatments falling under this category, have generally been more precisely defined in international law, than the criteria to define CIDT.<sup>130</sup> The most widely accepted definition of torture in international law is provided by art. 1 of UNCAT.<sup>131</sup> Under UNCAT, states also undertake to prevent “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1.”<sup>132</sup> Under both provisions, the treatment must happen at the hands of or with the acquiescence of state officials. The classification of an act as CIDT or torture remains relevant due to the fact that the prohibition on torture constitutes *jus cogens*, because under UNCAT, the non-refoulement principle does not apply to the prohibition of CIDT.<sup>133</sup>

Various human rights bodies, including UNCAT, have understood the difference between torture and CIDT to lay in the severity of the treatment.<sup>134</sup> Under this approach, torture would consist of a particularly aggravated form of pain or suffering, more intense than that required for inhuman treatment, and the difference lays both in the severity of the treatment and in the purpose.<sup>135</sup> However, both Nowak, McArthur and Rodley disagree and argue that “the requirement of purpose seems to be the most decisive criterion which distinguishes torture from cruel or inhuman treatment.”<sup>136</sup> They further state that there is not a severity difference between inhuman treatment and torture, while degrading treatment has a lower threshold. Furthermore, some forms of physical and psychological ill-treatment may lead to similar psychological outcomes as torture, notwithstanding the different legal classification.<sup>137</sup>

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<sup>128</sup> Nigel Rodley, Matt Pollard “The treatment of prisoners under international law” (OUP, 2009), p.86

<sup>129</sup> Campbell and Cosans v. the United Kingdom, Application n. 7511/76 (ECtHR,1982), par. 28

<sup>130</sup> Nigel Rodley, Matt Pollard “The treatment of prisoners under international law” (OUP, 2009), p.86

<sup>131</sup> Nigel Rodley, Matt Pollard “The treatment of prisoners under international law” (OUP, 2009), p.84

<sup>132</sup> UNCAT, art.16

<sup>133</sup> UNCAT, art. 3

<sup>134</sup> Nigel Rodley, Matt Pollard “The treatment of prisoners under international law” (OUP, 2009), p.100-104

<sup>135</sup> Nigel Rodley, Matt Pollard “The treatment of prisoners under international law” (OUP, 2009), p.99

<sup>136</sup> Nowak, McArthur “United Nations Convention Against Torture: A commentary” (OUP, 2008), in

Rodley, Pollard “The treatment of prisoners under international law” (OUP, 2009) p.74

<sup>137</sup> Metin Basoglu et al “Torture vs Other cruel, inhuman or degrading treatment: is the distinction real or apparent?” *Arch Gen Psychiatry* (2007, 64), p. 276

Under the Inter-American Convention to Prevent and Punish Torture, the degree of suffering is not a determining condition for torture, and torture also includes the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.<sup>138</sup> The Special Rapporteur on Torture furthermore stated the threshold between ill-treatment and torture is not clear, and that a gender sensitive lens must be adopted in order classify human rights violations against LGBT correctly.<sup>139</sup> He added that “the purpose and intent elements of the definition of torture are always fulfilled if an act is gender-specific or perpetrated against persons on the basis of their sex, gender identity, real or perceived sexual orientation or non-adherence to social norms around gender and sexuality.”<sup>140</sup>

Traditionally, the legal elements and definitions of torture have been discussed in contexts such as interrogation, punishment or intimidation of a detainee.<sup>141</sup> This traditional framework is usually also applied to violations of CIDT, and it involves a male perpetrator and a male victim. As an example, Article 7 of the ICCPR, concerning both torture and CIDT, is mostly applied in circumstances of abuse within state custody.<sup>142</sup> However, the international human rights system in the past years has started to adopt an increasingly expansive interpretation of the prohibition of torture and CIDT, particularly in the context of gender based concerns.<sup>143</sup> The change in approach is shown by the fact that the HRC has condemned violence against women including domestic violence under Article 7.<sup>144</sup> The shift towards an inclusion derives from a better understanding of the severity of pain and suffering of gender-specific treatments.<sup>145</sup> Such change started with the understanding of courts that rape may be an act of torture on its own.<sup>146</sup> This gendered understanding of pain and suffering by human

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<sup>138</sup>Pau Pérez-Salez “Psychological torture: definition, evaluation and measurement” (Routledge, 2017), p. 72

<sup>139</sup> UNGA ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’ (2016) A/HRC/31/57, par.8

<sup>140</sup> UNGA ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’ (2016) A/HRC/31/57, par.8

<sup>141</sup> Ronli Sifris “Conceptualising involuntary sterilisation as severe pain or suffering for the purposes of torture” *Netherlands Quarterly of Human Rights* (28, 2010)

<sup>142</sup> Alice Edwards “The ‘feminising’ of torture under international human rights law” *Leiden Journal of International Human Rights Law* (2006, 19), p.357

<sup>143</sup> Ronli Sifris “conceptualising involuntary sterilisation as ‘severe pain or suffering’ for the purposes of Torture discourse” *Netherlands Quarterly on Human Rights* (2010, 28), p. 527

<sup>144</sup> Alice Edwards “The ‘feminising’ of torture under international human rights law” *Leiden Journal of International Human Rights Law* (2006, 19), p.359

<sup>145</sup> Report of the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment A/HRC/31/57, par.9

<sup>146</sup> Gender and Torture Conference report (Redress and Amnesty International, 2011), p.19

rights bodies now has to be expanded to issues that emerge from States' policing of trans bodies.

In order for a state to violate the prohibition of torture and CIDT, there must be a link between the State and the pain or suffering experiences.<sup>147</sup> Under international human rights law, states obligations give rise to a duty to Respect, Protect and Fulfil. Concerning the duty to protect, "States fail in their duty to prevent torture and ill-treatment whenever their laws, policies or practices perpetrate harmful gender stereotypes in a manner that enables or authorises, explicitly or implicitly, prohibited acts to be performed with impunity"<sup>148</sup> When an act or a treatment derives from a State policy or law regulating gender transitions, State responsibility can be easily established. States also have the duty to fulfil, providing services such as accessibility to health services or the legal framework to allow trans people to transition.

### **3.b Analysis of the severity of treatment required**

Trans rights violations arising from the prohibition to transition and/or the imposition of prohibitive requirements, result in both physical and mental suffering. To classify such treatments as breaches of the right to be free from CIDT, the physical and mental suffering standards adopted by human rights bodies have to be analysed. 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.<sup>149</sup> When classifying an act as torture or CIDT, consideration must be given not only to what is done to a person, but also to the overall situation and circumstances and individual susceptibilities and vulnerabilities.<sup>150</sup> While conducting the analysis, one of the relevant issues to determine the severity of the act, is the personal significance of the psychological maltreatment.<sup>151</sup> The ECtHR has defines a treatment to be degrading if "it arouses feelings of fear, anguish and inferiority capable of

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<sup>147</sup> Ronli Sifris "Conceptualising involuntary sterilisation as 'severe pain or suffering' for the purposes of Torture discourse" *Netherlands Quarterly of Human Rights* (2010, 28), p.531

<sup>148</sup>UNGA 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2016) A/HRC/31/57, par. 10

<sup>149</sup> Katherine Mayall et al. "reproductive rights violations as torture or ill-treatment" in *Gender perspectives on torture: Law and Practice* (Washington University College of Law, 2017), p. 268

<sup>150</sup> Hernan Reyes "The worst scars are in the mind: psychological torture" *International Review of the Red Cross* (2007, 89), p.599

<sup>151</sup> Pau Pérez-Salez "Psychological torture: definition, evaluation and measurement" (Routledge, 2017), p.78

breaking an individual's moral and physical resistance."<sup>152</sup> 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.<sup>153</sup> In cases concerning 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.<sup>154</sup> 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.<sup>155</sup> Humiliation refers to the debasement of a person's identity rather than actions.<sup>156</sup> To determine whether an act is humiliating or not towards a trans person, personal factors and vulnerabilities have to be taken into account.

