
GENDER IS NOT AN ILLNESS

*How pathologizing trans people
violates international human
rights law.*



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GATE is an international organization working on gender identity, sex characteristics and, more broadly, on bodily diversity issues. We work on supporting trans, gender diverse and intersex movements by producing and making available critical knowledge, promoting their access to organizational resources (funding, training, mentoring, personal and professional supporting systems), and advocating with them to make all human rights a lived reality.

Our work on **Depathologization** is focused on increasing political mobilization on human rights in medical settings; securing classificatory reforms that depathologize trans, gender diverse, and intersex people while granting their full access to legal gender recognition, general and specific healthcare and its full coverage under public, private and mixed healthcare systems; preventing the introduction of new psycho-medical references pathologizing trans, gender diverse, and intersex children, and supporting processes of legal depathologization worldwide.

To know more about **GATE**, our work and our international initiative on Depathologization, visit us at www.transactivists.org or send us an email to gate@transactivists.org

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“Pathologization of LGBT adults and children - branding them as ill based on their sexual orientation, gender identity or gender expression - has historically been, and continues to be, one of the root causes behind the human rights violations that they face. It is also an obstacle to overcoming negative attitudes, stereotypes, and the multiple barriers for the realization of LGBT people’s most fundamental human rights.”

Joint statement by UN and regional human rights experts, IDAHOT 2016¹

INTRODUCTION

Trans people have been pathologized by psycho-medical classifications and national laws for over four decades. This paper presents the argument that the pathologization of trans people infringes international human rights law, and leads to a range of human rights violations across civil and political, economic, social and cultural rights. This argument is supported by international human rights jurisprudence and standards as interpreted by United Nations (UN) and regional human rights bodies and mechanisms.

The UN has documented a range of violations against trans people, including, *inter alia*, killings, attacks, sexual assault, police violence, arbitrary detention, forced medical treatment, lack of legal gender recognition, abuses of sexual and reproductive rights, as well as discrimination in the areas of education, access to public facilities and services, employment, travel and access to justice. Importantly, UN and regional human rights bodies have linked these violations directly to the continued use of discriminatory diagnostic classifications and other laws and policies that pathologize gender diversity.²

In order for States to fulfil their obligations and commitments under international human rights law, they must take steps to address these violations, and fundamentally, to dismantle the arbitrary, discriminatory and harmful classifications and regulations pathologizing trans people.

1. The Conceptual Framework

Trans people are defined as those who identify and express themselves in a gender different from the sex assigned to them at birth. In the context of this paper, the term trans includes different experiences of gender, including those of people who identify as trans men or trans women, those who identify as gender non-binary, gender diverse, and those who identify in specific identities (such as transgender, travesti, hijra, fa’afafine, etc.), regardless of their legal or transitional status. Despite the historical diversity of trans experiences around the world, one experience remains common: being trans is still considered to be a pathology.

Pathologization can be defined as the psycho-medical, legal and cultural practice of identifying a feature, an individual or a population as intrinsically disordered.³ In this sense, trans people are routinely defined as inherently pathological just because of the gendered way in which they identify and express themselves: their gender is normatively defined as a disorder in itself. Historically, pathologization has had, and indeed still has, a decisive role in producing and reinforcing gender hierarchies and inequalities between trans people and cis people.⁴ The nexus between psycho-medical and legal systems, as well as their combined influence on social life, have appallingly negative effects on trans peoples’ human rights. Even today, there are many countries in the world where trans peoples’ ac-

1 UN Committee on the Rights of the Child, UN independent experts (Mr. Philip Alston, Special Rapporteur on extreme poverty and human rights; Mr. Dainius Pūras, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Mr. Juan E. Méndez, Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, Ms. Dubravka Šimonović, Special Rapporteur on violence against women, its causes and consequences), the Inter-American Commission on Human Rights, the African Commission on Human and Peoples’ Rights, & Nils Muižnieks, the Council of Europe Commissioner for Human Rights (2016) *Joint Statement on Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness for International Day Against Homophobia, Transphobia and Biphobia*, 17 May 2017. [From now referred to as *Joint Statement (2016)*]. Retrieved from: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956>

2 *Ibid.*

3 Suess, A., Espineira, K. & Crego Walters, P. (2014) Depathologization, in *TSQ. Transgender Studies Quarterly. Postposttranssexual. Key concepts for a Twenty-First-Century Transgender Studies*, 1 (1-2): 73-77. See also Brinkman, S. (2016) *Diagnostic cultures: A Cultural Approach to the Pathologization of Modern Life*. Routledge; Davy, Z., Sorlie, A., Suess Schwend, A. (2017) Democratizing diagnoses? The role of the depathologization perspective in constructing corporeal trans citizenship. *Critical Social Policy*. Published online on 25 September 2017. Retrieved from: <https://doi.org/10.1177/0261018317731716>.

4 Cisgender, often shortened to “cis” is a term used to describe people whose sense of their own gender is aligned with the sex that they were assigned at birth. Therefore, cisgenderism describes “discriminatory approaches towards people’s self-designated genders and body diversity”. Ansara, G. Y. (2012) Cisgenderism in Medical Settings. Challenging Structural Violence Through Collaborative Partnerships, in Ian Rivers and Richard Ward (Eds.) *Out of the ordinary: LGBT lives*. Chapter 7. Cambridge Scholars Publishing, pages 93-111.

cess to basic human rights is conditioned or denied on the ground of pathologization.⁵

Civil society advocacy to depathologize trans people and their experiences of gender, active since the early twentieth century, has been strongly focused on challenging both the psycho-medical classifications and the legal regulations at work, as well as denouncing the human rights implications of pathologizing gender identity and expression.⁶

This paper was written in a context defined by the open process of revising and reforming the key psycho-medical classification system, the International Classification of Diseases (or ICD). The ICD revision process constitutes an historical opportunity to depathologize trans people in psycho-medical settings and to achieve legal depathologization worldwide. Many different sources have already established the scientific argument to cease pathologizing trans people, advocating for a radical change in professional and institutional practices on healthcare provision and its coverage.⁷ The goal of this paper is to affirm and ground de-pathologization as a key human rights issue.

1.1. The International Classification of Diseases

The WHO defines the ICD as “the international standard for reporting diseases and health conditions,” and “the diagnostic classification standard for all clin-

ical and research purposes.”⁸ Over 100 States around the world, as well as health care providers, researchers, policy makers and insurers, use the ICD as a diagnostic standard inter alia to monitor and analyse disease patterns, manage health care provision, and to allocate resources.⁹

The ICD has evolved since its first edition in 1893 (then known as the International List of Causes of Death), and has been revised and updated “to reflect advances in health and medical science over time.”¹⁰ The WHO is currently undergoing a process of revision of the 10th version of the ICD (ICD-10), which was endorsed by the World Health Assembly – the intergovernmental decision-making body of the WHO, composed of all WHO Member States – in May 1990.¹¹ The 11th revision of the ICD (ICD-11) is due to be adopted in 2018.

1.2. Pathologization of trans people

Trans people were first pathologized by the WHO through the ICD-9 in 1975, with the inclusion of “trans-sexualism” in the chapter on “mental disorders,” coded under a block titled “Neurotic Disorders, Personality Disorders and Other Nonpsychotic Mental Disorders” and the category “Sexual Deviations and disorders”.¹² This followed several decades of research, documentation of, and hypothesizing on the nature of trans identities by psychiatrists, and the inclusion of “Gender identity disorder” in the American Psychiatric

5 Theilen J.T. (2014) Depathologisation of Transgenderism and International Human Rights Law. *Human Rights Law Review*, 14 (2): 327-342. See also Engdahl, U. & Harrison, K. (2013) Guest Editors’ Introduction. *Trans Rights as Human Rights. The Implications for Trans Health (Care)*. *Lambda Nordika* 18 (3-4): 10-28.

