



**EUROPEAN COMMITTEE OF SOCIAL RIGHTS  
COMITE EUROPEEN DES DROITS SOCIAUX**

27 April 2015

**Case Document No. 1**

**Transgender - Europe and ILGA - Europe v. Czech Republic**  
Complaint No.117/2015

**COMPLAINT**

**Registered at the Secretariat on 30 March 2015**



**In the European Committee of Social Rights  
Council of Europe, Strasbourg, France**

**Transgender Europe and ILGA-Europe  
v.  
Czech Republic**

**COLLECTIVE COMPLAINT**

**March 30, 2015**

## I. PARTIES

### State Party

1. The Czech Republic ratified the European Social Charter (ESC) on 3 November 1999 and the collective complaint mechanism on 4 April 2012. It accepted among other provisions Article 11 on the right to protection of health. It signed the Revised European Social Charter (RESC) on 4 November 2000, but has not ratified it so far.

### Complainant Organisations

2. This Complaint is brought by Transgender Europe (TGEU) jointly with ILGA-Europe, two international non-governmental organizations entitled to submit collective complaints under Article 1(c) of the 1995 Additional Protocol, based on decisions of the Governmental Committee dated 13 - 17 October 2014 and 8-12 October 2012 respectively. Both organizations hold participatory status with the Council of Europe.

3. **Transgender Europe - TGEU** ([www.tgeu.org](http://www.tgeu.org)) founded in 2005 is a not-for-profit regional umbrella organization working for equality and the advancement of the human rights of transgender persons in Europe. To date, TGEU represents 68 member organizations and 44 individual members in 41 countries, and is registered under German law. TGEU advocates for the rights of transgender persons with European institutions such as the Council of Europe, the European Union and the Organization for Security and Cooperation in Europe, builds capacity of organizations and initiatives supporting transgender equality and rights on the national level and engages in research on the human rights situation of transgender people in Europe and different parts of the world. TGEU is a member of the Conference of International Non-governmental Organisations of the Council of Europe – INGO, the European Network of Social NGO's – The Social Platform, participant at the Fundamental Rights Platform consulting the EU Fundamental Rights Agency. TGEU is registered in the EU Transparency Register. TGEU's expertise is well-received by several Council of Europe's bodies like the Steering Committee for Human Rights – CDDH,

the European Commission on Racism and Intolerance – ECRI Secretariat, or the Committee of the Social Charter under the health reporting cycle of the ESC. It was accredited observer status with the DH-LGBT<sup>1</sup> committee drafting the “Recommendation of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation and gender identity” (CM/Rec(2010)5) and is actively cooperating with the Council of Europe SOGI unit on the implementation of the CM/Rec(2010)5. TGEU advised the Council of Europe Commissioner for Human Rights for his publications “Human Rights and Gender Identity” (2009) and “Report on Discrimination on grounds of Sexual Orientation and Gender Identity” (2011). TGEU has previously submitted third party interventions in cases before the European Court of Human Rights (ECtHR) in transgender cases *Joanne Cassar v. Malta*,<sup>2</sup> *Hämäläinen v. Finland*<sup>3</sup> and *D.Ç. v Turkey*.<sup>4</sup> Transgender Europe is the leading advocate at European level for the health rights of trans persons and has pre-eminent expertise in this field.

4. **ILGA-Europe**, the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association, (<http://www.ilga-europe.org>), was founded in 1996. It seeks to defend at European level the human rights of those who face discrimination on the grounds of sexual orientation, gender identity, or gender expression. It was granted consultative status with the Council of Europe in 1998 and with the United Nations Economic and Social Council in 2006. Its membership consists of over 400 non-governmental organisations from across the Council of Europe countries, whose members are mainly lesbian, gay, bisexual, transgender or intersex individuals. ILGA-Europe has made numerous shadow reports to the European Committee of Social Rights under the national reporting procedure, including specifically in relation to transgender health issues under Article 11. Over the years it has also made submissions to many other institutions of the Council of Europe, including the ECtHR, the Committee of Ministers, the Parliamentary Assembly, the Steering Committee on Human Rights, the European Commission against Racism and Intolerance, and the Office of the Commissioner for Human Rights.

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<sup>1</sup> Committee of Experts on Discrimination on Grounds of Sexual Orientation and Gender Identity (DH-

<sup>2</sup> *Joanne Cassar v. Malta* (dec.), no. 36982/11, 1 June 2011.

<sup>3</sup> *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014.

<sup>4</sup> *D.Ç. v Turkey*, no. 10684/13 (pending).

5. The complainant organizations benefited from the support and cooperation of national non-governmental organizations Transfusion and PROUD in preparing the present complaint. Transfusion is a non-governmental organization established in 2013, with the mission to improve the quality of life of trans\* people in the Czech Republic, in all areas of their existence, through a variety of activities including legislative advocacy, working with relevant health care professionals and education establishments in relation to trans\* people's needs and raising public awareness. PROUD (Czech acronym of Platform for Equality, Recognition and Diversity) is a Czech NGO whose aim is to advocate, lobby, spread expertise and create awareness on LGBT+ people and issues in order to positively change legal and social position of LGBT+ people. The complainant organizations would also like to acknowledge the contributions of Constantin Cojocariu, lawyer, who led the drafting, and Alex Lorenzu, who provided expertise on the pathologization of gender diversity, including trans identities, in the discourse of Czech medicine.

## **II. STATEMENT OF THE ALLEGED VIOLATIONS**

6. This collective complaint alleges that the legal requirement of sterilisation imposed on trans people<sup>5</sup> wishing to change their personal documents so that they reflect their gender identity is in breach of Article 11 regarding the right to protection of health, alone or in conjunction with the non-discrimination principle stated in the Preamble to the ESC.

### **a) The requirement of sterilisation in the Czech Republic**

7. Access to legal gender recognition is regulated in two pieces of legislation adopted relatively recently – the Civil Code (2014) and the Act on Specific Health Services (2011), both of which explicitly mention sterilisation.<sup>6</sup> The new Civil Code, which came into force on 1 January 2014, states that “the change of sex is accomplished by a surgical operation involving the termination of reproductive

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<sup>5</sup> Section IV below provides recommendations on accurate trans rights terminology.