Various human rights bodies found that stripping a prisoner naked, depending on one's cultural sensitivities and religion, may constitute CIDT.<sup>157</sup> Acting against one's religion has also been found to constitute CIDT. Forced sterilisation often involves the destruction of an essential feature of a person's identity.<sup>158</sup> 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 amount to CIDT, since it creates a feeling of humiliation.<sup>159</sup> For these reasons, the analysis of the severity of treatment cannot be narrowed down to an objective analysis. Concerning the duration of the treatment, the ECtHR found that premeditated threat of ill-treatment for a short time, constituted CIDT, since the person was in a state of vulnerability.<sup>160</sup> There is therefore no established minimum time limit for a treatment or an act to be considered in violation of the right to be free from CIDT.

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<sup>152</sup> *Pretty v. UK*, Application no. 2346/02, (ECtHR, 2002), par. 52

<sup>153</sup> *Vuolanne v. Finland*, CCPR/C/35/D/265/1987 (HRC, 1989)

<sup>154</sup> Pau Pérez-Salez "Psychological torture: definition, evaluation and measurement" (Routledge, 2017), p.77

<sup>155</sup> Linda M. Hartling, Tracy Luchetta "Humiliation: assessing the impact of derision, degradation and debasement" *The Journal of Primary Prevention* (1999, 19), p. 264

<sup>156</sup> Linda M. Hartling, Tracy Luchetta "Humiliation: assessing the impact of derision, degradation and debasement" *The Journal of Primary Prevention* (1999, 19), p. 263

<sup>157</sup> Hernan Reyes "the worst scars are in the mind: psychological torture" *International Review of the Red Cross* (2007, 89)

<sup>158</sup> Ronli Sifris "conceptualising involuntary sterilisation as 'severe pain or suffering' for the purposes of Torture discourse" *Netherlands Quarterly on Human Rights* (2010, 28), p. 537

<sup>159</sup> Pau Pérez-Salez "Psychological torture: definition, evaluation and measurement" (Routledge, 2017), p.77

<sup>160</sup> *Gafgeng v. Germany*, Application n. 22978/05 (ECtHR, 2010) par. 101-108

Physical forms of pain and suffering are more easily understood than psychological forms of suffering.<sup>161</sup> Some physical treatments or invasion of one's bodily integrity always reach the minimum severity threshold. As will be seen in the next chapter, coerced sterilisation is one of such treatments.

#### **Chapter 4. Analysis of Trans rights violations under the right to be free from torture and CIDT**

This chapter applies the definition of CIDT to laws and policies prohibiting or imposing medical and administrative requirements to obtain LGR. Trans rights are violated in a multitude of ways by both State and non-State actors. In the vast majority of the world, being trans is still legally considered a pathology.<sup>162</sup> As previously seen, the induction of feelings of humiliation and degradation are important elements to establish whether a violation of the right to be free from CIDT has occurred or not. On this point, the Special Rapporteur on Torture recently stated that "discrimination on grounds of sexual orientation or gender identity may often contribute to the process of dehumanisation of the victim, which is often a necessary condition for torture and ill-treatment to take place."<sup>163</sup>

Policies that prohibit trans people to legally transition or pathologise their identity and require invasive medical procedures, induce feelings of humiliation and degradation, and therefore expose trans people to CIDT. It is widely understood that discriminatory legislation and pathologisation contribute to an environment in which violence against trans people is tacitly permitted or tolerated.<sup>164</sup> Contextually, trans people often are seen as less credible by law enforcement agency or as not fully entitled to an equal standard of protection due to their gender identity.<sup>165</sup>

As a result, States violate trans rights in two types of situations. First, they fail to respect trans people's rights when they implement laws and policies that directly violate their rights.

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<sup>161</sup> Hernan Reyes "The worst scars are in the mind: psychological torture" *International Review of the Red Cross* (2007, 89), p.596

<sup>162</sup> Kara Sheherezade "gender is not an illness: how pathologizing trans people violates human rights law" GATE, 2017, p.4

<sup>163</sup>UNGA 'Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment' (2001) A/56/156, par. 19

<sup>164</sup> IACHR "Violence against LGBTI persons in the Americas" (2015) OAS/Ser.L/V/II.rev.1 Doc. 36, p.49

<sup>165</sup> UNGA 'Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment' (2001) E/CN.4/2002/76, Annex III, p.11

Secondly, they violate their rights when failing to protect trans people from violence and discrimination at the hands of non-State actors. State responsibility must be established in order for a State to be considered responsible for a violation of the right to be free from CIDT. UNCAT, in General Comment n. 2, provides that “States bear international responsibility for the acts and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control or otherwise under colour of law.”<sup>166</sup> States can therefore be held responsible for violations occurring as a result of the implementation of a law or policy. This chapter will focus on the consequences of state policies regulating or prohibiting the medical and legal gender transition process.

#### **4.a Prohibition to transition**

Trans persons who are not legally allowed to transition, are *de facto* not enjoying to right to be equally recognised before the law. The term prohibition to transition includes both *de jure* and *de facto* impossibility to legally transition due to state policies. Even in States that do not allow LGR, trans people still do transition medically and socially. Heightened levels of discrimination resulting from the impossibility of obtaining LGR, may however deter some trans people from socially and medically transitioning, therefore causing even further psychological distress. Furthermore, some States may not allow LGR, yet actively provide trans-specific healthcare.<sup>167</sup> Other states have not regulated the legal and medical fields, and as a result leave trans people in a juridical vacuum.<sup>168</sup> When trans people’s gender is not recognised before the law, they face heightened levels of discrimination, exclusion, harassment and violence. States have a responsibility to respect trans people’s rights by recognising them before the law. The right to equal recognition before the law is a central tenet for other rights and freedoms.<sup>169</sup> People who transition and whose gender identity is not recognised on their documents, are not equally recognised before the law and live in a *de facto* legal vacuum. The IACHR explicitly recognises

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<sup>166</sup> UNCAT ‘general comment n. 2: implementation of Article 2 by state parties’ (2008) CAT/C/GC/2, par. 15

<sup>167</sup> see for example the United Kingdom before Christine Goodwin v. the UK and the subsequent Gender Recognition Act

<sup>168</sup> Adam Smiley et al. “Over diagnosed but underserved. Trans healthcare in Georgia, Poland, Serbia, Spain and Sweden: trans health survey” (Transgender Europe 2018), p.5

<sup>169</sup>UNGA ‘Report of the Independent Expert on Sexual Orientation and Gender Identity’ (2018) A/73/152, par. 22

the right to recognition as a person before the law in article 3, and the right to a name in article 18.<sup>170</sup> In relation to trans rights, the IACtHR argued that “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.”<sup>171</sup> On a similar note, the Independent Expert on SOGI argued that “lack of recognition of gender identity may also lead to violations of human rights in other contexts, including torture and ill-treatment in medical and detention settings, sexual violence and coerced medical treatment.”<sup>172</sup> As it will be shown in this section, the lack of recognition before the law has consequences on all sphere of one’s life and affects the enjoyment of civil, political, economic, social and cultural rights.<sup>173</sup>

Not being allowed to legally transition gives rise to two main issues that, 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. Secondly, not being recognised before the law exposes trans people to further discrimination, humiliation and violence as well as violations of other human rights.

i. Non-recognition *per se*:

Denying the possibility to obtain LGR violates trans people’s moral integrity, since it induces feelings of humiliation and psychological suffering. Forcing a person to expose their sex and name assigned at birth on a daily basis or leading them not to live their gender, is humiliating and breaches trans people’s moral integrity. Gender identity is recognised by most human rights bodies as a fundamental component of a person’s identity.<sup>174</sup> In 2012, the UNHCR stated that “being compelled to conceal one’s gender identity may also result in significant psychological or other harms.”<sup>175</sup> Therefore, if even under refugee law a person cannot be asked to conceal their gender identity in order to return to their country of origin and avoid persecution, then being forced to conceal one’s gender identity cannot be required in less

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<sup>170</sup> IACHR Article 3 and 18

<sup>171</sup> Advisory Opinion OC-24/17 (IACtHR, 2017), par. 98

<sup>172</sup> UNGA ‘Report of the Independent Expert on Sexual Orientation and Gender Identity’ (2018) A/73/152, par. 18

<sup>173</sup> “Advances and challenges towards the recognition of the rights of LGBTI persons in the Americas” (IACHR, 2018), p.17

<sup>174</sup> see for example *Van Kuck v. Germany*, Application n. 35968/97 (ECtHR, 2003), par. 56

<sup>175</sup> UNHCR ‘Guidelines on international protection n. 9’ (2012) HRC/GIP/12/09, par. 33

severe situations.<sup>176</sup> Being unable to live in one's gender has devastating effects on the mental health of trans people. While the overall attempted suicide rates for the trans population reach 20 to 25% in many countries,<sup>177</sup> studies clearly show that if a person is able to transition (medically, socially and legally), self-harm and suicidal thoughts decrease sharply.<sup>178</sup> It is important to recognise that trauma and psychological suffering are not inherent to trans people, but the result of society's failure to embrace bodily diversity, constant discrimination and threats of violence.<sup>179</sup>

Being forced to share an extremely intimate and private information every day for an extended period of time, can be considered humiliating. As previously stated, one of the elements used to determine if an act is inhuman or degrading, is the assessment of whether such act or policy humiliates and debases a victim "in their own eyes or in the eyes of others".<sup>180</sup> According to the ECtHR, the humiliation inflicted must attain a particular level to constitute CIDT. The necessary level is determined by both personal and 'objective' factors.<sup>181</sup> Nigel Rodley endorses the HRC provision and argues that an act or treatment constitutes ill-treatment if a person's moral and physical integrity are violated and the treatment grossly humiliates a person or drives them to act against their will or conscience.<sup>182</sup> Not having matching documents harms a person's psychological integrity also because it has the effect of not being recognised before the law. On this issue, the IACtHR states that "the lack of juridical personality harms human dignity because it is an absolute denial of a person's condition as a subject of rights, and places that person in a vulnerable position owing to the non-observance of his or her rights by the State or by private individuals."<sup>183</sup> The lack of legal recognition therefore negates the identity of the person to the extent that it provokes a fundamental rupture of state obligations.<sup>184</sup> By denying trans people legal gender recognition, States fail to both respect and protect trans

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<sup>176</sup> UNHCR 'Guidelines on international protection n. 9' (2012) HRC/GIP/12/09, par. 31-33

<sup>177</sup> see Adam Smiley et al. "Overdiagnosed but underserved: trans healthcare in Georgia, Poland, Serbia, Spain and Sweden." (Transgender Europe, 2017), p.21

<sup>178</sup> "Being trans in the European Union: Comparative analysis of EU survey data" (European Union Fundamental Rights Agency), p.78

<sup>179</sup> Maria Elisa Castro-Paranza et al. "Gender Identity: the human right of depathologisation" *International Journal of Environmental Research and Public Health* (2016, 16), p.3

<sup>180</sup> *Campbell and Cosans v. the United Kingdom*, Application n. 7511/76 (ECtHR, 1982), par.28, *Tyrer v. the United Kingdom* Application n. 5856/72 (ECtHR, 1978), par. 30-32

<sup>181</sup> *Tyrer v. the United Kingdom* Application n. 5856/72 (ECtHR, 1978), par. 33

<sup>182</sup> Nigel Rodley, Matt Pollard "The treatment of prisoners under international law" (OUP, 2009), p.86

<sup>183</sup> Advisory Opinion OC-24/17 (IACtHR, 2017), par.102

<sup>184</sup> UNGA 'Report of the Independent Expert on Sexual Orientation and Gender Identity' (2018) A/73/152, par. 23



people's right to moral integrity and their right not to be discriminated on the basis of their gender identity. While gender identity is not an internationally protected category, it is protected under the open clause included in most non-discrimination provisions.<sup>185</sup>

ii. Exposure to further human rights violations

Trans people's normal social life is severely hindered when States do not allow LGR: without matching documents and social security number or bank card with the appropriate name, participation in society becomes very difficult.<sup>186</sup> Documents that do not reflect one's gender may be seen as not valid by national and foreign authorities.<sup>187</sup> In the following paragraphs, there are some examples of human rights violations that trans people endure as a result of not having matching documents.

One of the results of being denied LGR is fear of gender based violence and transphobic attacks.<sup>188</sup> Violent attacks against trans people are common in every region of the world. In the American continent, the life expectancy of a trans woman is less than 35 years.<sup>189</sup> In the European Union, one in two trans people are attacked or threatened with violence every year.<sup>190</sup> In South Asia violence and discrimination against trans people are extremely prevalent yet highly under-reported.<sup>191</sup> In Southern Africa transgender persons are often harassed and prosecuted under general criminal law provisions, and therefore do not seek protection from violent attack.<sup>192</sup> When trans people are not recognised before the law, they are increasingly exposed to violent attacks, and less able or unable to seek protection by state authorities, due to fear of further discrimination and accusation of identity fraud.

Trans people's rights are also violated in a number of other situations in a manner that limits their daily life. When trans people without matching IDs try to cross a border or board a

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<sup>185</sup> OHCHR "Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law" (United Nations, 2012) HR/PUB/12/06, p. 41-45

<sup>186</sup> "Being trans in the European Union: Comparative analysis of EU survey data" (European Union Fundamental Rights Agency), p.19

<sup>187</sup> Jack Byrne "License to be yourself: responding to national security and indentity fraud arguments" (Open Society Foundations, 2016), p.10

<sup>188</sup> Zhan Chiam et al. "Trans legal mapping report: recognition before the law" (ILGA, 2016), p.17

<sup>189</sup> "Violence against LGBTI persons in the Americas" OAS/Ser.LV/II.rev.1 (IACHR, 2015), p.34

<sup>190</sup> "Being trans in the European Union: Comparative analysis of EU survey data" (European Union Fundamental Rights Agency), p.10

<sup>191</sup> "Know Violence: exploring the links between violence, mental health and HIV risk among men who have sex with men and transwomen in South Asia" (UNDP 2018), p.8

<sup>192</sup> Usha Jugroop "Laws and Policies Affecting Transgender Persons in Southern Africa" (Southern Africa Litigation Centre, 2016), p. 15

plane, they are often stopped and questioned by authorities suspecting an identity fraud.<sup>193</sup> When they are questioned by the authorities concerning the un-matching documents, authorities often engage in invasive interrogations and/or body searches.<sup>194</sup> According to the Special Rapporteur on Torture, trans people are at heightened risk of ill-treatment during body searches.<sup>195</sup> When such searches are conducted solely on the basis of discrimination, the risk is further heightened. The enjoyment of the right to freedom of movement as enshrined in article 12 of ICCPR is therefore threatened by the lack of documents reflecting one's gender.

When looking for employment, without matching documents, trans people are subjected to high levels of discrimination. Trans rights organisations argue that equal access to employment is not a reality for trans people across much of the world.<sup>196</sup> Having matching documents is often a decisive factor when applying for a job, since trans people with un-matching documents are exposed to institutionalised discrimination. In South-East Asia, a region where most trans people are unable to rectify their document, when applying for employment, trans people have 60% less chances of gaining employment compared to cisgender people.<sup>197</sup> In the EU, approximately one in three trans people seeking a job face discrimination.<sup>198</sup> Endemic employment discrimination leads trans people in a cycle of poverty that further exacerbates societal discrimination.