6 Suess Schwend, A. (2015) *Transitar por los géneros es un derecho. Recorridos por la perspectiva de despatologización*. Tesis Doctoral. Universidad de Granada.

7 Robles, R., Fresán, A., Vega-Ramírez, H., Cruz-Islas, J., Rodríguez-Pérez, V., Domínguez Martínez, T. & Reed, G.M. (2016) Removing transgender identity from the classification of mental disorders: Removing transgender identity from the classification of mental disorders: a Mexican field study for ICD-11. *The Lancet Psychiatry*, Volume 3 (9): 850 – 859; Reed G.M., Drescher J., Krueger R.B., Atalla, E. Cochran, S.D, First, MB, Cohen-Kettenis, P.T, de Montis, I., Parish, S. Cottler, S., Briken, P. & Saxena, S. (2016) Disorders related to sexuality and gender identity in the ICD-11: revising the ICD-10 classification based on current scientific evidence, best clinical practices, and human rights considerations. *World Psychiatry Journal*, 15: 205–21; Winter, S., Diamond, M., Green, J., Karasic, D., Reed, T., Whittle, S., & Wylie, K. (2016) Transgender people: health at the margins of society. *The Lancet*, Volume 388 (10042): 390-400; Winter, S., Settle, E., Wylie, K., Reisner, S., Cabral, M, Knudson, G. & Baral, S. (2016) Synergies in health and human rights: a call to action to improve transgender health. *The Lancet*, Volume 388 (10042): 318-321; Drescher J., Cohen-Kettenis, P., Winter, S. (2012) Minding the body: situating gender identity diagnoses in the ICD-11. *International Review of Psychiatry* 24(6): 568–77; Winter S., Chalungsooth P., Teh Y.K., Rojanalert, N., Maneerat, K., Wong Y.W., Beaumont A., Ho L.M.W., Gomez F.C. & Macapagal R.A. (2009) Transpeople, transprejudice and pathologization: a seven-country factor analytic study. *International Journal of Sexual Health* 21: 96–118; United Nations Development Programme (UNDP) and Winter, S. (2012). *Lost in Transition: Transgender People, Rights and HIV Vulnerability in the Asia-Pacific Region*. UNDP Asia-Pacific Regional Centre.

8 Retrieved from: <http://www.who.int/classifications/icd/en/>

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 World Health Organization (WHO) (1975) *International Statistical Classification of Diseases and Related Problems* 9th Revision (ICD-9). Geneva: WHO. [Note: The ICD also pathologized ‘transvestitism’ as a ‘sexual deviation’ in the previous revision (ICD-8, Code 302.3) in 1965. This was followed by inclusion of ‘transvestism’ in the ICD-9 (302.3), and of ‘dual-role transvestism’ in the ICD-10 (F64.1). See Drescher et al. (2012) Minding the Body: Situating gender identity diagnoses in the ICD-11 *International Review of Psychiatry*, December 24(6): 568–577.

Association's (APA) *Diagnostic and Statistical Manual of Mental Disorders*, 3rd edition (DSM-III) in 1980.¹³ In the ICD-10, gender transition processes were classified as "Gender Identity Disorders" in the chapter on "Mental and Behavioural Disorders", under the block "Disorders of adult personality and behaviour".¹⁴ It is notable that this latest revision de-linked gender identity from "disorders of sexual preference," which were then listed as a separate classification.

While the inclusion of classifications on gender identity in the ICD and DSM have in many cases provided a screen against unjust criminal prosecutions, and a pathway for trans people who wish to access gender affirming procedures and health care (such as hormones and surgery), these classifications are increasingly being recognised not only to be grossly misleading, but as a major obstacle to the realization of a broad range of human rights for trans individuals.¹⁵ As a result, there has been growing consensus thus far in the revision process to remove the code on "gender identity disorder" from the mental health chapter of the ICD.¹⁶

1.3. Introducing the concerns

Classifying trans peoples' gender identities and expressions as pathological is problematic for a number of reasons.

First, global psycho-medical classifications that are derived from restrictive and outdated Western cultur-

al norms, and that are focused on a cisnormative¹⁷ gender binary, impose a neocolonialist standard that seeks to erase the cultural plurality of diverse gender expressions and identities.¹⁸ Advocates and academics across regions have highlighted the intersection between depathologization and the decolonization of trans people and their experiences.

Second, defining gender diversity as an illness, disease, or otherwise abnormal is unfounded, discriminatory, and has no demonstrable clinical utility.¹⁹ Scholarship in this field has noted that trauma and dissonance are not inherent to trans people, but are a result of "sociocultural and medico-legal failure to embrace bodily diversity."²⁰ (Psycho)pathologization thus becomes a self-fulfilling prophecy by forcing trans people into socially and medically constructed distressing circumstances.

Third, in many countries, pathologization creates an unnecessary dependence on a diagnosis for the realization of the right to legal gender recognition as well as access to gender affirming procedures. This creates a negative domino effect whereby an individual's identity documents are incongruent with their gender identity and expression, leaving them open to stigma and discrimination in all walks of life, from picking up a parcel at the post office, to applying for a job, to international travel. Trans people who wish to undertake gender-affirming medical procedures, or change their legal name or gender, may be forced to accept a mental illness diagnosis, regardless of the state of their mental health. In many instances, this is coupled with requirements to attend a psychologist, psychiatrist, or psychiatric insti-

13 American Psychological Association (1980) *DSM-III: Diagnostic and Statistical Manual of Mental Disorders*, 3rd Edition. See also, Drescher, J. (2010) *Archives of Sexual Behaviour*, 39: 427-460.

14 WHO (2016[1990]) *International Statistical Classification of Diseases and Related Problems 10th Revision (ICD-10)*. Geneva: WHO. Retrieved from: <http://www.who.int/classifications/icd/en/>

15 *Joint statement* (2016).

16 Cochran, S.D., Drescher, J., Kismodi, E., Giami, A., Garcia-Moreno, C. & Atalla, E. (2014) Proposed declassification of disease categories related to sexual orientation in the International Statistical Classification of Diseases and Related Health Problems (ICD-11). *Bulletin of the World Health Organization* 92: 672-679.

17 Cisnormativity makes reference to "the practices and institutions that legitimise and privilege those who are comfortable in the gender belonging to the sex assigned to them at birth. On the other hand, this norm systematically disadvantages and marginalises all persons whose gender identity and expression do not meet social expectations." Agius, S. and Tobler, C. (2011) *Trans and Intersex People. Discrimination on the grounds of sex, gender identity and gender expression*. European Network of Legal Experts in the non-discrimination field. European Commission, page 88.

18 Suess, A., Espineira, K. & Crego Walters, P. (2014); Winter, S. (2014) *Gender Troubles: What's Wrong with the WHO Proposal for Gender Incongruence in Childhood*. Retrieved from: <http://www.gidreform.files.wordpress.com/2014/07/20140717samwintergicd.pdf>;

Iranti-org (2017) *Ending Pathological Practices Against Trans and Intersex Bodies in Africa*. Retrieved from: <https://www.iranti-org.co.za/content/Resources/ICD-pathologies-2017/Iranti-org-toolkit-2017.pdf>; Vergueiro, V. (2015) *Despatologizar é descolonizar*, 25 October, 2015. Retrieved from: <http://transactivists.org/2015/10/26/viviane-vergueiro-despatologizar-es-descolonizar/>

19 Hammarberg T., Council of Europe Commissioner of Human Rights (2009) *Issue Paper. Human Rights and Gender Identity*. Strasbourg: Council of Europe; Drescher, J. (2010) *Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual*. *Archives of Sexual Behaviour* 39, page 427; Cochran, S.D., Drescher, J., Kismodi, E., Giami, A., Garcia-Moreno, C. & Atalla, E. (2014); Iranti-org (2017).