<sup>6</sup> A compilation of relevant excerpts from national law on legal gender recognition, in the original language and in English (unofficial translation), is attached to the present complaint as annex 1.

function and a change of genitalia” and that the date of the change of legally-registered sex is considered to be the one stated by the health service which provided the treatment in question.<sup>7</sup>

8. The Act on Specific Health Services, adopted in 2011 and which entered into force in 2012, regulates in more detail the medical aspects of gender reassignment treatment, including the eligibility for gender reassignment surgery.<sup>8</sup> The Act makes it clear that the “sex change of transsexual patients is ...understood as the carrying out of medical operations, whose aim is to surgically change sex and at the same time disable the reproductive function.”<sup>9</sup> In order to obtain authorization to undergo gender reassignment surgery, an individual must fulfill the following cumulative requirements:

- (i) be diagnosed unequivocally with gender identity disorder;
- (ii) prove their ability to permanently live as a person of the opposite sex;
- (iii) prove that they were not married, in a registered partnership, or that the marriage or registered partnership had been terminated.
- (iv) be at least 18-year old
- (v) not be subject to a custodial or protective medical treatment measure.

9. A multidisciplinary “expert commission” is tasked with examining any applications for gender reassignment surgery for the whole country. In the event of a positive decision by the commission, gender reassignment surgery leading to infertility may take place. The changes in the Population Registry are operated based on a certificate issued by the medical service providing the treatment in question. The medical file of the person in question is then transmitted to a court that authorizes the changes to the birth certificate.<sup>10</sup> With the new birth certificate, they may then change all other personal documents to correspond to their new identity, including the passport or the driving license. The legal gender recognition procedure usually takes approximately seven years, including two years on average spent obtaining all relevant medical certificates, undergoing hormonal treatment and taking the so-called “real life test” which involves living publicly in accordance with the gender identity

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<sup>7</sup> § 29 of Act No. 89/2012, Coll., Civil Code

<sup>8</sup> §21-23 of Act No. 373/2011 Coll., on specific health services.

<sup>9</sup> § 21 (1) of Act on Specific Health Services.

<sup>10</sup> Also see Act No. 301/2000 Coll.

sought by the person in question. The procedure before the above-mentioned commission, until the actual personal document changes are implemented, including the gender reassignment measures required under the law, may take approximately five years.

10. For individuals designated female at birth, sterilisation involves the removal of the ovaries (oophorectomy), customarily along with the uterus (hysterectomy).<sup>11</sup> It is emphasized that at least the ovaries must be actually removed, therefore other methods of sterilisation are not accepted for the purposes of legal gender recognition. For individuals designated male at birth, sterilisation (castration in some texts) includes visibly altering the genitals through vaginoplasty. Reversible or non-surgical sterilisation, such as that commonly induced through hormone replacement therapy (when e.g. the ovaries cease production), or a vasectomy, is not mentioned in the legislation as a sufficient measure for being granted legal gender recognition.

11. A 2014 EU-wide survey by the Agency for Fundamental Rights (FRA) provided some basic information regarding the situation of trans people in the Czech Republic. Respondents generally reported high rates of discrimination, violence and hostile behavior based on gender identity. Thus, 40% of respondents from the Czech Republic reported having felt discriminated or harassed because of being perceived as trans in the previous 12 months, in relation to employment, education, healthcare and other areas of social life.<sup>12</sup> 9% respondents experienced incidents of hate-motivated violence over the same period,<sup>13</sup> and 24% experienced incidents of hate-motivated harassment.<sup>14</sup> 22% of Czech respondents would avoid expressing their gender through their physical appearance and clothing for fear of being assaulted, threatened or harassed.<sup>15</sup> In relation to legal gender recognition, a majority of Czech respondents – 65% - agreed that easier procedures would allow them to live more comfortable lives as a trans person, as opposed to 13% who disagreed.<sup>16</sup>

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<sup>11</sup> The list of surgical procedures that may potentially be required for the purposes of legal gender recognition is included in the non-binding Ministry of Health Guidelines no. 29991/2012.

<sup>12</sup> European Union Agency for Fundamental Rights, *Being Trans in the European Union: Comparative Analysis of EU LGBT Survey Data*, 2014, p. 25.

<sup>13</sup> *Idem*, p. 56.

<sup>14</sup> *Idem*, p. 65.

<sup>15</sup> According to the information provided on the FRA website, <http://fra.europa.eu/DVS/DVT/lgbt.php> [accessed on 17 March 2015].

<sup>16</sup> *Idem*.



12. The Czech Republic has a history of promoting sterilisation as a measure to control the birth rates of certain groups of the population, inspired by the eugenics movement prevalent across Europe during the first decades of the 20<sup>th</sup> century. Starting from the 1970's, Communist Czechoslovakia adopted policies encouraging mainly Roma women to submit to sterilisation, using either the promise of financial incentives or the threat of sanctions to ensure compliance.<sup>17</sup> After sustained criticism from the international community,<sup>18</sup> the Czech Government committed in 2014 to provide victims with compensation.<sup>19</sup> The practice of sterilising trans people dates back from the same era. Trans people in Czechoslovakia had been able to obtain documents reflecting their gender identity since as early as the 1960s, based on procedures that resembled those currently in place, and which likewise included the sterilisation requirement. The Czech Republic still operates a policy of providing sex offenders with chemical or surgical castration, aspects of which have been criticized by the Committee for the Prevention of Torture (CPT).<sup>20</sup> Most notably, the CPT expressed its “firm opposition” to the application of surgical castration.<sup>21</sup>

#### **b) Details of the violations alleged**

13. Sterilisation is a major medical procedure, with irreversible consequences for a person's health, especially reproductive health, self-conception and mental wellbeing. As with any other medical procedure, the informed consent of the person concerned is in principle required. According to the authorities analyzed below,<sup>22</sup>

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<sup>17</sup> For further information, see Parliamentary Assembly, *Putting an end to coerced sterilizations and castrations: Report*, 28 May 2013.

<sup>18</sup> See for example Concluding observations of the Committee on the Elimination of Racial Discrimination Czech Republic, CERD/C/CZE/CO/8-9, §19-20; Concluding observations of the Committee against Torture Czech Republic, CAT/C/CZE/CO/4-5, §12-13; Concluding observations of the Committee on the Elimination of Discrimination against Women - Czech Republic, CEDAW/C/CZE/CO/5, §34-35.

<sup>19</sup> See *Roma women to be compensated over sterilization*, in *Prague Post*, 18 October 2014, available here: <http://praguepost.com/czech-news/42144-roma-women-to-be-compensated-over-sterilization>, accessed on 17 March 2015.

<sup>20</sup> *Le rapport du CPT relatif à sa visite du 7 au 16 septembre 2010, publié le 18 février 2014 (CPT/Inf (2014) 3)*, §118-119 ; *Le rapport du CPT relatif à sa visite du 25 mars au 2 avril 2008, publié le 5 février 2009 (CPT/Inf (2009) 8)* §17-25, 42-43 ; ) *Le rapport du CPT relatif à sa visite du 27 mars au 7 avril 2006 et du 21 au 24 juin 2006, publié le 12 juillet 2007 (CPT/Inf (2007) 32)*.