Access to healthcare is also hindered by lack of matching documents. When trying to access public services, including public healthcare, trans people are often met with hostility and discrimination.<sup>199</sup> While discrimination in healthcare is not only a result of the lack of identity documents, in countries where LGR is not possible, discrimination of trans people and exclusion from the provision of services is justified by the legal system.<sup>200</sup> In the Asia Pacific

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<sup>193</sup> Jack Byrne "License to be yourself: responding to national security and identity fraud arguments" (Open Society Foundations, 2016), p.10

<sup>194</sup> Paisley Currah, Tara Mulqueen "Securitizing gender: identity, biometrics, and transgender bodies" *Social Research* (2011, 78), p. 562

<sup>195</sup> UNGA 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2016) A/HRC/31/57, par.36

<sup>196</sup> 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), p.18

<sup>197</sup> 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), p. 18

<sup>198</sup> "Being trans in the European Union: Comparative analysis of EU survey data" (European Union Fundamental Rights Agency), p.9

<sup>199</sup> Mauro Cabral Grinspan, Morgan Carpenter "Gendering the lens: critical reflections on gender, hospitality and torture" in *Gendered Perspectives on Torture: Law and Practice* (Center for Human Rights and Humanitarian Law, 2018), p.194

<sup>200</sup> Kara Shehrezade "Gender is not an illness: How pathologising trans people violates international human rights law" (GATE, 2017), p.10

region for example trans people face significant barriers in exercising their human rights, including the right to health: social exclusion and the difficulty in finding employment lead to a situation in which trans people often lack an adequate standard of living, and do not access to adequate healthcare.<sup>201</sup> In South-East Asia, “in all but a handful of countries in the region, trans people lack access to basic healthcare.”<sup>202</sup> In Latin America and the Caribbean, a report shows that healthcare workers and administrative staff often discriminate and perpetrate trans and gender non-conforming patients, especially in those countries where trans people are unable to obtain matching documents.<sup>203</sup> Access to healthcare services is therefore hindered by lack of matching identity documents, which provides a justification for discrimination of trans people.<sup>204</sup> Trans people without matching documents are further hindered from accessing social security schemes. General Comment 19 of the CESCR, states that a core obligation under the right to social security is to “ensure the right of access to social security system or schemes on a non-discriminatory basis, especially for disadvantaged and marginalized individuals and group.”<sup>205</sup> The Committee further argued that “states should remove de facto discrimination on prohibited grounds, where individuals are unable to access social security.”<sup>206</sup> The IACHR 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.<sup>207</sup>

Non-recognition before the law fundamentally disrupts trans people’s lives on a daily basis. For example, in some regions trans people are routinely suspected of identity fraud when trying to open a bank account or paying with a credit card reporting a name not matching their gender expression.<sup>208</sup> The possibility to prove one’s identity when paying with a card, opening

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<sup>201</sup> “Blueprint for the provision of comprehensive care for trans people and trans communities in Asia and the Pacific” (Asia Pacific Trans Network., 2015), p.2

<sup>202</sup> “Blueprint for the provision of comprehensive care for trans people and trans communities in Asia and the Pacific” (Asia Pacific Trans Network., 2015), p.2

<sup>203</sup> 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” *Violence and Gender* (2019, 1), p.41

<sup>204</sup> 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” *Violence and Gender* (2019, 1), p.41

<sup>205</sup> CESCR ‘General comment 19: the right to social security’(2008) E/C.12/GC/19, par. 59 (b)

<sup>206</sup> CESCR ‘General comment 19: the right to social security’(2008) E/C.12/GC/19, par. 30

<sup>207</sup> “Advances and challenges towards the recognition of the rights of LGBTI persons in the Americas” (IACHR, 2018), p.13

<sup>208</sup> Usha Jugroop “Laws and Policies Affecting Transgender Persons in Southern Africa” *Southern Africa Litigation Centre*, 2016, p. 10

a bank account or showing one's ID when driving are fundamental for integration in society, and hindered by lack of matching documents.

Given the interdependence and indivisibility of rights, grave violations of economic, social and cultural rights can lead to a violation civil and political rights.<sup>209</sup> 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.<sup>210</sup> 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 violation of trans people's ESC rights may lead to severe mental and physical suffering to such an extent that it reaches a level of suffering required to constitute CIDT.

Trans people also have their rights violated when in detention settings. The risk of being exposed to ill-treatment generally rises in cases of deprivation of liberty.<sup>211</sup> In such situations, it is well established that the proper identification of the individual is the first guarantee to state accountability. Equal recognition before the law is therefore a fundamental element for the protection from arbitrary arrest and detention, torture and ill-treatment.<sup>212</sup> When deprived of their liberty, trans people with un-matching documents are often placed in the section of their sex assigned at birth.<sup>213</sup> In these situations they are at heightened risk of violence, rape and sexual victimisation.<sup>214</sup> The Special Rapporteur on Torture stated that "humiliating and invasive body searches may constitute torture and ill-treatment particularly for transgender detainees."<sup>215</sup> The United Nations Office of Drugs and Crimes has stated that trans prisoners are a particularly vulnerable group, to which little attention is paid, despite extensive reports of discrimination, humiliation, sexual abuse, rape and other forms of violence, torture and ill-

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<sup>209</sup> 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), p.455

<sup>210</sup> *Xamok Kasek Indigenous Community v. Paraguay*, Series C.124 (IACtHR, 2010), par. 192 -193

<sup>211</sup> Ilias Bantekaas, Lutz Oette "International Human Rights Law and Practice" (Cambridge University Press, 2013), p.323

<sup>212</sup> UNGA 'Report of the Independent Expert on Sexual Orientation and Gender Identity' (2018) A/73/152, par. 24

<sup>213</sup> "Living Free and Equal: what states are doing to tackle violence and discrimination against LGBTI people" (UN OHCHR, 2016), p. 43

<sup>214</sup> "Violence against LGBTI persons in the Americas" OAS/Ser.LV/II.rev.1 (IACHR, 2015), p.99

<sup>215</sup> UNGA 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2016) A/HRC/31/57, par.36

treatment.<sup>216</sup> 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.<sup>217</sup> In particular, trans women with un-matching documents are routinely placed in male detention facilities without regards to their safety.<sup>218</sup> Isolation and solitary confinement for are extensively used as a protective measure against violence.<sup>219</sup> However, placement in solitary for confinement of trans people for long periods of time, constitutes an infringement on the prohibition of torture and ill-treatment.<sup>220</sup> Due to space constraints and the large amount of violations, this section presented only few examples of violations that occur as a result of non-recognition of trans people's gender identity by the State. These provide an example of the practical effects that the non-recognition of identity has on trans people's enjoyment of basic human rights on a daily basis. The impossibility of obtaining legal gender recognition therefore constitutes a violation of trans people's right to be free from Cruel, Inhuman or Degrading Treatment.