20 O'Brien, W. (2015) Can International Human Rights Law Accommodate Bodily Diversity? *Human Rights Law Review* 15 (1): 1-20; Ponsford, M.P. (2017) *The Law, Psychiatry and Pathologization of Gender-Confirming Surgery for Transgender Ontarians*. *Windsor Review of Legal and Social Issues*, 38 (20): 20-37.

tution for a set period of time prior to legal recognition being considered.²¹

Fourth, pathologizing classifications are commonly applied to trans children and, in practice, to all children whose gender expression does not conform to socio-cultural expectations associated with the sex assigned to them at birth. Therefore, the pathologization of gender diversity is imposed on children whose key needs in terms of gender identity and expression are freedom to explore them, respect, understanding and access to reliable information.²²

Fifth, abusive practices and policies that are justified by these medical classifications, such as so-called corrective or reparative therapies, and forced or coerced sterilizations and surgeries, including as pre-requisites to legal gender recognition, have been recognized as tantamount to torture, or cruel, inhuman or degrading treatment by United Nations and regional human rights mechanisms.²³ In addition, they may lead to further rights infringements, including of the rights to privacy, bodily integrity, self-determination, freedom of expression, and the right to be free from discrimination, including in access to healthcare, education, employment, and housing.

2. Placing the issues in the international human rights framework

Not only does international human rights jurisprudence explicitly call for the depathologization of trans people,²⁴ but the core human rights principles of equality and non-discrimination apply to all persons, regardless of gender identity or expression. All human rights,

including the right to recognition before the law, the right to the highest attainable standard of health, the right to privacy, the right to bodily integrity, the right to found a family, the right to be free from torture, cruel, inhuman or degrading treatment, among others, apply equally to all human beings, including those who may be trans or gender diverse.

UN human rights mechanisms have brought explicit attention to these issues, and have made clear recommendations to States on addressing abusive treatment of trans people, including in health care settings and in facilitating legal gender recognition (examples are provided in detail below).

International human rights norms and standards are unequivocal – the human rights of trans people must be respected and protected, and abusive and discriminatory policies repealed. Discriminatory medical classifications, recognized by UN and regional human rights experts as a root cause of violations against trans people, must be revised in line with international law. State obligations in relation to gender identity and gender expression are explicitly compiled in the Yogyakarta Principles and Yogyakarta Principles Plus 10 – a set of legal principles on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics.²⁵

2.1. Access to legal gender recognition

The right to recognition before the law is guaranteed under article 6 of the Universal Declaration on Human Rights (UDHR), as well as by core international human

21 See for example, Transgender Europe, TvT research project (2016). *Transrespect versus Transphobia Worldwide*. Retrieved from: <http://transrespect.org/en/map/legal-gender-recognition-change-of-name/?submap=pathologization-requirement>

22 Iranti-org (2017); Winter, S. (2014); GATE (2013) *Critique and Alternative Proposal to the "Gender Incongruence of Childhood" Category in ICD-11*. Retrieved from https://globaltransaction.files.wordpress.com/2012/03/critique-and-alternative-proposal-to-the-_gender-incongruence-of-childhood_-category-in-icd-11.pdf; Cabral Grinspan, M. (2017) Right answers: Commentary on Winter et. al. *Archives of Sexual Behaviour* 46 (8):2505-2506; Cabral, M., Suess, A., Ehrt, J., Seehole, T.J. & Wong, J. (2016) Removal of a gender incongruence of childhood diagnostic category: a human rights perspective. *The Lancet Psychiatry* 3(5), 405-406; Riley, E. (2017) Being Human. *Archives of Sexual Behaviour* 56 (8) 2517-2518; Suess Schwend, A. (2017) Gender Diversity in Childhood: A Human Right. *Archives of Sexual Behaviour* 46(8) 2519-2520; Winter, S., Diamond, M., Green, J., Karasic, D., Reed, T., Whittle, S. & Wylie, K., (2016) Transgender people: health at the margins of society." *The Lancet*; 388: 390–400; Winter, S., Ehrensaft, D., Pickstone-Taylor, S., De Cuyper & G., Tando, D. (2016) The psycho-medical case against a gender incongruence of childhood diagnosis. *The Lancet Psychiatry* 3(5):404-405; Winter, S., Riley, E., Pickstone-Taylor, S., Suess Schwend, A., Winters, K., Griffins, L., Ehrensaft, D., et al. (2016) *The 'Gender Incongruence of Childhood' diagnosis revisited: A statement from clinicians and researchers*. Retrieved from: gicrevisited.org; Winter, S., Settle, E., Wylie, K., Reisner, S., Cabral, M., Knudson, G., & Baral, S. (2016) Synergies in health and human rights: a call to action to improve transgender health. *The Lancet* 388 (10042): 318-321.

23 *Joint statement* (2016).

24 *Ibid.*; United Nations, OHCHR (2016) *Living Free and Equal: what States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people* (HR/PUB/16/3), page 128. [From now referred to as *Living Free and Equal* (2016)]

25 International Commission of Jurists (2007). *The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity*. Retrieved from: www.yogyakartaprinciples.org. [From now referred to as *Yogyakarta Principles* (2007)] and *Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*. Retrieved from www.yogyakartaprinciples.org

rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR).²⁶ Furthermore, the principle of bodily integrity is protected under the rights of security of the person (UDHR, article 3; ICCPR, article 9), the right to privacy (UDHR, article 12; ICCPR, article 17) and the right to be free from torture, and cruel, inhuman or degrading treatment (UDHR, article 5; ICCPR, article 7).

Contrary to their obligations under international human rights law, many countries do not allow trans people to legally change their name or gender.²⁷ Where a legal gender change is permitted, trans people may face considerable obstacles. Such legal and administrative hurdles are often based on the need for medical certification that the individual: a) has been diagnosed with “gender identity disorder”; b) has submitted to psychological treatment; c) has taken hormones and undergone sex-reassignment surgery, and/or; d) has been surgically sterilized.²⁸ UN human rights mechanisms have found these requirements to be abusive, and have called on States to repeal them, and to ensure the rights of trans persons to legal gender recognition without violating other human rights.²⁹

The *Yogyakarta Principles* defines “gender identity” as:

“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.”³⁰

The Principles (including the definition of gender identity) have been widely accepted and used by international human rights bodies.³¹ It is important to recognize that gender identity is an “internal and individual experience,” that the sense of body is personal, and that modifications of the body and expressions of gender must be *freely chosen*. While some trans people may wish to undergo some gender affirming procedures, such as through hormones or surgery, others may not want to do so.

To impose a requirement of such procedures before legally recognizing an individual’s gender identity violates the principles of personal autonomy and integrity. As noted by the UN Special Rapporteur on torture, “medical care that causes severe suffering for no justifiable reason can be considered cruel, inhuman or degrading treatment or punishment, and if there is State involvement and specific intent, it is torture.” The international human rights mechanisms have consistently established that such requirements, which may cause “long-term physical and psychological suffering”³² when coerced or performed without consent, are not justifiable.³³

For example, in a 2014 review of Belgium, the Committee on the Elimination of Discrimination Against Women (CEDAW) expressed concern about the “lengthy and burdensome procedure” for legal gender recognition, and recommended the State party make the procedure “more expeditious, transparent and accessible”, and:

26 International Covenant on Civil and Political Rights, Article 16; Convention on the Elimination of all forms of Discrimination Against Women, Article 15; Convention on the Rights of the Child, Article 8.