<sup>21</sup> *Le rapport du CPT relatif à sa visite du 25 mars au 2 avril 2008, publié le 5 février 2009 (CPT/Inf (2009) 8)*, §43.

<sup>22</sup> See below Section III.

informed consent is compromised where access to a benefit or right is predicated on agreement to undergo a medical procedure. Legal recognition of a person's gender identity as male or female has been designated as a fundamental right under international law, including by the ECtHR.<sup>23</sup> Czech law makes access to legal recognition of one's gender identity conditional upon "agreeing" to undergo sterilisation, regardless of the preferences of the person in question. In other words, trans people are faced with a closed choice between two fundamental rights – the right to health, in its various incarnations, and the right to legal gender recognition.

14. The person in question faces dire consequences regardless of the choice they make. If they choose legal gender recognition, they have to accept an intrusive and painful procedure that results in a permanent loss of the ability to procreate. Sterilisation without informed consent has been conceptualized in international law as a violation of the right to health, the right to physical integrity, the right to respect for private life or the right to decide on the number and spacing of children. If, on the other hand, they choose to stay free from any medical intervention, they have to face the daily indignity and suffering resulting from the incongruence between their gendered appearance and the gender marker inscribed in their documents. Depending on their specific circumstances, the person in question may be prevented from getting married and founding a family, may find it difficult to secure stable employment, may face difficulties in daily interactions where an identity document is required, including for example opening a bank account or picking up a parcel at the post-office.

15. Under international law, medical treatment may be imposed only in an emergency situation for the benefit of the health of the individual concerned, where that individual is not able to provide consent.<sup>24</sup> Sterilisation for the purposes of legal gender recognition clearly does not meet these conditions. Legal gender recognition is not a health emergency. Those who would not otherwise want to undergo any gender reassignment measures end up de facto in a situation where they are forced to accept such treatment. Moreover, those who wish to undergo gender reassignment surgery are compelled to do so as part of a legal process – legal gender recognition - not

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<sup>23</sup> See below §32.

<sup>24</sup> See below Section III.

necessarily related to their actual health needs. It follows that although trans people formally apply for legal gender recognition of their own initiative, in many cases their consent to undergoing sterilisation is fundamentally vitiated. In no other circumstances is it considered justified for national authorities to impose sterilisation against the will of the person concerned. The situation in the Czech Republic whereby trans people are forced to undergo sterilisation, under pain of withholding legal gender recognition, is therefore in breach of the right to protection of health under Article 11 of the ESC.

16. The sterilisation requirement is also discriminatory on the grounds of gender identity, and therefore in violation of the discrimination provision in the Preamble to the ESC. Trans people are discriminated when compared to cisgender people,<sup>25</sup> whose gender identity is readily recognized at birth without the need to undergo sterilisation. This difference in treatment lacks an objective and reasonable justification. It is also important to note that policies aimed at restricting reproductive rights often target stigmatized minorities (including racial minorities, disabled women etc.), and in that sense they are inherently discriminatory.<sup>26</sup>

### III. LEGAL STANDARDS

17. This section details the relevant legal standards applicable to the present complaint, as derived from the ESC, UN human rights treaties, other Council of Europe law, and European comparative law, as well as the position of professional bodies on the question of sterilisation. In principle, international, regional and comparative human rights law requires the informed consent of the patient before a medical intervention may take place. Where sterilisation has taken place without informed consent, it has variously been characterized as a breach of the right to health, the right to respect for private life, the right to bodily integrity, the right to reproductive health, and even the right to be free from inhuman and degrading treatment. Recent trends across Europe demonstrate a gradual improvement of legal gender recognition procedures, including by abandoning the sterilisation requirement.

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<sup>25</sup> See Section IV below on terminology. As opposed to transgender/trans people, cisgender people are those whose gender identity coincides with that assigned at birth.

<sup>26</sup> See for example *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, 1 February 2013, A/HRC/22/53, §36-38.

Finally, we also cite evidence proving that gender identity has emerged as a stand-alone protected anti-discrimination ground in international and regional law.

**a) The European Social Charter**

18. The Committee takes into account the European Convention on Human Rights (ECHR),<sup>27</sup> as well as developments in the national law of Member States and other international standards in delineating the scope of the provisions contained in the ESC.<sup>28</sup> The right to protection of health under Article 11 complements Articles 2 and 3 of the ECHR, including by imposing a range of positive obligations designed to secure the effective exercise of the right in question.<sup>29</sup> In addition, the Committee has acknowledged that all human rights are “universal, indivisible and interdependent and interrelated”.<sup>30</sup> The Committee adopts a teleological approach, seeking to interpret the ESC in a manner that is most appropriate in order to realize the aim and achieve its object, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.<sup>31</sup>

19. The Committee has emphasized the importance of dignity in connection to the right to the protection of health under Article 11. Thus, “human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European Convention of Human Rights and [that] health care is a prerequisite for the preservation of human dignity”.<sup>32</sup> The Committee has notably held Article 11 to be applicable to requests regarding a state’s failure “to provide appropriate and timely health care on a non-

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<sup>27</sup> *International Federation of Human Rights League (FIDH) v France*, Collective complaint No 14/2003, 8 September 2004, §27.

<sup>28</sup> *World Organisation against Torture (OMCT) v. Ireland*, Collective Complaint No. 18/2003, Decision on the merits, 26 January 2005, §63.

<sup>29</sup> *Conclusions XVII-2 and Conclusions 2005, Statement of Interpretation on Article 11§5*.

<sup>30</sup> *International Federation of Human Rights League (FIDH) v France*, Collective complaint No 14/2003, 8 September 2004, §28.

<sup>31</sup> *World Organisation against Torture (OMCT) v. Ireland*, Collective Complaint No. 18/2003, Decision on the merits, 26 January 2005, §63.