#### 4.b Prohibitive requirements

Most of the countries that allow gender marker change, do so with medical requirements that violate a trans person's bodily integrity by requiring sterilisation, permanent medical changes and/or a psychiatric diagnosis.<sup>221</sup> Some states also have administrative and judicial requirements such as asking trans people to divorce their spouse, not have dependent children and go to court to change their gender marker.<sup>222</sup> These requirements have been defined as prohibitive since they violate trans people's moral and physical integrity to a certain degree and often require long and expensive administrative proceedings.<sup>223</sup> This section

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<sup>216</sup> UNODC, *Handbook on Prisoners with Special Needs*, Criminal Justice Handbook Series (United Nations publication, Sales No. E.09.IV.4)

<sup>217</sup> "Gender and Torture Conference Report" (Amnesty International and Redress, 2011), p.29

<sup>218</sup> "Violence against LGBTI persons in the Americas" OAS/Ser.L/V/II.rev.1 (IACHR, 2015), p.102, Martina Castagnoli "Transgender persons' rights in the EU member states" (European Parliament Directorate-general for Justice, 2010), p. 13

<sup>219</sup> Gabriel Arkles "safety and solidarity across gender lines: rethinking segregation of transgender people in detention" *Temple Political and Civil Rights Law Review* (2009, 18), p.518, "Living Free and Equal: what states are doing to tackle violence and discrimination against LGBTI people" (UN OHCHR, 2016), p. 40

<sup>220</sup> UNGA 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2016) A/HRC/31/57, par.35

<sup>221</sup> Zhan Chiam et al. "Trans legal mapping report: recognition before the law" (ILGA 2017), p.3

<sup>222</sup> Zhan Chiam et al. "Trans legal mapping report: recognition before the law" (ILGA 2017)

<sup>223</sup> This term is the one adopted by the ILGA trans legal mapping report.

argues that such requirements imply coerced medical interventions and therefore constitute CIDT.

Human rights bodies have left the most of the prohibitive requirements that are officially sanctioned by the WHO, unquestioned.<sup>224</sup> Pathologisation of trans identities creates a dependency on a diagnosis for LGR and to access to gender affirming medical procedures.<sup>225</sup> In the past decade, it has become increasingly clear that compulsory compliance with psychological and medical requirements to obtain LGR, violate an individual's right to personal autonomy and bodily integrity.<sup>226</sup> When a state requires trans people to undergo a medical procedure to have their gender identity recognised before the law, it deprives trans people of free consent, because the alternative is non-recognition before the law, which violates CIDT.

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."<sup>227</sup> 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. This person shall be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks. The person concerned may freely withdraw consent at any time."<sup>228</sup> The Special Rapporteur on the right to health further argues that "informed consent is valid only when documented prior to medical procedure and provided voluntarily, meaning without coercion, undue influence or misrepresentation. [...] Coercion include conditions of duress such as fatigue or stress. Undue influence include situations in which the patient perceives there may be an unpleasant consequence associated with refusal of consent"<sup>229</sup> As previously stated, the impossibility of having one's gender identity recognised before the law violates the right to be free from CIDT. Refusal to consent medical interventions and invasive

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<sup>224</sup> International Classification of Diseases, section V, F.64.0, available at <https://icd.who.int/browse10/2016/en#/V>

<sup>225</sup> Kara Shehrezade "gender is not an illness: how pathologising trans people violates international human rights law" GATE, 2017, p.6

<sup>226</sup> Pieter Canoot "The pathologisation of trans persons in the ECtHR case law on gender recognition" *Netherlands Quarterly of Human Rights* (2019, 37), p. 15

<sup>227</sup> ICCPR, art. 7

<sup>228</sup>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

<sup>229</sup> UNGA 'Report of the Special Rapporteur on the highest attainable standard of physical and mental Health' (2009) A/64/272, par. 13- 14

psychiatric evaluations would therefore result in a trans person's impossibility to be recognised before the law. The Special Rapporteur on Torture noted that invasive medical treatments "of an intrusive and irreversible nature, when lacking a therapeutic purpose, may constitute torture or ill-treatment when enforced or administered without free and informed consent of the person concerned."<sup>230</sup> The IACtHR also stated that the procedure for name and legal sex change "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]."<sup>231</sup> Therefore, when a medical procedure is necessary for LGR, there is no free consent because the consequences of refusing treatment amount to CIDT. Due to space constraints, the following analysis is not exhaustive as it does not touch upon all the prohibitive requirements that give rise to CIDT. This section will first analyse sterilisation requirements, second, other medical requirements and compulsory medical examinations, and finally it will analyse administrative and judicial requirements.

#### **i. Sterilisation Requirement**

Many countries require trans people to undergo permanent bodily modifications in order to obtain LGR. 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 have undergone a surgery.<sup>232</sup> When the requirement of 'surgery' is framed in a general manner, it is usually understood as requiring permanent sterilisation. Despite society's misunderstanding about the subject, there is no such a thing as a single 'sex change/reassignment surgery' that symbolises a person's transition or changes one's sex.<sup>233</sup> Such belief is entrenched in the misunderstanding that gender is biologically determined, and leads to the coercion of trans people to medically useless surgeries that may be unwanted.

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<sup>230</sup>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, par. 32

<sup>231</sup> Advisory Opinion OC-24/17 (IACtHR, 2017), par. 146

<sup>232</sup>Zhan Chiam et al. "Trans legal mapping report: recognition before the law" (ILGA, 2016), p. 3, 39

<sup>233</sup> Rebecca Lee "forced sterilisation and mandatory divorce: how a majority of Council of Europe member states' laws regarding gender identity violate the internationally and regionally established human rights of trans people" *Berkeley Journal of International Law* (2015, 33), p.122

Coercive sterilisation gives rise to both mental and physical suffering. Such procedure involves one or more invasive surgeries to trans people's genitals and reproductive organs. It therefore entails severe physical pain. The severe mental distress comes from the imposition of a coercive medical procedure and invasion of a person's physical and moral integrity.<sup>234</sup> The sterilisation requirement is also used by some countries to purposefully hinder trans people's access to LGR. As an example of sterilisation purposefully hindering LGR, Singapore, allows gender transitions after sterilising surgery, but such surgery has not been offered by a single Singaporean hospital since 2003.<sup>235</sup> This requirement therefore adds a further economic burden on trans people seeking LGR. 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.<sup>236</sup>

In the past thirty years, human rights bodies have progressively found violations of the right to be free from torture and CIDT in situations that were previously not under the scope of its prohibition. These include rape, domestic violence, sterilisation, female genital mutilation and corporal punishment of children.<sup>237</sup> The definition of which violations fall under CIDT is therefore not a fixed one, but may vary in time.<sup>238</sup> As seen in chapter two of this paper, UNCAT, IACtHR, the Special Rapporteur on Torture and the Independent Expert on SOGI have agreed that the requirement of sterilisation constitutes a violation of the right to be free from CIDT. Such argument has been developed by human rights bodies in relation to women's rights, and was applied to trans people only in a second moment. The ECtHR and the HRC, have only found that coercive sterilisation of trans people constitutes a violation of the right to private life.<sup>239</sup> Referring to women's rights, the HRC stated that in order to assess the compliance with the

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<sup>234</sup> Ronli Sifris "conceptualising involuntary sterilisation as 'severe pain or suffering' for the purposes of torture discourse" *Netherlands Quarterly of Human Rights* (2010, 28), p. 537

<sup>235</sup> Sam Winter et al. "denied work: an audit of employment discrimination on the basis of gender identity in South East Asia" Asia Pacific Transgender network and United Nations Development Programme, 2018, p. 20

<sup>236</sup> UNGA 'Report of the Independent Expert on Sexual Orientation and Gender Identity' (2018) A/73/152, par. 31

<sup>237</sup> Alyson Zurieck "(En)gendering suffering: denial of abortion as a form of cruel, inhuman or degrading treatment" *Fordham Journal of International Law* (2015, 38), p.102, Selmouni v. France, Application n. 25803/94 (ECtHR, 2000), par. 100

<sup>238</sup> see Selmouni v. France, Application n. 25803/94 (ECtHR, 2000), par. 100

<sup>239</sup> see A.P., Garçon and Nicot v. France, Application n. 79885/12 (ECtHR, 2017) and G. v. Australia, Application n. 2171/2012 (HRC, 2017)



prohibition of torture and CIDT, “State parties should also provide the Committee with information on measures to prevent forced abortion and forced sterilisation.”<sup>240</sup> When encountering the issue of coerced sterilisation of trans people in concluding observations on several states, the HRC recognised it only as a violation of the right to private life.<sup>241</sup> The HRC therefore adopted a double standard and failed to recognise trans people’s right to humane treatment and bodily integrity.