27 See International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA): Chiam, Z. Duffy, M. and González Gil, M. (2016) *Trans Legal Mapping Report 2016: Recognition before the law*, ILGA. Retrieved from: <http://ilga.org/trans-legal-mapping-report>. Transgender Europe, TvT research project (2016) *Transrespect versus Transphobia Worldwide*. Retrieved from: www.transrespect.org

28 *Ibid.*

29 Kara, S. (2016) Reclaiming the Gender Framework: Contextualising Jurisprudence on Gender Identity in the UN Human Rights Mechanisms. *Harvard Kennedy School LGBTQ Policy Journal* Vol, 2015-2016. *Trans* Rights: The Time is Now*: 33-45.

30 *Yogyakarta Principles* (2007).

31 See for example, UN Committee on Economic, Social and Cultural Rights, General Comment 20 refers to *Yogyakarta Principles* definitions at footnote 25 (E/C.12/GC/20), 2 July 2009; Report of the UN High Commissioner for Human Rights on sexual orientation and gender identity, at footnote 7 (A/HRC/19/41), 17 November 2011; UN Committee Against Torture has made recommendations to States under review to use the Principles in policy development (see CAT/C/FIN/CO/5-6, on Finland, 29 June 2011; CAT/C/MNG/CO/1 on Mongolia, 20 January 2011); UN Special Procedures mandates referring to the Principles include torture (A/HRC/22/53), 1 February 2013, para.38; health (A/64/272), 10 June 2009, para.46; A/HRC/14/20), 27 April 2010 para.10; counter-terrorism (A/64/211), 3 August 2009, para. 48, and education (A/65/162), 23 July 2010, para. 23.

32 UN Committee Against Torture, Concluding Observations on the fifth periodic report of China with respect to Hong Kong, China (CAT/C/CHN-HKG/CO/5), 3 February 2016, para.29.

33 See for example: UN Human Rights Committee, Concluding Observations on Ireland (CCPR/C/IRL/CO/3), 30 July 2008 (para. 8), on Ukraine (CCPR/C/UKR/CO/7), 22 August 2013 (para.10); on Kazakhstan (CCPR/C/KAZ/CO/2), 23 June 2016, (para.9-10); on Slovakia (CCPR/C/SVK/CO/4), 18 October 2016 (para.14-15); UN Committee on the Elimination of Discrimination Against Women, Concluding Observations on the Netherlands (CEDAW/C/NLD/CO/5), 5 February 2010 (para. 46-47), on Belgium (CEDAW/C/BEL/CO/7), November 2014 (para. 45); UN Committee on Economic, Social and Cultural Rights, Concluding Observations on Germany (E/C.12/DEU/CO/5), 12 July 2011, para. 26.

“Amend current laws and practices ... to abolish the requirements for a psychiatric assessment, sterilization and surgery for transgender women who wish to obtain legal recognition of their gender.”³⁴

Human rights treaty monitoring bodies have made similar recommendations in other instances, noting further rights infringements. For example, in reviewing Slovakia, CEDAW highlighted that requiring trans women to undergo medical treatment for legal gender recognition “does not respect their freedom to control one’s body.”³⁵ In Concluding Observations on China, with respect to Hong Kong, the Committee Against Torture (CAT) expressed concern about the “long-term physical and psychological suffering” caused by “abusive preconditions” for legal gender recognition, such as sterilization and sex reassignment surgery.³⁶ The Human Rights Committee noted concern that Ukraine required trans persons to “undergo compulsory confinement in a psychiatric institution for a period up to 45 days and mandatory corrective surgery” prior to legal recognition of gender.³⁷ In its General Recommendation 24, CEDAW stressed that “States parties should not permit forms of coercion, such as non-consensual sterilization ... that violate women’s rights to informed consent and dignity.”³⁸

Treaty bodies have recommended that States parties take the necessary legislative, administrative and other measures to ensure respecting and protecting the rights of trans women to “control their body and to be free from non-consensual medical treatment”, and to “guarantee respect for the autonomy and physical and psychological integrity” of trans persons, including by “removing abusive preconditions” such as the requirement of compulsory sterilization and surgery for trans women who wish to obtain legal recognition of their gender.³⁹ States have further been recommended to ensure “that all psychiatric treatments and services are

always delivered with the free and informed consent of the individual concerned.”⁴⁰

A 2013 report of the UN Special Rapporteur on torture similarly recognized compulsory sterilization and surgery as unlawful, and noted that “not only does enforced surgery result in permanent sterility and irreversible changes to the body, and interfere in family and reproductive life, it also amounts to a severe and irreversible intrusion into a person’s physical integrity.”⁴¹ The Special Rapporteur called on all States “to repeal any law allowing intrusive and irreversible treatments ... when enforced or administered without the free and informed consent of the person concerned.” He further called upon them “to outlaw forced or coerced sterilization in all circumstances.”⁴²

The Council of Europe (CoE) Commissioner for Human Rights has highlighted how trans people are, “for a long period in their lives, effectively barred from meaningful and full participation in society, education or employment as they may face continuous problems with ‘justifying’ who they are” as a consequence of requirements of surgery, hormonal treatment or “gender dysphoria” diagnosis.⁴³

As noted by the European Court of Human Rights in the case of *Van Kück v. Germany* (2003), “gender identity is one of the most intimate areas of a person’s private life. The burden placed on a person in such a situation to prove the medical necessity of treatment, including irreversible surgery, appears therefore disproportionate.”⁴⁴ While *van Kück* affirms the right to access gender affirming procedures, this is placed in the context of the right to privacy. The court decided that the State had violated the applicants right to private life by taking decisions regarding her own body and identity out of her hands. Similarly, in *Y.Y. v. Turkey* (2015), the Court

34 UN Committee on the Elimination of Discrimination Against Women, Concluding Observations on the seventh periodic report of Belgium, (CEDAW/C/BEL/CO/7), 14 November 2014, para. 45.

35 UN Committee on the Elimination of Discrimination Against Women, Concluding Observations on the fifth and sixth periodic report of Slovakia, (CEDAW/C/SVK/CO/5-6), 25 November 2015, para. 36.

36 UN Committee Against Torture, Concluding observations on the fifth periodic report of China with respect to Hong Kong, China (CAT/C/CHN-HKG/CO/5), 3 February 2016, paras. 28-29.

37 UN Human Rights Committee, Concluding Observations on Ukraine, (CCPR/C/UKR/CO/7), 22 August 2013, para.10.

38 UN Committee on the Elimination of Discrimination Against Women, General Recommendation 24, 1999, para.22.

39 See, for example, UN Committee on the Elimination of Discrimination Against Women, Concluding Observations on the fifth and sixth periodic report of Slovakia, (CEDAW/C/SVK/CO/5-6), 25 November 2015, para. 37; Committee Against Torture, Concluding observations on the fifth periodic report of China with respect to Hong Kong, China (CAT/C/CHN-HKG/CO/5), 3 February 2016, para.29.

40 Committee on the Rights of Persons with Disabilities (CRPD), Concluding Observations on Germany, 1st reporting cycle (CRPD/C/DEU/CO/1), 13 May 2015, para. 38.

41 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 1 February 2013 (A/HRC/22/53), para.78.

42 *Ibid.*, para. 88.