<sup>32</sup> *International Federation of Human Rights League (FIDH) v France*, Collective complaint No 14/2003, 8 September 2004, §31.

discriminatory basis, including services relating to sexual and reproductive health”<sup>33</sup> and the right to a healthy environment respectively.<sup>34</sup>

20. Article 11 applies to specific trans health-related issues. In its 2010 Conclusions on Malta, the Committee referred to information received indicating that “the Maltese authorities do not offer the possibility of hormone therapy or sex change surgery, some health professionals know nothing about the specific health issues faced by transgender persons thus jeopardizing the quality of the care provided in this sphere and discrimination has been experienced by transgender people when attempting to access routine health care.” Relying on the Committee of Ministers Recommendation Rec(2001)12 to member states on “the adaptation of health services to the demand for health care and health care services of people in marginal situations”, the Committee asked the Maltese authorities to describe in their next report “the situation as regards access to health care for all people in marginal situations, particularly transgender people.”<sup>35</sup> In 2013, the Committee issued a blanket request to all participating states to provide information as part of their reporting obligations under the ESC/RESC as to “whether legal gender recognition for transgender persons requires (in law or in practice) that they undergo sterilisation or any other invasive medical treatment which could impair their health or physical integrity.”<sup>36</sup>

21. The Committee has stated that the principle of equality and non-discrimination in the Preamble forms an integral part of the rights under the substantive articles of the ESC.<sup>37</sup> In collective complaints brought under the RESC, the Committee decided that Article E prohibits both direct and indirect discrimination; that a differential treatment based on an objective and reasonable justification shall not be deemed discriminatory; and that in respect of complaints alleging discrimination, the burden of proof should not rest entirely on the complainant organization, but should be

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<sup>33</sup> *International Planned Parenthood Federation European Network (IPPF EN) v Italy*, Collective complaint no. 87/2012, 7 November 2013.

<sup>34</sup> *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Complaint No. 30/2005, 6 December 2006, §195.

<sup>35</sup> 2009/def/MLT/Date: 01/12/2010, Article 11 - *The right to protection of health, Access to health care.*

<sup>36</sup> European Committee of Social Rights, *Activity Report 2013*, p. 37.

<sup>37</sup> *European Roma Rights Centre (ERRC) v. Greece*, Collective complaint 15/2003, 7 February 2005, §26.

shifted appropriately.<sup>38</sup> We submit that these considerations should apply *mutatis mutandis* to collective complaints brought under the ESC.

## **b) Global human rights standards**

22. Numerous international instruments recognize the right to health, most prominently Article 12 of the International Covenant on Economic, Social and Cultural Rights. The Committee on Economic, Social and Cultural Rights emphasized in its General Comment on Article 12 that the right to health comprises both freedoms and entitlements and that the freedoms include “the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation”<sup>39</sup> The obligation to respect the right to health requires States to refrain from interfering directly or indirectly with the right to health.

23. The General Recommendation No. 24 adopted by the CEDAW Committee in 1999 recommended that all health services in State Parties “be consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice.”<sup>40</sup> In a report published in 2009, the UN Special Rapporteur on the Right to Health highlighted the fact that informed consent is a “fundamental” element of a number of related rights including “the right to health, the right to self-determination, freedom from discrimination, freedom from non-consensual experimentation, security and dignity of the human person, recognition before the law, freedom of thought and expression and reproductive self-determination”.<sup>41</sup> Informed consent “is not mere acceptance of a medical intervention, but a voluntary and sufficiently informed decision, protecting the right of the patient to be involved in medical decision-making, and assigning associated duties and

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<sup>38</sup> *International Planned Parenthood Federation European Network (IPPF EN) v Italy*, Collective complaint no. 87/2012, 7 November 2013, §189.

<sup>39</sup> At §8.

<sup>40</sup> *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, §31(e).

<sup>41</sup> *Right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 10 August 2009, §19.

obligations to health-care providers.”<sup>42</sup> Furthermore, “the right to consent to treatment also includes the right to refuse treatment, regardless of a procedure’s advisability.”<sup>43</sup>

24. Article 16§1(e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides that states must ensure equality between women and men regarding their rights “to decide freely and responsibly on the number and spacing of their children.” Reproductive health also means that women and men have the “right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice”<sup>44</sup> and that they have the right “to make decisions concerning reproduction free of discrimination, coercion and violence.”<sup>45</sup> The CEDAW Committee specifically condemned the practice of requiring trans women to undergo compulsory sterilisation for the purposes of legal gender recognition.<sup>46</sup>

25. In a 2013 report focusing on abuses that take place in health care settings, the UN Special Rapporteur on Torture listed sterilisation of transgender people as a form of medical care that causes suffering for no justifiable reason, amounting to inhuman or degrading treatment. The Rapporteur therefore called on all States “to repeal any law allowing intrusive and irreversible treatments, including ... involuntary sterilisation ...when enforced or administered without the free and informed consent of the person concerned” and to “provide special protection to individuals belonging to marginalized groups”.<sup>47</sup>

26. In 2014, seven UN Agencies (OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO) published a joint Statement on “Eliminating forced, coercive and otherwise involuntary sterilisation”, which explicitly included transgender people, along with other marginalized groups who had historically been

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<sup>42</sup> *Idem*, §9.

<sup>43</sup> *Idem*, §28.

<sup>44</sup> General comment No. 14 of the CESCR, E/C.2./2000/4, §12.

<sup>45</sup> Cairo Programme of Action 1994, §7§2.

<sup>46</sup> Committee on the Elimination of Discrimination against Women, *Concluding Observations – The Netherlands*, 5 February 2010, CEDAW/C/NLD/CO/5, § 46-47.

<sup>47</sup> *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, 1 February 2013, A/HRC/22/53, §88.

the victims of the practice.<sup>48</sup> The statement expressly formulated a list of “guiding principles for the provision of sterilisation services”, including autonomy in decision-making, provision of information and support, and a non-discriminatory approach, as well as a range of recommendations of legal, regulatory, policy and practice actions that states should take in order to prevent the coercive use of sterilisation and provide remedies in case of breach.

27. The Yogyakarta Principles were adopted in 2006 by a group of human rights experts with the aim of promoting the implementation of already existing international human rights law in relation to people of diverse sexual orientations and gender identities, and were specifically endorsed by global and regional human rights bodies as well as by several European states.<sup>49</sup> Insofar as relevant for our purposes, the Yogyakarta Principles stated that “everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of [...] gender identity” including with respect to sexual and reproductive health.<sup>50</sup> In addition, States must ensure that all persons have the ability to take decisions regarding medical care on the basis of “genuinely informed consent.”<sup>51</sup> The Principles specifically emphasized that “no one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.”<sup>52</sup>

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<sup>48</sup> OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF, WHO. *Eliminating forced, coercive and otherwise involuntary sterilization – An interagency statement*, 2014, available here: [http://www.unaids.org/sites/default/files/media\\_asset/201405\\_sterilization\\_en.pdf](http://www.unaids.org/sites/default/files/media_asset/201405_sterilization_en.pdf) [accessed on 17 March 2015].