In *S.V. v. Slovakia*, the ECtHR stated that “In order for treatment to be ‘inhuman’ or ‘degrading’, the suffering or humiliation involved must in any event go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment.”<sup>242</sup> It further states that sterilisation constitutes a major interference with a person’s reproductive health status, and therefore the forced sterilisation of a Roma woman constituted a violation of the right to be free from torture and CIDT.<sup>243</sup> In *A.P., Garçon and Nicot v. France*, a case concerning the requirement to undergo sterilisation against one’s will to obtain LGR, the ECtHR only found a violation of the right to private life.<sup>244</sup> Therefore, ECtHR also adopted a double standard when analysing a case concerning trans people. Both the impossibility of obtaining LGR and coercive sterilisation constitute CIDT. As a consequence, the imposition of a sterilisation requirement must constitute CIDT. and human rights bodies should recognise this issue in the future.

## ii. Other Medical Requirements

In addition to sterilisation, there are two main medical requirements that violate the right to be free from CIDT. The first, is the requirement to obtain a psychiatric diagnosis proving that one has gender identity disorder. The second, is the requirement to have undergone irreversible changes as a result of hormonal replacement therapy.<sup>245</sup> As previously stated, when a law requires trans people to undergo medical treatments to obtain LGR, it violates the principle of

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<sup>240</sup> HRC ‘General Comment No. 28: Article 3 on the equality of rights between men and women’ (2000), CCPR/C/Rev.1/Add.10, par.11

<sup>241</sup> See for example HRC ‘Concluding observations on the fourth periodic report of the Republic of Korea’ (2015) CCPR/C/KOR/CO/4, par. 14

<sup>242</sup> *V.C. v. Slovakia*, Application n. 18968/07 (ECtHR, 2011), par. 104

<sup>243</sup> *V.C. v. Slovakia*, Application n. 18968/07 (ECtHR, 2011), par. 120

<sup>244</sup> *A.P., Garçon and Nicot v. France*, Application n. 79885/12 (ECtHR, 2017) par. 127-135

<sup>245</sup> Kara Sheherezafé “gender is not an illness: how pathologizing trans people violates international human rights law” GATE, 2017, p.6

autonomy and integrity because they are coercive.<sup>246</sup> The severity of the harm procured by coercive medical requirements that do not involve sterilisation is underestimated by human rights bodies. Harm and suffering inflicted to trans people is often underestimated by domestic and international courts. The arguments to define coerced sterilisation as CIDT has already been argued by the women's rights movement and therefore does not involve an evaluation of the severity of the suffering imposed on trans people. When considering the coercive nature of other medical treatments imposed solely on trans people, most human rights bodies did not find a violation. In few situations, human rights bodies found that coercive medical treatments for trans people violate human rights law. UNCAT in its concluding observations, required Hong Kong to remove abusive preconditions for legal gender recognition so as to respect trans people's autonomy and psychological integrity.<sup>247</sup> The recommendation may be interpreted as including not only sterilisation, but also other medical procedure and psychiatric diagnosis process, since coerced psychiatric diagnosis and hormonal replacement therapy should be considered to be abusive conditions.<sup>248</sup> CEDAW opposed the pathologising model in the observations of Slovakia, stating that "when transgender and intersex women seek to change their legally recognised gender, they are required to undergo medical treatment, which does not respect the freedom to control one's body."<sup>249</sup> The Committee then urged the State party to change the legal framework in order to protect transgender and intersex women from non-consensual medical treatment.<sup>250</sup>

The ECtHR, while it recognised the harm provided by the coerced sterilisation to some extent, and classified it as a violation of the right to private life, failed to recognise the harm provided by the requirement of psychiatric diagnosis and other medical treatments.<sup>251</sup> Indeed, the ECtHR stated that the requirement to undergo a psychiatric diagnosis did not affect a

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<sup>246</sup> Kara Sheherezade "gender is not an illness: how pathologizing trans people violates international human rights law" GATE, 2017, p.8

<sup>247</sup> UNCAT 'Concluding observations on the fifth periodic report of China with respect to Hong Kong, China' (2016) CAT/C/CHN-HKG/CO/5, par.28-29

<sup>248</sup> UNCAT 'Concluding observations on the fifth periodic report of China with respect to Hong Kong, China' (2016) CAT/C/CHN-HKG/CO/5, par.28-29

<sup>249</sup> CEDAW 'concluding observations on the combined fifth and sixth periodic reports on Slovakia' (2015) CEDAW/C/SVK/CO/5-6 par. 36

<sup>250</sup> CEDAW 'concluding observations on the combined fifth and sixth periodic reports on Slovakia' (2015) CEDAW/C/SVK/CO/5-6 par. 37

<sup>251</sup> A.P., Garcon and Nicot v. France in Zhan Chiam et al. "Trans legal mapping report: recognition before the law" (ILGA, 2016), p. 4

person's physical integrity.<sup>252</sup> In that analysis the Court failed to mention one's psychological integrity, and endorsed the pathologising model sanctioned by the WHO.

- Psychiatric diagnosis

Legal and medical transitions should be accessible to trans people and based on informed consent system, rather than on a mental illness diagnosis.<sup>253</sup> The legal requirement of a psychiatric diagnosis violates trans people's rights for two main issues. First, it violates trans people's moral integrity because it is coerced upon them. Any coercive medical treatment that is not necessary to save a person's life violates the right to personal and bodily integrity under the right to be free from CIDT. The psychiatric diagnosis requirement has not even been considered a violation of the right to privacy by most human rights bodies. Second, it humiliates trans people because it entails that one's gender identity is a pathology. A psychiatric diagnosis counts as a medical treatment to which a person must to provide consent. The Council of Europe's bioethics committee recognised that gender identity disorder diagnosis should never constitute a justification for imposing involuntary medical treatment.<sup>254</sup> 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. As stated by the Special Rapporteur on Health, patients have to give free and informed consent even for medically necessary treatments, unless the patient is unconscious and the situation life-threatening.<sup>255</sup> Human rights bodies have furthermore established that even coercive treatments that are not physically irreversible may reach the threshold of mental suffering required to be considered CIDT under human rights law.<sup>256</sup> The fact that the treatment does not have a physical element shall not impede the classification of the treatment as CIDT, since all the prohibitions of torture and CIDT include mental suffering. When considering if a treatment

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<sup>252</sup>A.P., Garçon and Nicot v. France, Application n. 79885/12 (ECtHR, 2017), par.139

<sup>253</sup> Advisory Opinion OC-24/17 (IACtHR, 2017), par. 171

<sup>254</sup> 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, p.3

<sup>255</sup>UNGA 'Report of the Special Rapporteur on the highest attainable standard of physical and mental Health' (2009) A/64/272, par. 12

<sup>256</sup> Herman Reyes "the worst scars are in the mind: psychological torture" *International Review of the Red Cross* (2007, 89), p.597

constitutes CIDT, elements such as the long-term impact on a victim's physical and psychological well-being and effects on their ability to pursue life goals must be considered.<sup>257</sup>

At the moment of writing, the vast majority of States continue to require a psychiatric diagnosis of gender dysphoria in order to allow legal gender recognition.<sup>258</sup> Only in the most extreme situations the psychiatric requirement has been considered a violation of CIDT. The HRC in its concluding observation on Ukraine stated that “any medical treatment should be provided in the best interest of the individual and with his/her consent, should be limited to those medical procedures that are strictly necessary [...] and that abusive or disproportionate requirements for legal recognition of a gender reassignment are repealed.”<sup>259</sup> In Ukraine trans people are interned in a psychiatric institution for up to 45 days in order to obtain the diagnosis required to access medical transition and LGR.<sup>260</sup>

The severity of harm caused by coerced psychiatric diagnoses is still not fully understood by human rights institutions. The HRC's concluding observation on states that ‘just’ require a coercive psychiatric diagnosis, usually do not find a violation of CIDT or even the right to private life.<sup>261</sup> The ECtHR, in *A.P. , Garçon and Nicot* also did not find a violation of the right to be free from CIDT or the right to private life when analysing the requirement to undergo medical treatments not amounting to sterilisation, to obtain LGR.<sup>262</sup> The IACtHR in its Advisory Opinion has 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.