43 Hammarberg (2009).

44 ECtHR, *Van Kück v. Germany*, no. 35968/97, ECHR 2003-VII, Judgment of 12 June 2003, para.56.

took the view that interference with the applicant's right to respect for his private life, resulting from permanent sterilization, could not be considered "necessary" in a democratic society.⁴⁵

A UN inter-agency statement on eliminating forced, coercive and otherwise involuntary sterilization, notes that sterilization without full, free and informed consent has been recognized as "a violation of fundamental human rights, including the right to health, the right to information, the right to privacy, the right to decide on the number and spacing of children, the right to found a family and the right to be free from discrimination," as well as the right to be free from torture and other cruel, inhuman or degrading treatment or punishment.⁴⁶

The statement recommends, *inter alia*, to "provide access, including through legal aid, to administrative and judicial redress mechanisms, remedies and reparations for all people who were subjected to forced, coercive or involuntary sterilization procedures."⁴⁷

In line with their obligations under international human rights law, States should facilitate legal recognition of the gender of trans people and establish arrangements to permit relevant identity documents to be reissued reflecting self-identified gender and name, "without infringements of other human rights."⁴⁸ In particular, the OHCHR has stated the process for legal gender recognition should: a) be based on self-identification; b) allow for recognition of non-binary identities; c) be a simple administrative process; d) give minors access to recognition of their gender identity, and; e) not require applicants to present medical certification, undergo surgery, or divorce.⁴⁹

UN mechanisms have commended States that have adopted legislative and other measures to respect trans people's right to legal gender recognition.⁵⁰ For example, in Concluding Observations on Argentina,

the Human Rights Committee welcomed the adoption of the Gender Identity Act (Act No. 26.743) in 2012.⁵¹ The OHCHR has also commended Argentina's gender identity law in a report on best practices:

"The law establishes a simple administrative process for modification of name and sex markers on official documents through the Civil Registry, without any abusive requirements of medical diagnosis, medical treatment, sterilization and divorce. It also guarantees this right for children, with relevant safeguards."⁵²

The passing and implementation of this law, as well as other non-pathologizing gender recognition laws in Denmark, Malta, Ireland, Colombia, Norway, and Bolivia,⁵³ proves the legal and administrative possibility to protect the right to legal gender recognition without abusive preconditions.

In a legal context where trans people are required to undergo treatment in order for their gender to be legally recognized, they are placed in a deadlock: where gender affirming treatment is not financially accessible, and where there are unaffordable administrative and/or legal costs associated with applying for a legal gender change, legal documents congruent with gender become out of reach. Without documents that reflect an individual's self-identified gender, they are less likely to gain the employment that would make treatment accessible.⁵⁴ Many trans people are unable to access health services more broadly because of socio-economic marginalization and discrimination, including in education and employment.⁵⁵

2.2. Access to gender affirming procedures

The previous section has highlighted violations relating to forced and coerced medical treatment of trans per-

45 ECtHR, *Y.Y. v. Turkey*, no. 14793/08, Judgment of 10 March 2015, para.121.

46 OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO (2014) *Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement*. Geneva: WHO.

47 *Ibid.*

48 Report of the UN High Commissioner for Human Rights on sexual orientation and gender identity (A/HRC/19/41), 17 November 2011, para.84(h).

49 *Living Free and Equal* (2016), page 95.

50 See for example, UN Human Rights Committee, Concluding Observations on Argentina (CCPR/C/ARG/CO/5), 30 June 2016, para.3; on Denmark (CCPR/C/DNK/CO/6), 21 June 2016, para.3

51 Human Rights Committee Concluding Observations on Argentina (CCPR/C/ARG/CO/5), 30 June 2016, para.3

52 *Living Free and Equal* (2016), page 94.

53 *Ibid.* [Note that in case of Bolivia, there is no requirement for a diagnosis or medical treatment, but a psychological examination to prove that the person knows and voluntarily assumes the implications of the decision is required ("Examen técnico psicológico que acredite que la persona conoce y asume voluntariamente las implicaciones de su decisión.") <http://www.derechoteca.com/gacetabolivia/ley-no-807-del-21-de-mayo-de-2016/>

54 Hammarberg (2009).

55 See for example, V.S. Balakrishnan (2016) Growing recognition of transgender health, *Bulletin of the World Health Organization* 94:790-91.

sons, including treatment that is undertaken without full, free and informed consent. Parallel violations occur in cases where trans individuals who wish to undertake gender-affirming treatment, such as through hormones or surgery, are effectively prevented from doing so. This raises comparative concerns relating to physical and psychological integrity and autonomy, as well as the right to the highest attainable standard of health.

In most of the countries where gender affirming procedures are available under public or private health-care systems, access to those procedures is severely conditioned by pathologizing requirements, including psychological and psychiatric examinations, diagnosis and treatment. These requirements severely undermine trans people's right to autonomy and self-determination. As manifested by the joint statement of UN and regional human rights experts in May 2016,

“...pathologizing classifications also create abusive obstacles to access safe gender affirming procedures for trans people, which leads to preventable and early deaths resulting from unsafe and clandestine procedures.”⁵⁶

The right to the “enjoyment of the highest attainable standard of physical and mental health” is protected under article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and applies equally to all persons regardless of gender identity (ICESCR, article 2). The applicability of the non-discrimination clause of ICESCR has been clearly outlined in General Comment 20 of the Committee on Economic, Social and Cultural Rights (CESCR), which affirms that “gender identity is recognized as among the prohibited grounds of discrimination.”⁵⁷

The UN Office of the High Commissioner for Human Rights (OHCHR) has highlighted the particular difficulties faced by trans persons in many countries in accessing healthcare, including the issue of gender affirming

care, where available, being “prohibitively expensive”, with State funding or insurance coverage rarely available.⁵⁸ In addition, “healthcare professionals are often insensitive to the needs of transgender persons and lack the necessary professional training.”⁵⁹ As raised by the CoE Commissioner for Human Rights, “the quality of transgender-related treatment often does not even come close to the ‘highest attainable standard of health’, sometimes resulting in life-long bodily harm.”⁶⁰ Furthermore, lack of access to trans-related services leads some to rely on “unsafe and clandestine procedures”⁶¹ including self-treatment.⁶²

The CoE Commissioner for Human Rights has noted that the “right to access gender reassignment treatment should include a reasonable choice of available treatment centres and treatment expenses should be reimbursed according to the national health care rules.”⁶³ This was affirmed in *Van Kück v. Germany*, where the European Court considered that “German courts, in dealing with [the applicant’s] claims for reimbursement of medical expenses, had failed to discharge the State’s positive obligations” regarding the right to privacy.⁶⁴ The Court recalled that “gender identity is one of the most intimate areas of a person’s private life. The burden placed on a person in such a situation to prove the medical necessity of treatment, including irreversible surgery, appears therefore disproportionate.”⁶⁵

This issue has further been raised by the international human rights mechanisms. For example, in reviewing the Netherlands in 2010, CEDAW expressed concern that health insurance did not reimburse trans women for gender affirming surgery, and invited the State to reconsider its position on the matter.⁶⁶ In Concluding Observations on Switzerland, the Committee expressed concern about the costs associated with surgical and/or hormonal treatment for trans persons, and recommended that the State party “review the decisions taken by civil courts requiring transgender persons to undergo surgical and/or hormonal treatment before

⁵⁶ *Joint Statement* (2016).

⁵⁷ UN Committee on Economic, Social and Cultural Rights, General Comment 20, “Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights),” (E/C.12/GC/20), 2 July 2009, para.32.

⁵⁸ United Nations, OHCHR (2012) *Born Free and Equal* (HR/PUB/12/06), page. 49.

⁵⁹ *Ibid.*

⁶⁰ Hammarberg (2009).

⁶¹ *Joint statement* (2016).

⁶² Iranti-org (2017). See also Winter, S., Settle, E., Wylie, K., Reisner, S., Cabral, M, Knudson, G. & Baral, S. (2016) Synergies in health and human rights: a call to action to improve transgender health. *The Lancet*, Volume 388 (10042): 318-321

⁶³ Hammarberg (2009), page 11.

⁶⁴ ECtHR, *Van Kück v. Germany*, 2003, para. 75.

⁶⁵ ECtHR, *Van Kück v. Germany*, 2003, para. 56.