<sup>49</sup> The “Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity” (“*the Yogyakarta Principles*”), Preamble, available here: <http://www.yogyakartaprinciples.org/>. For examples of countries or international organizations that referred to or endorsed the Principles, see Ettelbrick P. L. and Zerán A. T., *The Impact of the Yogyakarta Principles on International Human Rights Law Development. A Study of November 2007 – June 2010*, Final Report, 2010, p. 12. For his part, the Council of Europe Commissioner for Human Rights referred to the Guidelines in his publications, for example *Human Rights and Gender Identity*, Issue Paper by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 2009, Introduction. Also see for example *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, 1 February 2013, A/HRC/22/53, §38.

<sup>50</sup> *Idem*, principle 17

<sup>51</sup> *Idem*, principle 17(e).

<sup>52</sup> *Idem*, principle 3



### c) Regional human rights standards

28. In Europe, the Convention on Human Rights and Biomedicine provided that “an intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.”<sup>53</sup> The only permitted exception to the informed consent rule is in a situation of emergency, when “a medically necessary intervention may be carried out immediately for the benefit of the health of the individual concerned”, even without consent. According to the explanatory report, “the patient's consent is considered to be free and informed if it is given on the basis of objective information from the responsible health care professional as to the nature and the potential consequences of the planned intervention or of its alternatives, in the absence of any pressure from anyone.”

29. The ECtHR has held that “a compulsory medical intervention, even if it is of minor importance,” such as a forced gynaecological examination<sup>54</sup> or the obligation to undergo a urine test,<sup>55</sup> constitutes an interference with the right to respect for private life, under Article 8 of the Convention. Individuals have an “inalienable right to self-determination”, which extends to “the right to refusal of hospitalization or medical treatment, that is, his or her “right to be ill.”<sup>56</sup> The ECtHR has held that consent is an indispensable pre-requisite for any medical treatment, underpinned by the notion of human dignity and human freedom that constitute “the very essence of the Convention”.<sup>57</sup> Thus, even “where the refusal to accept a particular treatment might lead to a fatal outcome, the imposition of medical treatment without the consent of a mentally competent adult patient would interfere with his or her right to physical integrity.”<sup>58</sup> The ECtHR has read the provisions of the European Convention on Human Rights in light of other international law to permit medical procedures, including sterilisation, only subject to prior informed consent of a mentally competent adult person, with the exception of “emergency situations when a medical treatment

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<sup>53</sup> *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*, Oviedo, 4.IV.1997 Article 5. The Czech Republic ratified the Convention on 22 June 2001.

<sup>54</sup> *Y.F. v. Turkey*, no. 24209/94, §33-34, ECHR 2003-IX.

<sup>55</sup> *Peters v Netherlands* (dec.), no. 21132/93, 6 April 1994.

<sup>56</sup> *Plesó v Hungary*, no. 41242/08, §66, 2 October 2012.

<sup>57</sup> *V.C. v. Slovakia*, no. 18968/07, §105, ECHR 2011 (extracts).

<sup>58</sup> *Idem*, §105 and references cited therein.

cannot be delayed and the appropriate consent cannot be obtained.”<sup>59</sup> The ECtHR has stated in its case-law that “sterilisation constitutes a major interference with a person’s reproductive health status”, since “it concerns one of the essential bodily functions of human beings, it bears on manifold aspects of the individual’s personal integrity including his or her physical and mental well-being and emotional, spiritual and family life.”<sup>60</sup>

30. The ECtHR has recently decided in *Y.Y. v. Turkey* that the inability of a trans man to access gender reassignment surgery, a precondition for achieving legal gender recognition, on account of not being infertile, constituted a breach of his right to respect for private life under Article 8.<sup>61</sup> That ruling was predicated on somewhat different facts, considering that in the Czech Republic sterilisation is a prerequisite to legal gender recognition. However, in reaching this decision, the ECtHR noted the recent trends in Europe outlined below towards abolishing the infertility requirement.<sup>62</sup> At the same time, four concurring judges questioned the validity under the Convention of the sterilisation requirement, more broadly with reasons that apply equally to the situation in the Czech Republic.

31. Two additional judgments are also relevant for the purposes of the present complaint. In *V.C. v. Slovakia*, the ECtHR held that the sterilisation of a Roma woman in a public hospital amounted to inhuman and degrading treatment in contravention of Article 3 of the Convention.<sup>63</sup> In order to reach this decision, the ECtHR decided that the consent given by the applicant was invalid, considering that she did not receive full information regarding the procedure in question, that she had been misled into agreeing to the procedure, that she was not allowed sufficient time to consider all implications of her decision, and considering her vulnerability at a time when she was giving birth. In *Dvořáček v Czech Republic*, a case concerning the medical treatment applied to a sex offender allegedly as a protective measure, the

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<sup>59</sup> *Idem*, §107-108.

<sup>60</sup> *Idem*, §106. In another case, the ECtHR noted “the devastating effect on the ...applicant from having lost her ability to reproduce and from the ensuing long-term health problems, [resulting in] a particularly serious interference with her rights under Article 8 of the Convention”, *G.B. and R.B. v. the Republic of Moldova*, no. 16761/09, §32, 18 December 2012.

<sup>61</sup> *Y.Y. v. Turkey*, no. 14793/08, 10 March 2015.

<sup>62</sup> *Idem*, §110-111; also see the concurring opinion of Judges Keller and Spano.

<sup>63</sup> *V.C. v. Slovakia*, no. 18968/07, ECHR 2011 (extracts).

ECtHR acknowledged that the applicant was presented with a “difficult choice” between accepting libidinal suppressive medication and benefiting from early release on the one hand, and treatment by psychotherapy and socio-therapy only which were less efficient, and correspondingly required a longer period of detention.<sup>64</sup> This situation raised doubts in relation to the existence of free and informed consent to the procedure in question.

32. The ECtHR endorsed the principle of full legal gender recognition of an individual’s gender identity. In *Christine Goodwin v. United Kingdom*, the ECtHR linked the applicant’s claim, defined as “a right to personal development and to physical and moral security in the full sense”, to the values of “human dignity and human freedom” underpinning the Convention and the notion of “personal autonomy” included in the scope of Article 8 on the right to respect for private life.<sup>65</sup> The ECtHR noted that the legal consequences derived from lack of gender recognition were substantial, and related to all aspects of life “where sex is of legal relevance and distinctions are made between men and women, as inter alia, in the area of pensions and retirement age.”<sup>66</sup> Beyond the legal fallout from this dissonance, the ECtHR also conceptualized the claims raised by the applicant as “a serious interference with private life, [arising] where the state of domestic law conflicts with an important aspect of human personality”, and drew a parallel with the *Dudgeon v UK* case, concerning the validity under the Convention of statutes criminalizing homosexuality.<sup>67</sup> In *Van Kück v. Germany*, the ECtHR stated that “gender identity was one of the most intimate areas of a person’s private life.”<sup>68</sup> Along similar lines, the ECtHR found that “the right to gender identity and personal development” constitutes “a fundamental aspect of the right to respect for private life”<sup>69</sup> and that “gender identity is one of the most basic essentials of self-determination”.<sup>70</sup> Finally, the ECtHR recognised that the applicant had a “right to sexual self-determination”, which was one of the aspects of her right to private life.<sup>71</sup>

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<sup>64</sup> *Dvořáček v. the Czech Republic*, no. 12927/13, §102-104, 6 November 2014.