The diagnosis requirement entails that trans people are mentally ill and has both stigmatising and dehumanising effects on trans people.<sup>263</sup> The psychiatric diagnosis defines one's identity as a pathology. For a treatment to be degrading, IHRL requires such treatment to force a person to act against his or her own will or to be grossly humiliated.<sup>264</sup> The ECtHR

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<sup>257</sup> UNGA 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2016) A/HRC/31/57

<sup>258</sup> Zhan Chiam et al. “Trans legal mapping report: recognition before the law” (ILGA, 2016), p. 3

<sup>259</sup> HRC ‘Concluding observations on the seventh periodic report of Ukraine’ (2013) CCPR/C/UKR/CO/7, par.10

<sup>260</sup> HRC ‘Concluding observations on the seventh periodic report of Ukraine’ (2013) CCPR/C/UKR/CO/7, par.10

<sup>261</sup> 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.

<sup>262</sup> *A.P., Garçon and Nicot v. France*, Application n. 79885/12 (ECtHR, 2017)

<sup>263</sup> Adam Smiley et al. “Overdiagnosed but underserved. Trans healthcare in Georgia, Poland, Serbia, Spain and Sweden: trans health survey” (Transgender Europe, 2018) p.24, Advisory Opinion OC-24/17 (IACtHR, 2017), par. 130

<sup>264</sup> Nigel Rodley, Matt Pollard “The treatment of prisoners under international law” (OUP, 2009),p.86

requires a person to have undergone in their eyes or in the eyes of others humiliation or debasement attaining a minimum level of severity.<sup>265</sup> Having one's own identity defined as a pathology that is classified as a 'disorder of personality and behaviour' by the ICD-10<sup>266</sup> alongside issues such as pathological gambling, pathological fire-setting, kleptomania, fetishism, exhibitionism, voyeurism, sadomasochism and paedophilia, is deeply humiliating for trans people and it encourages stigma and discrimination.<sup>267</sup>

The requirement to have a psychiatric diagnosis is not only a violation of one's moral integrity, but also leads to further human rights violations of trans people. Many states require trans people to accept a mental illness diagnosis to access medical transition.<sup>268</sup> The diagnosis therefore works as a gatekeeping force. As a result of this process, trans people's access to both basic and trans-specific healthcare is hindered.<sup>269</sup> Lack of access to medical transition has adverse effects on trans people's well-being. Furthermore, in several countries, the requirements for the diagnosis is not properly regulated, and gender recognition becomes at the discretion of individual specialists.<sup>270</sup> In other countries the process is unduly lengthy and intentionally humiliating. For example, in Serbia trans people have to come out and be examined by panels of doctors several times before even granting access to medical transition.<sup>271</sup> Access to basic healthcare is hindered by the diagnosis requirements. Lack of understanding of trans people's medical needs and overall marginalisation created by lack of access to medical and legal transition hinder trans people's access to basic medical services, given the gatekeeping system in place.<sup>272</sup>

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<sup>265</sup> Campbell and Cosans v. The United Kingdom (1982) ECtHR, Application n. 7511/76, par. 28

<sup>266</sup> The ICD-10 has been recently replaced by the ICD-11, but most countries still use the ICD-10 and will continue to do so for several years.

<sup>267</sup> See chapter five of the ICD-10, available at <https://icd.who.int/browse10/2016/en#/F64>.

<sup>268</sup> Kara Sheherezafé "gender is not an illness: how pathologizing trans people violates international human rights law" GAT, 2017, p.6

<sup>269</sup> Adam Smiley et al. "Overdiagnosed but underserved. Trans healthcare in Georgia, Poland, Serbia, Spain and Sweden: trans health survey" (Transgender Europe, 2018), p.25

<sup>270</sup> Adam Smiley et al. "Overdiagnosed but underserved. Trans healthcare in Georgia, Poland, Serbia, Spain and Sweden: trans health survey" (Transgender Europe, 2018), p. 37

<sup>271</sup> Adam Smiley et al. "Overdiagnosed but underserved. Trans healthcare in Georgia, Poland, Serbia, Spain and Sweden: trans health survey" *Transgender Europe*, 2018, p.43

<sup>272</sup> Adam Smiley et al. "Overdiagnosed but underserved. Trans healthcare in Georgia, Poland, Serbia, Spain and Sweden: trans health survey" (Transgender Europe, 2018), p.6, Asia Pacific Transgender Network "Blueprint for the provision of comprehensive care for trans people and communities in Asia and the Pacific" (Futures Group: Health Policy Project, 2015), p.2

- Hormonal Replacement Therapy

Some states require trans people to have undergone irreversible changes as a result of hormonal replacement therapy to obtain LGR.<sup>273</sup> The decision to undertake a gender transition is motivated by one's desire to affirm one's gender identity. Gender transition is not a singular event, but rather a social, medical and legal process that unfolds over time.<sup>274</sup> 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. Most 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, it does constitute CIDT. The full severity of psychological suffering of 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. When the requirement consists of hormonal replacement therapy, the same reasoning concerning coercion should continue to apply.

**iii. Compulsory Medical Examinations**

As a part of the pathologising model, courts often need to obtain proof that the medical requirements have been fulfilled, and therefore mandate specific medical examinations. Such examinations cannot be considered voluntary. In A.P., Garçon and Nicot v. France, one of the applicants claimed that the court mandated medical (genital) examinations to prove that she had been sterilised, 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.<sup>275</sup> The coercive element of the court-mandated exam was not analysed. Coercive medical examinations for the purpose of LGR, can be compared to body searches. When conducted in a disproportionate,

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<sup>273</sup>UNGA 'Report of the Independent Expert on Sexual Orientation and Gender Identity' (2018) A/73/152, par. 28

<sup>274</sup> Lisa R. Millner, Eric A. Grollmen "the social costs of gender non-conformity for transgender adults: implications for discrimination and health" *Sociological Forum* (2015, 30), p.810

<sup>275</sup> A.P., Garçon and Nicot v. France, Application n. 79885/12 (ECtHR, 2017), par. 153

humiliating or discriminatory manner, body searches may amount to CIDT.<sup>276</sup> 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.<sup>277</sup> The search was not absolutely necessary and inevitable, and violated the right to be free from CIDT.<sup>278</sup>

The ECtHR also stated that non strictly necessary invasive body searches constitute CIDT.<sup>279</sup> In *X and Y. v. Argentina*, the applicants were not forced to submit to an invasive body search, but this was a precondition to visit a family member in a prison. Similarly, trans people are not forced to submit themselves to unnecessary and invasive medical exams, but this is a precondition towards LGR. Coercive genital medical examination can be equated with invasive body searches also in their severity and mental health harm. It has been recognised multiple times that trans individuals are particularly vulnerable in situations that involve body searches.<sup>280</sup> Trans people are also particularly vulnerable in medical settings, since “for many trans people the discrepancy between gender identity and/or expression and the body can lead to difficulties when accessing healthcare services.”<sup>281</sup> Trans people are also more vulnerable to coercive genital examinations for several reasons. Discrimination against trans people in healthcare settings is extremely common.<sup>282</sup> An extremely elevated number of trans people are physically and sexually attacked, or threatened with sexual violence.<sup>283</sup> In states where homosexuality is criminalised, men suspected of same-sex sexual activity, are subjected to non-consensual anal examination intended to obtain physical evidence of homosexuality.<sup>284</sup>