⁶⁶ UN Committee on the Elimination of Discrimination Against Women, Concluding Observations on the Netherlands (CEDAW/C/NLD/CO/5), 5 February 2010, paras. 46-47.

legal gender recognition can be granted, and ensure that the costs for such interventions is reimbursed.”⁶⁷

In addition, in recommendations on the rights of trans persons to Ukraine, the Human Rights Committee stressed that “medical treatment should be provided in the best interests of the individual with [their] consent, should be limited to those medical procedures that are strictly necessary, and should be adapted to [their] own wishes, specific medical needs and situation.”⁶⁸

In recent reports, the UN Independent Expert on sexual orientation and gender identity has drawn attention to the need to ensure access to comprehensive care for all, including gender affirming care, “without resorting to labels that give rise to stigma,” and has reinforced the call for States “to provide equal access to health-care and access to gender affirming treatment to those who seek it.”⁶⁹

A group of UN and regional human rights mechanisms have collectively called on States to “ensure the provision of health services based on informed consent and free from stigma, pathologization and discrimination, including gender affirming procedures for trans people.”⁷⁰ Furthermore, the Human Rights Committee and the OHCHR have welcomed the adoption of legislation in Argentina that “guarantees access to hormone treatment and surgery based on free and informed consent, through the public health system.”⁷¹

Children

With specific regard to gender diverse children and adolescents, the UN Convention on the Rights of the Child binds State parties to take the “best interests of

the child” as the primary consideration in all actions regarding children (article 3).⁷² The Committee on the Rights of the Child (CRC) has stressed that in determining best interests, “the child’s views should be taken into account, consistent with their evolving capacities and taking into consideration the child’s characteristics.”⁷³ The Committee has further emphasized “the rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy.”⁷⁴

Children reaching adolescence may wish to delay the onset of puberty through the use of agents which suppress the release of hormones. Gender diverse children and adolescents should have full, free, and confidential access to information, commodities, services and counselling on the physiological changes brought on by puberty and options around puberty suppressing agents, without stigma or discrimination based on their gender identity or expression. Such requirements are in line with State obligations as outlined by CRC General Comment 20 on the implementation of the rights of the child during adolescence,⁷⁵ as well as under the right to the highest attainable standard of health.

Trans and gender diverse people (of any age) who experience anxiety, distress or depression as a result of discrimination, stigma, violence or economic or social marginalization should have access to health services without a pathologizing diagnosis, for example as currently framed under the ICD-10 “factors influencing health status and contact with health services.”⁷⁶

Under their international human rights obligations and commitments, States are required to ensure affordable access to the highest attainable standard of gender affirming care to trans adolescents and adults, and gender

67 UN Committee on the Elimination of Discrimination Against Women, Concluding Observations on Switzerland (CEDAW/C/CHE/CO/4-5), 2 November 2016, paras. 38-39.

68 UN Human Rights Committee, Concluding Observations on Ukraine (CCPR/C/UKR/CO/7), 22 August 2013, para.10.

69 See reports of the UN Independent Expert on sexual orientation and gender identity: (A/HRC/35/36) April 2017, para.58, (A/72/172) July 2017, para.21.

70 *Joint statement* (2016).

71 *Living Free and Equal* (2016), page 94; UN Human Rights Committee Concluding Observations on Argentina (CCPR/C/ARG/CO/5), June 2016, para. 3.

72 UN Convention on the Rights of the Child (1990), article 3: “1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

73 UN Committee on the Rights of the Child, General Comment 20 (CRC/C/GC/20), 6 December 2016.

74 *Ibid.*

75 *Ibid.*

76 See *International Classification of Diseases* version 10, Chapter XXI (“Z codes”) on “Factors influencing health status and contact with health services.” This includes a number of factors directly of relevance to trans people at risk of social and economic marginalisation and discrimination, including inter alia: Z56.2 Threat of job loss; Z59 Homelessness; Z59.5 Extreme poverty; Z60.4 Social exclusion and rejection; Z60.5 Target of perceived adverse discrimination and persecution; Z63.2 Inadequate family support; Z65.1 Imprisonment and other incarceration; Z65.3 Arrest; Z65.4 Victim of torture; Z76 Persons encountering health services in other circumstances.

diverse children, without requirement of a pathologizing diagnosis. States should sensitize health-care workers to the health needs of trans persons, “including in the areas of sexual and reproductive health and rights, suicide prevention, HIV/AIDS and trauma counselling.”⁷⁷

2.3. The domino effect

In addition to a denial of legal gender recognition and gender affirming care, pathologizing medical classifications are used to justify further human rights abuses against trans people, including violence, criminalization, and discrimination in the realization of economic and social rights.⁷⁸

Classifying trans people’s gender identities and expressions as “mental and behavioural disorders” (ICD-10, F64) and gender diverse children as having a “profound disturbance of the normal gender identity” (ICD-10, F64.2) positions gender diversity as abnormal, and reinforces discrimination, stigma and violence against trans people.⁷⁹ The UN Special Rapporteur on the right to safe drinking water and sanitation noted:

“What is considered “abnormal” changes over time and place, while the targets of stigma are always those who do not fit the “social norm”. In some instances, stigma is attached to a person’s social identity, especially in relation to one’s gender or gender identity, sexual orientation, caste or race.”⁸⁰

UN human rights mechanisms have brought attention to a wide range of violations against trans people, including patterns of violence and killings (perpetrated by State and non-State actors), as well as criminaliza-

tion, infringements of the rights to freedom of expression, assembly and association, and discrimination in education, employment, healthcare, housing, and access to justice.⁸¹

The UN High Commissioner for Human Rights has noted that acts of transphobic violence “constitute a form of gender-based violence, driven by a desire to punish individuals whose appearance or behaviour appears to challenge gender stereotypes.”⁸² Such violence “may be physical (including murder, beatings, kidnapping and sexual assault) or psychological (including threats, coercion and the arbitrary deprivation of liberty, including forced psychiatric incarceration).”⁸³ The UN Special Rapporteur on torture has similarly recognized that “members of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment because they fail to conform to socially constructed gender expectations.”⁸⁴

A range of mechanisms have drawn attention to the killings of trans individuals, including the Human Rights Committee, and Special Rapporteurs on extrajudicial executions and violence against women.⁸⁵ A joint UN Women and OHCHR Model Protocol for the investigation of gender-related killings of women highlighted the particularly brutal nature of abuses committed against trans persons, noting that killings of trans persons are “inflicted with severe violence and [are] charged with a strong emotional component of anger or rage.”⁸⁶

The High Commissioner for Human Rights has referenced Transgender Europe’s Trans Murder Monitoring project, which monitors, collects and analyses reports of homicides of trans and gender-diverse people worldwide.⁸⁷ The project has documented “2,649

77 Report of the UN High Commissioner for Human Rights on “Discrimination and violence against individuals based on their sexual orientation and gender identity” (A/HRC/29/23), 4 May 2015, para.79(e).

78 Joint statement (2016).

79 Iranti-org (2007).

80 Report of the UN Special Rapporteur on the human right to safe drinking water and sanitation (A/HRC/21/42), 2 July 2012, para.13.

81 See reports of the High Commissioner for Human Rights on the topic of sexual orientation and gender identity (A/HRC/19/41, 17 November 2011; A/HRC/29/23, 4 May 2015); UN OHCHR (2012); Kara, S. (2016).

82 Report of the High Commissioner for Human Rights on “Discrimination and violence against individuals based on their sexual orientation and gender identity” (A/HRC/29/23), 4 May 2015, para.21

83 *Ibid.*

84 Report of the UN Special Rapporteur on torture, and other cruel, inhuman and degrading treatment or punishment (A/56/156), 3 July 2011, para. 19.