<sup>65</sup> *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, §§71-93, ECHR 2002-VI; also see *Grant v. the United Kingdom*, no. 32570/03 (Sect. 4), §§39-44, ECHR 2006-VII – (23.5.06).

<sup>66</sup> *Christine Goodwin v the United Kingdom*, §76.

<sup>67</sup> *Idem*, §77.

<sup>68</sup> *Van Kück v. Germany*, no. 35968/97, §56, ECHR 2003-VII.

<sup>69</sup> *Idem*, §75.

<sup>70</sup> *Y.Y. v. Turkey*, no. 14793/08, §102, 10 March 2015.

<sup>71</sup> *Idem*, §78.

33. In its 2010 *Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity*, the Committee of Ministers urged States to regularly review “prior requirements, including changes of a physical nature, for legal recognition of a gender reassignment... in order to remove abusive requirements.”<sup>72</sup> At the same time, the Committee of Ministers emphasized that “no person should be subjected to gender reassignment procedures without his or her consent”.<sup>73</sup> Similarly, the Parliamentary Assembly of the Council of Europe adopted a resolution calling on Member States to ensure in legislation and in practice the right of transgender individuals to “official documents that reflect an individual’s preferred gender identity, without any prior obligation to undergo sterilisation or other medical procedures such as sex reassignment surgery and hormonal therapy”.<sup>74</sup> In turn, the Council of Europe Commissioner for Human Rights affirmed his opposition to compulsory surgery in the following terms: “... Such requirements clearly run counter to the respect for the physical integrity of the person. To require sterilisation or other surgery as a prerequisite to enjoy legal recognition of one’s preferred gender ignores the fact that while such operations are often desired by transgender persons, this is not always the case. [...] It is of great concern that transgender people appear to be the only group in Europe subject to legally prescribed, state-enforced sterilisation.”<sup>75</sup>

#### **d) Comparative legal gender recognition law**

34. Thirteen Council of Europe Member States do not currently require sterilisation for the purposes of legal gender recognition: Austria, Croatia, Denmark, Estonia, Germany, Hungary, Iceland, Netherlands, Poland, Portugal, Sweden, Spain, United Kingdom.<sup>76</sup>

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<sup>72</sup> *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, §20.

<sup>73</sup> At §35.

<sup>74</sup> *Resolution 1728 (2010) Discrimination on the basis of sexual orientation and gender identity*; Assembly debate on 29 April 2010 (17th Sitting).

<sup>75</sup> Council of Europe Commissioner for Human Rights, *Human Rights and Gender Identity, Issue Paper*, 29 July 2009.

<sup>76</sup> A survey of national legislation on legal gender recognition in the Council of Europe area up to date until 15 April 2014, is available here: [http://tgeu.org/trans\\_rights\\_europe\\_map/](http://tgeu.org/trans_rights_europe_map/).

35. A clear trend towards simplifying legal gender recognition procedures, including by abandoning sterilisation and/or other medical pre-requisites, may be identified in Europe, with several countries that have either recently undertaken law reform in the area, or are in the process of doing so, as follows:

- In December 2014, the Irish Government published a draft Gender Recognition Bill aimed at regulating legal gender recognition in Ireland for the first time; the draft bill does not include mandatory sterilisation or any other medical pre-requisites to gender recognition.<sup>77</sup>
- The Italian Constitutional Court is currently seized with a question regarding the constitutionality of a provision in Law no. 164/14 April 1982, which had been interpreted as requiring genital surgery for the purposes of legal gender recognition.<sup>78</sup>
- On 29 October 2014, Malta introduced in Parliament a draft Gender Identity Bill, which would enact a simple legal gender recognition administrative procedure based solely on self-determination; the draft bill would specifically prohibit requesting proof of medical interventions, such as surgeries, hormone treatment or a psychological evaluation.<sup>79</sup>
- On 9 September 2014, the Norwegian Equality Ombudsperson decided that the sterilisation requirement was discriminatory and that it lacked any justifications, referring to it as a remnant of a “shameful history.”<sup>80</sup>
- On 1 September 2014, a new Danish gender recognition law came into force, entirely based on a self-determination approach, and which abolished all medical requirements previously in force, including psychiatric diagnosis, sterilisation and hormonal treatment.<sup>81</sup>

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<sup>77</sup> See the *Gender Recognition Bill 2014 [Seanad]*, available here <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2014/11614/document1.htm> [accessed on 6 February 2015]

<sup>78</sup> Ordinance of 20 August 2014 of the Tribunale Ordinario di Trento.

<sup>79</sup> Ministry for Social Dialogue, Consumer Affairs and Civil Liberties, ‘*Gender Identity, Gender Expression and Sex Characteristics Act*’, available here: [http://socialdialogue.gov.mt/en/Public\\_Consultations/MSDC/Pages/Consultations/GIGESC.aspx](http://socialdialogue.gov.mt/en/Public_Consultations/MSDC/Pages/Consultations/GIGESC.aspx) [accessed on 6 February 2015].

<sup>80</sup> See *TGEU Statement: Norwegian Ombud decides forced sterilisation is discrimination: there is no good argument to uphold current practice*, [http://www.tgeu.org/TGEU\\_Statement\\_Norwegian\\_Ombud\\_decides\\_forced\\_sterilisation\\_is\\_discrimination](http://www.tgeu.org/TGEU_Statement_Norwegian_Ombud_decides_forced_sterilisation_is_discrimination), [accessed on 6 February 2015].

<sup>81</sup> See *L 182 Motion to amend the Act on the (Danish) Civil Registration System*, available here [http://tgeu.org/Denmark\\_amendments\\_to\\_Civil\\_Registry\\_Act](http://tgeu.org/Denmark_amendments_to_Civil_Registry_Act) (in English and

- On 1 July 2014, a new law on transgender rights that simplified the legal gender recognition procedure, including by abandoning the hormonal treatment, surgery and sterilisation requirements that had been in force previously, entered into force in the Netherlands.
- On 1 July 2013, the changes to the Swedish Gender Recognition Act came into force whereby the mandatory legal requirement of sterilisation had been removed;<sup>82</sup>
- Croatia (2012)<sup>83</sup> and Portugal (2011)<sup>84</sup> also adopted legislation on gender recognition that did not include sterilisation as a mandatory requirement.