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<sup>276</sup>UNGA ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’ (2016) A/HRC/31/57, par.23

<sup>277</sup>*X and Y v. Argentina*, Case n. 10.506 (IACtHR, 1996), par. 69- 73

<sup>278</sup>*X and Y v. Argentina*, Case n. 10.506 (IACtHR, 1996), par. 89

<sup>279</sup> see for example *El Shennawy v. France*, Application n. 28541/95 (ECtHR, 1999)

<sup>280</sup> “Living Free and Equal: what states are doing to tackle violence and discrimination against LGBTI people” (UN OHCHR, 2016), p.40, 43

<sup>281</sup>“Being trans in the European Union: Comparative analysis of EU survey data” (European Union Fundamental Rights Agency, 2014), p.43

<sup>282</sup>“Being trans in the European Union: Comparative analysis of EU survey data” (European Union Fundamental Rights Agency, 2014), p.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), p. 2

<sup>283</sup>“Being trans in the European Union: Comparative analysis of EU survey data” (European Union Fundamental Rights Agency, 2014)

, p.51

<sup>284</sup>UNGA ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’ (2016) A/HRC/31/57, par. 36

The UNCAT has stated that such practice is medically worthless and constitutes torture or CIDT, given its humiliating nature.<sup>285</sup> The same reasoning should be applied to coercive medical treatment 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 gender identity their right to bodily integrity is violated. Considering the personal vulnerabilities, the fact that the procedure is not medically necessary, it includes examination of one's genitals, and is coercive, it can be concluded that such examination may amount to CIDT.

#### **iv. Administrative and Judicial requirements**

This section first analyses legal requirements such as coerced divorce, and secondly it analyses the legal and administrative processes of LGR. In order to access legal gender recognition, States impose administrative and legal requirements in addition to the medical ones. Some of these conditions violate trans people's psychological integrity and cumulatively contribute CIDT. The most common administrative prohibitive requirement concerns marriage. In the vast majority of countries, trans people are required to be unmarried or to divorce in order to change legal gender.<sup>286</sup> This requirement is imposed also in states that do recognise same sex marriage or civil partnership.<sup>287</sup> In *G. v. Australia*, the applicant was forced to divorce from her wife in order to legally transition, even though same-sex marriage was recognised at the time in Australia.<sup>288</sup> The requirement was therefore solely discriminatory. The Special Rapporteur on Torture on this point, argued that forcing a person to divorce in order to obtain LGR, may destroy their life goals.<sup>289</sup> Being forced to divorce undermines trans people's right to be recognised before the law as an equal citizen.<sup>290</sup> Forced divorce provokes severe mental suffering has a high emotional and economic cost, to both the trans person and their spouse.<sup>291</sup> Even though this requirement may not provoke a mental suffering so severe to constitute CIDT

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<sup>285</sup>UNGA 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2016) A/HRC/31/57, par. 36

<sup>286</sup> Zhan Chiam et al. "Trans legal mapping report: recognition before the law" (ILGA, 2016)

<sup>287</sup> *G. v. Australia*, Application n. 2171/2012 (HRC, 2017)

<sup>288</sup> *G. v. Australia*, Application n. 2171/2012 (HRC, 2017)

<sup>289</sup>UNGA 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2016) A/HRC/31/57, par. 68

<sup>290</sup> Jack Byrne "License to be yourself: marriage and forced divorce" (*Open Society Foundations*, 2014)

<sup>291</sup> Jack Byrne "License to be yourself: marriage and forced divorce" (*Open Society Foundations*, 2014)



if taken individually, cumulatively with other medical and/or administrative requirements they reaches the threshold of CIDT requirements for mental suffering.

Secondly, the legal process of changing one's documents may be structured in a way in which it leads to mental suffering amounting to a violation of CIDT. Some legal processes purposefully ostracise trans people. Poland, is an extreme case, and has a system in place in which trans people have to sue their parents for having assigned them the wrong gender at birth, after having undergone sterilisation.<sup>292</sup> Many other countries do not go to such lengths, but require trans people to undergo lengthy judicial and administrative processes in order to change their legal gender.<sup>293</sup> In countries such as in Lithuania and Singapore, the State allows legal transition to people who have undergone sterilisation, but fails to provide such surgeries, rendering transition *de facto* inaccessible.<sup>294</sup>

Where the state has a pathologising policy, administrative and judicial processes require the presentation of medical evidence to the authorities responsible to approve the change. The result of such policies, often coupled with pathologisation, is that trans people are unable to be recognised before the law in a timely manner. If the permanent non-recognition of a person before the law constitutes CIDT, then also prolonged non-recognition provokes the same mental suffering and leads to a violation of the right to be free from CIDT. In *S.V. v. Italy*, the ECtHR stated that non-recognition of a trans person more than two and a half years after being acknowledged as a trans person by the state, constituted a violation of the right to private life. In Sweden, while the legal framework is seemingly respectful of trans people's moral autonomy, the waiting times to access trans-specific healthcare and legal gender recognition are purposefully long, as a gatekeeping mechanism.<sup>295</sup>

However, as previously explained, the consequences of not having one's gender identity recognised by the law are so grave to constitute cruel or inhuman and degrading treatment.

## Conclusion

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<sup>292</sup>Adam Smiley et al. "Over diagnosed but underserved. Trans healthcare in Georgia, Poland, Serbia, Spain and Sweden: trans health survey" (Transgender Europe 2018), p.37

<sup>293</sup> *S.V. v. Italy*, Application n. 55216/08 (ECtHR, 2019)

<sup>294</sup> *L. v. Lithuania*, Application n. 27527/03 (ECtHR, 2007), Sam Winter et al. "denied work: an audit of employment discrimination on the basis of gender identity in South East Asia" Asia Pacific Transgender Network, 2018

<sup>295</sup>Adam Smiley et al. "Over diagnosed but underserved. Trans healthcare in Georgia, Poland, Serbia, Spain and Sweden: trans health survey" (Transgender Europe 2018), p.67

In the past thirty years, the adjudication of trans rights under the right to private life has allowed the pathologising model to thrive and further violate trans people's rights. However, trans people's moral and physical integrity are severely violated by restrictive and pathologising laws and policies. The analysis of human rights bodies' case law through a gender-sensitive approach has led to the conclusion that laws and policies violating trans people's moral and physical integrity, violate their right to be free from CIDT.

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 moral integrity. As stated by the IACtHR, the lack of recognition before the law negates a person's dignity because it denies his condition as a subject 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 violated the right to be free from CIDT. Trans people without matching documents are even more exposed to ill-treatment when in a detention setting. This paper has also analysed how, 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. Human rights bodies have previously stated that coercive medical treatments constitute CIDT, and coerced sterilisation has been widely recognised as constituting CIDT. However, due to the gendered nature of human rights law, trans-specific coercive medical treatments, have been justified by the pathologisation and not recognised as constituting CIDT. In addition, lengthy judicial processes and other administrative requirements may, alone or cumulatively, constitute degrading treatment. Such processes unduly extend the amount of time trans people have to endure while not being recognised before the law. To conclude, human right bodies should depart from the endorsement of pathologisation of trans identities, and recognise the harm inflicted on trans people by States when prohibiting legal transitions and imposing prohibitive requirements.

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