85 See for example: Report of the UN Special Rapporteur on violence against women, its causes and consequences (A/HRC/20/16), 23 May 2012, para.72; Report of the UN Special Rapporteur on extrajudicial summary or arbitrary executions (A/HRC/17/28/Add.1), 27 May 2011, para.31; UN Human Rights Committee Concluding Observations on Uruguay (CCPR/C/URY/CO/5), 2 December 2013, para. 12.

86 UN Office of the High Commissioner for Human Rights & UN Women Latin American Model Protocol for the investigation of gender-related killings of women, August 2014, para.155.

87 TvT research project (2017) Trans Murder Monitoring, *Transrespect versus Transphobia Worldwide* (TvT). Retrieved from: <http://transrespect.org/en/research/trans-murder-monitoring/>, referenced by the UN High Commissioner for Human Rights in a report on “Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity” (A/HRC/19/41), 17 November 2011, para.27.

reported killings of trans and gender-diverse people in 69 countries worldwide between the 1st of January 2008 and the 30th of September 2017.”⁸⁸

The UN General Assembly has adopted a series of resolutions calling on States “to ensure the protection of the right to life of all persons under their jurisdiction” and to investigate promptly and thoroughly all killings, including those motivated by the victim’s gender identity.⁸⁹

The UN Committee on the Rights of the Child, UN Special Rapporteurs on extreme poverty, health, torture and violence against women, the Inter-American Commission on Human Rights (IACHR), the African Commission on Human and Peoples’ Rights (ACHPR) and the CoE Commissioner for Human Rights have drawn attention to the link between branding trans people as ill through pathologizing classifications and transphobic violence.⁹⁰

In at least six countries, trans people are criminalized under laws against “cross-dressing.”⁹¹ In a report on a country visit to Malaysia, the Special Rapporteur on health expressed concern such legislation, which “forced transgender people, who had historically enjoyed a certain degree of acceptance in society, to go underground.”⁹² The Special Rapporteur noted that criminalization of:

“different forms of gender identity and expression has reinforced negative societal attitudes and has led to serious human rights violations of the rights of this group of the population, including significant barriers in access to health care. Law enforcement officials arrest transgender women and subject them to various abuses, including humiliation in the media, and physical and verbal abuse.”⁹³

The Human Rights Committee and CESCR have called for laws criminalizing trans people to be repealed.⁹⁴ As with violence, the criminalization of trans people is recognized as being justified by discriminatory medical classifications.⁹⁵

Trans people face infringements to their economic and social rights through widespread discrimination and marginalization, amplified by the lack of gender congruent identity documentation.⁹⁶ Often this starts from a young age. The Committee on the Rights of the Child, as well as other UN and regional human rights mechanisms, have noted that trans and gender diverse children commonly face discrimination, bullying and exclusion from education and training, as well as a lack of family and social support.⁹⁷ Trans and gender diverse children may face restrictions in accessing bathrooms, locker rooms and other shared facilities in school.⁹⁸ Such practices set trans people to an economic disadvantage well before reaching adulthood. Access to public bathrooms may affect trans people

88 TvT research project (2015) *Trans Murder Monitoring. Trans Day of Remembrance 2017 Press Release*. Retrieved from: <http://transrespect.org/en/tdov-2017-tmm-update/>

89 UN General Assembly resolutions on Extrajudicial, summary or arbitrary executions (A/RES/69/182), 18 December 2014, para. 6(b) and (A/RES/71/198), 19 December 2016, para. 6(b).

90 *Joint statement* (2016).

91 Human Rights Watch (2014) “I’m Scared to Be a Woman” - *Human Rights Abuses Against Transgender People in Malaysia*, 25 September 2014, (at footnote 12) Retrieved from: <https://www.hrw.org/report/2014/09/24/im-scared-be-woman/human-rights-abuses-against-transgender-people-malaysia>

92 Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, on a visit to Malaysia (A/HRC/29/33/Add.1), 1 May 2015, para. 84.

93 *Ibid.*, para.86

94 Concluding Observations of the UN Committee on Economic, Social and Cultural Rights on Guyana (E/C.12/GUY/CO/2-4), 28 October 2015, paras. 24-25; Concluding Observations of the UN Human Rights Committee on Kuwait (CCPR/C/KWT/CO/2), 18 November 2011, para. 30.

95 *Joint statement* (2016). [N.B. In some cases, trans people have been able to avoid prosecution under laws criminalizing “cross-dressing” by arguing on the basis of a “Gender Identity Disorder” diagnosis (see for example, *Muhamad Juzaili Bin Mohd Khamis and Others v. State Government of Negeri Sembilan and Others*, Civil Appeal No. N-01-498-11/2012, CLJ JT(2)). However, this does not provide justification for maintaining pathologizing classifications. Under human rights obligations, the State must repeal or revise the relevant penal provision, as well as desist from treating or classifying trans identities as an illness.]

96 World Health Organization (2015) *Policy Brief: Transgender People and HIV* (WHO/HIV/2015.17); Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/64/211), 3 August 2009, para. 48; Hammarberg T. (2009); ILGA (2016), page.3.

97 UN Committee on the Rights of the Child. General Comment No 20 on the implementation of the rights of the child during adolescence (CRC/C/GC/20), 6 December 2016, para. 33; see also *Joint statement of UN and regional human rights mechanisms, Discriminated and made vulnerable: Young LGBT and intersex people need recognition and protection of their rights on International Day against Homophobia, Biphobia and Transphobia*, 17 May 2015. Retrieved from: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15941&LangID=E>

98 Human Rights Watch (2016), *Shut Out: Restrictions on Bathrooms and Locker Room Access for Transgender Youth in US Schools*, September 2016. Retrieved from: https://www.hrw.org/sites/default/files/report_pdf/uslgbttrans0916_web.pdf

throughout life. The Special Rapporteur on the right to water and sanitation has noted that the use of sex-segregated public bathrooms has been associated with exclusion, denial of access, verbal harassment, physical abuse and sometimes even the arrest of trans individuals.⁹⁹

Lack of gender congruent identity documents can further restrict access to employment, voting rights, bank accounts, welfare and travel, and any other area that is gendered or where identity documents are required.¹⁰⁰ The Special Rapporteur on the promotion and protection of human rights while countering terrorism has brought attention to barriers faced by trans people in travel:

“increased travel document security, such as stricter procedures for issuing, changing and verifying identity documents, risk unduly penalizing transgender persons whose personal appearance and data are subject to change. This jeopardizes the right of persons of diverse sexual orientations and gender identities to recognition before the law.”¹⁰¹

The Special Rapporteur referenced the Yogyakarta Principles, stressing that States must “ensure that procedures exist whereby all State-issued identity papers which indicate a person’s gender/sex ... reflect the person’s profound self-defined gender identity.”¹⁰²

Research undertaken by the International Labour Organization (ILO) showed that LGBT people face discrimination in “access to employment and throughout the employment cycle, and can result in LGBT workers being bullied, mobbed, and sexually or physically assaulted”¹⁰³ Additionally, the study showed that people who

do not conform to traditional gender stereotypes often face more discrimination than those who can “pass”.

CESCR has noted that “the right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity”¹⁰⁴ and that the non-discrimination provision outlined in article 2 of the Covenant is “directly applicable to all aspects of the right to work.”¹⁰⁵ Importantly, CESCR requires states to “guarantee through law the exercise of the right [to just and favourable work] without discrimination of any kind as to ... gender identity.”¹⁰⁶

The above examples provide a mere snapshot of the areas of trans people’s lives affected by the discrimination and stigma rooted in pathologization. Adjacent to this lies the reality that trans people often have little recourse to redress, with lack of effective and equal access to justice,¹⁰⁷ despite the fact that such protections are guaranteed under international law.¹⁰⁸

The UN mechanisms have condemned widespread impunity for violence and discrimination based on gender identity, and have “repeatedly called for investigation, prosecution and punishment, and reparations for victims.”¹⁰⁹ For example, the Special Rapporteur on extrajudicial executions noted that crimes based on gender identity or expression “are emblematic of patterns of conduct of some members of society and recurrent actions of certain public servants, including prejudices, dislikes and rejections, reflecting the existence of a serious structural problem of intolerance.”¹¹⁰ The High Commissioner for Human Rights has drawn attention to “ineffective police action, fail-

99 Report of the UN Special Rapporteur on the human right to safe drinking water and sanitation (A/HRC/21/42), 2 July 2012, para.40.