36. Many of these developments came in the aftermath of landmark gender recognition legislation adopted in Argentina in 2012, still regarded as the most progressive in history.<sup>85</sup> That law permits individuals to amend the gender marker on all their official documents by simply submitting an affidavit that confirms their desire for change, without any medical requirements.

37. In Germany, Austria and Sweden legal reform has been the result of authoritative judgments by apex courts that examined in detail the validity of the sterilisation requirement against constitutional and regional human rights standards, and which are therefore particularly relevant for the purposes of the present complaint. In 2009, the High Administrative Court in Austria held that legal gender recognition need not involve genital surgery, as long as the person in question succeeded in demonstrating that “their feeling of belonging to the opposite gender was in all likelihood irreversible” and “has been expressed in external terms by the person closely aligning their appearance to the external appearance of the opposite gender.”<sup>86</sup>

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[http://www.ft.dk/RIPdf/samling/20131/lovforslag/L182/20131\\_L182\\_som\\_vedtaget.pdf](http://www.ft.dk/RIPdf/samling/20131/lovforslag/L182/20131_L182_som_vedtaget.pdf) (in Danish) [accessed on 6 February 2015].

<sup>82</sup> See the Act (1972:119) concerning recognition of gender in certain cases, available here: <http://tgeu.org/sweden-gender-recognition-act-reformed-2012/> (in English) [accessed on 16 March 2015].

<sup>83</sup> State Registries Law, 2013, Article 9a: <http://www.zakon.hr/z/603/Zakon-o-drzavnim-maticama>.

<sup>84</sup> See Law No. 7/2011 of 15th March 2010, available here: <http://tgeu.org/portugal-gender-identity-law/> (in English) [accessed on 16 March 2015].

<sup>85</sup> See the *Argentina Gender Identity Law* (2012) available here <http://tgeu.org/argentina-gender-identity-law/> (in English) [accessed on 16 March 2015].

<sup>86</sup> *Verwaltungsgerichtshof* [High Administrative Court], 2008/17/0054, 27 February 2009.

38. By a judgment dated 11 January 2011, the German Constitutional Court struck down as unconstitutional the provisions of the Transsexuals Act requiring permanent infertility and genital surgery for the purposes of legal gender recognition.<sup>87</sup> The claimant, a 62-year old transgender woman, complained about not being able to enter a registered partnership with her female partner, unless she underwent genital surgery leading to infertility, which was required for the purposes of legal gender recognition. The Constitutional Court held that the impugned legislation constituted “a massive impairment of physical integrity”, as well as being in breach of the right to physical integrity. The Court emphasized the constitutionally impermissible choice that the complainant had to make between entering marriage as a man, her sex assigned at birth, and undergoing genital surgery leading to infertility in order to be able to enter a same-sex registered partnership, which corresponded to the nature of the couple’s relationship. On the infertility requirement, the Constitutional Court dismissed the justification advanced by the legislature, namely that of “precluding that persons who legally belong to the male sex give birth to children or that persons who legally belong to the female sex procreate children.” In reaching this conclusion, the Constitutional Court noted that the group of trans people was small, and that those likely to give birth or procreate was even smaller, and that the new-born were in fact in the same position as pre-existing children vis-à-vis their parents, including the trans partner, and therefore the assignation of filiation could be done in the same manner.

39. By a judgment dated 19 December 2012, the Swedish Administrative Court of Appeal struck down the sterilisation requirement in the Law on Gender Determination as contrary to the Swedish Constitution and of the right to private life and the prohibition of discrimination in the ECHR.<sup>88</sup> The Court reasoned that sterilisation in this context was a forced medical intervention, as long as it constitutes a prerequisite to enjoying a certain benefit or right, in this case legal gender recognition. The sterilisation requirement was “out-dated”, out of line with “current social values”, “a very intrusive and irreversible bodily intervention,” and discriminatory since it only targeted trans people.

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<sup>87</sup> Federal Constitutional Court, 1 BvR 3295/07, 11 January 2011, available here <http://tgeu.org/german-federal-court-verdict-on-forced-sterilisation-2011/>, [accessed on 16 March 2015].

<sup>88</sup> Stockholm Administrative Court of Appeal, Judgment 2012-12-19, Case no. 1968-12, available here <http://tgeu.org/administrative-court-of-appeal-in-stockholm-on-sterilisation-requirement-in-gender-recognition-legislation-19-dec-2012/> (in English), [accessed on 16 March 2015].

### e) Professional bodies

40. The International Federation of Gynecology & Obstetrics (FIGO) has emphasized on several occasions that the patient's informed and freely given consent is an ethical requirement before sterilisation can be performed. For example, in 2012 FIGO Committee recommended that "consent to sterilisation must not be made a condition of receipt of any other medical care, such as HIV/AIDS treatment, assistance in natural or caesarean delivery, medical termination of pregnancy, or of any benefit such as employment, release from an institution, public or private medical insurance, or social assistance."<sup>89</sup>

41. In 2011, the World Medical Association (WMA) and the International Federation of Health and Human Rights Organizations (IFHHRO) issued a statement condemning "the practice of forced and coerced sterilisation as forms of violence that severely harm physical and mental health and infringe human rights."<sup>90</sup> The statement referred to the "history of forced and coerced sterilisation which affected certain "disenfranchised" groups, including "transgender persons", which required "special care to assure that the requirements of informed consent are met."

42. On 16 June 2010, the World Professional Association for Transgender Health (WPATH) officially stated its position as follows:

*No person should have to undergo surgery or accept sterilisation as a condition of identity recognition. If a sex marker is required on an identity document, that marker could recognize the person's lived gender, regardless of reproductive capacity. The WPATH Board of Directors urges governments*

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<sup>89</sup> *Ethical issues in obstetrics and gynecology by the FIGO Committee for the Study of Ethical Aspects of Human Reproduction and Women's Health*, October 2012, p. 122 et seq., available here <http://www.figo.org/sites/default/files/uploads/wg-publications/ethics/English%20Ethical%20Issues%20in%20Obstetrics%20and%20Gynecology.pdf> [accessed on 17 March 2015].

<sup>90</sup> See "Global Bodies Call for an End to Forced Sterilization", 5 September 2011, available at [http://www.wma.net/en/40news/20archives/2011/2011\\_17/](http://www.wma.net/en/40news/20archives/2011/2011_17/) [accessed on 17 March 2015].



*and other authoritative bodies to move to eliminate requirements for identity recognition that require surgical procedures.*<sup>91</sup>

43. On 19 January 2015, the WPATH issued a “Statement on Legal Recognition of Gender Identity”, emphasizing that “legally recognized documents matching self-identity are essential to the ability of all people to find employment, to navigate everyday transactions, to obtain health care, and to travel safely” and that “transgender, transsexual, or gender-nonconforming status should not preclude individuals from enjoying the legal recognition all citizens expect and deserve.”<sup>92</sup> Consequently, the WPATH “urged governments to eliminate unnecessary barriers,” including “medical, surgical, or mental health treatment or diagnosis”, marital status or parental status, and “to institute simple and accessible administrative procedures for transgender people to obtain legal recognition of gender, consonant with each individual’s identity.”

#### **f) Gender identity as a protected ground in anti-discrimination legislation**

44. Gender identity is a protected ground for the purposes of anti-discrimination legislation, under international law. The Committee on Economic, Social and Cultural Rights included gender identity under “other status” as a prohibited ground of discrimination<sup>93</sup> and urged the adoption of legislation to protect transgender individuals from discrimination.<sup>94</sup> The Committee on the Rights of the Child, the Committee on the Elimination of Discrimination against Women, and the Committee against Torture similarly include gender identity as a protected ground under their

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<sup>91</sup> *WPATH Identity Recognition Statement*, 16 June 2010, available here: [http://www.wpath.org/uploaded\\_files/140/files/Identity%20Recognition%20Statement%206-6-10%20on%20letterhead.pdf](http://www.wpath.org/uploaded_files/140/files/Identity%20Recognition%20Statement%206-6-10%20on%20letterhead.pdf), [accessed on 17 March 2015].

<sup>92</sup> *WPATH Statement on Legal Recognition of Gender Identity*, 19 January 2015, available here: [http://www.wpath.org/uploaded\\_files/140/files/WPATH%20Statement%20on%20Legal%20Recognition%20of%20Gender%20Identity%201-19-15.pdf](http://www.wpath.org/uploaded_files/140/files/WPATH%20Statement%20on%20Legal%20Recognition%20of%20Gender%20Identity%201-19-15.pdf) [accessed on 17 March 2015].

<sup>93</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)* U.N. Doc. E/C.12/GC/20 (2009), §32.

<sup>94</sup> See for example the concluding observations on Poland, E/C.12/POL/CO/5, 19 January 2010, Republic of Korea, E/C.12/KOR/CO/3, 17 December 2009, China, E/C.12/1/Add.107, May 13 2005, Trinidad and Tobago, E/C.12/1/Add.80, June 5, 2002, (Hong Kong) China, E/C.12/1/Add.58, May 21, 2001.

respective treaties.<sup>95</sup> The UN Human Rights Council adopted a resolution in June 2011 expressing “grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity.”<sup>96</sup> Gender identity and expression is explicitly referred to as a protected ground in the anti-discrimination clause of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (“the Istanbul Convention”).<sup>97</sup> The ECtHR clarified in *P.V. v. Spain*, that “transsexualism” is subsumed to the open-ended list of grounds in the discrimination clause under Article 14.<sup>98</sup> The Committee of Ministers called on member states to ensure that legislation and other measures are adopted and implemented to combat discrimination on grounds of gender identity and to ensure respect for the human rights of transgender persons.<sup>99</sup> Under European Union law, gender identity qualifies as discrimination on the basis of sex.<sup>100</sup> The Czech anti-discrimination act also specifically mentions gender identity as a protected ground in its definition of discrimination.<sup>101</sup>

#### IV. ACCURATE TRANS RIGHTS TERMINOLOGY

45. **Transgender or trans people** have a gender identity that is different to the gender assigned at birth. This includes people who intend to undergo, are undergoing, or have undergone gender reassignment as well as those who prefer or choose to present themselves differently to the expectations of the gender assigned to them at birth without undergoing medical transition procedures, or only opting for some of

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<sup>95</sup> CRC, General Comment No. 13, UN Doc. CRC/GC/2011/13, at §60 and 72(g); CAT, General Comment No. 2, UN Doc. CAT/C/GC/2, at §21; CEDAW, General Recommendation No. 27, UN Doc. CEDAW/C/GC/27, at §13 and General Recommendation No. 28, UN Doc. CEDAW/C/GC/28, at §18.

<sup>96</sup> A/HRC/17/L.9/Rev.1 (15 June 2011).

<sup>97</sup> At Art. 4§3

<sup>98</sup> *P.V. v. Spain*, Application No. 35159/09 (30 November 2010), §30.

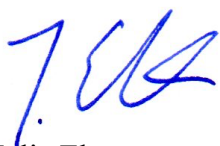
<sup>99</sup> *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity.*

<sup>100</sup> *P. v. S. and Cornwall County Council*, Case C-13/94 (ECJ 1996). Also see the 2006 EU Gender Recast Directive which provides that the “scope of the principle of equal treatment for men and women ... also applies to discrimination arising from the gender reassignment of a person”, EU Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) at preambular §3.

<sup>101</sup> 198/2009 Coll. *ACT of 23 April 2008 on equal treatment and on the legal means of protection against discrimination and on amendment to some laws (the Anti-Discrimination Act)*, Article 2§4, which refers to “sexual identification.”

them.<sup>102</sup> Diversity within the transgender spectrum is large, with 75% of transgender respondents not identifying as either male or female.<sup>103</sup> Most people are **cisgender**, with a gender identity that coincides with that assigned at birth. **Gender identity** is understood to refer to 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 personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.<sup>104</sup> **Legal gender recognition** is the official recognition of a person's gender identity, including gender marker and name(s) in public registries and key documents.

46. **Gender reassignment treatment** or gender confirming/affirming treatment is a set of medical measures that can but does not have to include psychological, endocrinological and surgical treatments aimed at aligning a person's physical appearance with their gender identity. It might include psychological consultation, hormone replacement therapy, sex or gender reassignment surgery (such as facial surgery, chest/breast surgery, different kinds of genital surgery and hysterectomy), facial/body hair removal, hair reconstruction, voice surgery and other non-genital, non-breast surgical interventions, sterilisation (leading to infertility). Not every trans person wishes for or is able to undergo all or any of these measures.



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<sup>102</sup> Council of Europe, *Discrimination on grounds of sexual orientation and gender identity in Europe*, 2nd edition, 2011, p. 132, available here: [http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011\\_en.pdf](http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf); Council of the European Union, *Guidelines to promote and protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons*, 2013.

<sup>103</sup> EU Fundamental Rights Agency 2012 LGBT Survey on Victimization and Discrimination.

<sup>104</sup> *The Yogyakarta Principles*, Preamble.