100 WHO (2015); Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/64/211), 3 August 2009 para. 48; Hammarberg T. (2009); Goodwin v. United Kingdom, 2002, para.62; ILGA (2016), page 3.

101 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/64/211), 3 August 2009, para. 48.

102 *Ibid.*

103 International Labour Organization (2016) *Gender Identity and Sexual Orientation: Promoting Rights, Diversity and Equality in the World of Work, Results of the ILO’s PRIDE Project*. Retrieved from: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/briefingnote/wcms_481575.pdf

104 UN Committee on Economic, Social and Cultural Rights, General Comment 18 on Article 6 of the Covenant on Economic, Social and Cultural Rights (E/C.12/GC/18), 6 February 2006, para.1.

105 *Ibid.*, para.33.

106 UN Committee on Economic, Social and Cultural Rights, General Comment No. 23 (on just and favourable conditions of work), 6 February 2016, para. 65(a); see also Committee on Economic, Social and Cultural Rights, General Comment No. 18 (right to work), 6 February 2006, para. 12(b)(1).

107 UN Committee on the Elimination of Discrimination Against Women, General Comment 33 on access to justice (CEDAW/C/GC/33), 23 July 2015, para.8.

108 See for example, article 7 of the Universal Declaration on Human Rights, and articles 26 and 2(3a) of the International Covenant on Civil and Political Rights.

109 Report of the UN High Commissioner for Human Rights on “Discrimination and violence against individuals based on their sexual orientation and gender identity” (A/HRC/29/23), 4 May 2015, para.24.

110 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, on a visit to Mexico (A/HRC/26/36/Add.1), 28 April 2014, para.86

ure to register cases, loss of documents, inappropriate classification of acts, including physical assault as a minor offence, and investigations guided by stereotypes and prejudices.”¹¹¹

Furthermore a mental health diagnosis may have a negative effect on the perception of competence of trans people to make legal decisions.¹¹² Often, courts do not take international human rights norms into account in their decisions on cases related to gender identity.¹¹³

States should ensure training, guidance and sensitization for the judiciary, police and other law enforcement officials regarding the human rights of trans persons, including through dissemination of information on international standards.

2.4. Pathologization

It is only possible to provide an overview of the plethora of documented abuses and violations faced by trans and gender diverse individuals in the limited context of this paper. Nevertheless the intention is to illustrate the insidious effects of laws, policies and practices that are rooted in misleading, discriminatory and stigmatizing medical classifications.

While in some cases trans pathologization creates a domino effect of toppling human rights (recognizing that all human rights are interrelated and interdependent); in others, it acts as an explicit justification for abuse. In one example raised by the Human Rights

Committee, Russia included “transgender identity, bi-gender identity, asexuality and cross-dressing in the list of medical conditions constituting contraindications to driving,” contrary to articles 2 (non-discrimination), 7 (torture, and other cruel, inhuman or degrading treatment), 9 (liberty and security of the person), 17 (privacy), 19 (freedom of expression), 21 (peaceful assembly) and 26 (equality before the law) of the ICCPR.¹¹⁴

Another issue directly justified by pathologization that has been routinely raised by the UN mechanisms is the practice of so-called corrective, conversion or reparative therapies aimed to “cure” trans and gender non-conforming people of their identity.¹¹⁵ Human rights bodies have stated that these practices are “abusive, harmful and unethical” with “particularly harmful effect on children and adolescents.”¹¹⁶ In Concluding Observations on Ecuador, the Human Rights Committee recommended the State “adopt the necessary measures to investigate, prosecute and ensure suitable punishment for persons responsible for such “treatment”; and provide full reparation for victims, including rehabilitation and compensation.”¹¹⁷ The OHCHR has stated that any requirement that trans people need to be treated, cured or suppressed on the basis of gender identity or expression should be prohibited or removed.¹¹⁸

The effects of pathologization on the human rights of trans people, as well as the unjust existence of discriminatory and degrading diagnoses, are increasingly recognized by international human rights mechanisms. For example, CESCR noted concern that trans people are “often assimilated to persons with mental illness.”¹¹⁹

111 Report of the High Commissioner for Human Rights on “Discrimination and violence against individuals based on their sexual orientation and gender identity” (A/HRC/29/23), 4 May 2015 para.24

112 Drescher J., Cohen-Kettenis, P., Winter, S. (2012) Minding the body: situating gender identity diagnoses in the ICD-11. *International Review of Psychiatry* 24(6): 568–77

113 United Nations, OHCHR, *Living Free and Equal: what States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people* (HR/PUB/16/3), 2016, page 104. [See also, for example, ECtHR, *Affaire A.P., Garçon et Nicot v. France*, (79885/12, 52471/13 and 52596/13), 6 April 2017 – while the Court considered international norms in its decision on sterilization, it failed to show equivalent regard for jurisprudence and standards on the requirement of the applicant(s) for a mental health diagnosis.]

114 UN Human Rights Committee Concluding Observations on the Russian Federation (CCPR/C/RUS/CO/7), 28 April 2015, para.10(e).

115 UN Human Rights Committee Concluding Observations on Ecuador (CCPR/C/ECU/CO/6), 28 June 2016, para.11-12; on the Republic of Korea (CCPR/C/KOR/CO/4), 23 October 2015, para.14-15; UN Committee on Economic, Social and Cultural Rights, General Comment No. 22 on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), (E/C.12/GC/22), 2 May 2016.

116 *Joint statement* (2016); see also UN Committee on the Rights of the Child, UN Committee Against Torture, UN independent experts on extreme poverty, the right to education, sexual orientation and gender identity, the right to health, violence against women, and discrimination against women, as well as the Inter-American Commission on Human Rights, Chairperson of the Committee for the Prevention of Torture in Africa (of the African Commission on Human and Peoples’ Rights), and the Council of Europe Commissioner for Human Rights. *Embrace diversity and protect trans and gender diverse children and adolescents*, Joint Statement for International Day Against Homophobia, Transphobia and Biphobia, 17 May 2017. [From now referred to as Joint Statement (2017)] Retrieved from: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21622>

117 UN Human Rights Committee, Concluding Observations on Ecuador (CCPR/C/ECU/CO/6), 28 June 2016, para.12.

118 *Living Free and Equal* (2016), page 128.

119 UN Committee on Economic, Social and Cultural Rights, Concluding Observations on Germany (E/C.12/DEU/CO/5), 20 May 2011, para.26.

UN and regional human rights mechanisms have recognized pathologization as one of the “root causes of violence, discrimination and stigma” faced by trans people, and have stressed that legal and policy reform to protect trans people from violence and discrimination “will not be effective or sufficient on their own while outdated medical classifications exist.”¹²⁰ Furthermore, the UN Special Rapporteur on health has highlighted concerns “that the overexpansion of diagnostic categories encroaches upon human experience in a way that could lead to a narrowing acceptance of human diversity.”¹²¹

The Council of Europe Parliamentary Assembly has adopted text stating: “The fact that the situation of transgender people is considered as a disease by international diagnosis manuals is disrespectful of their human dignity and an additional obstacle to social inclusion.”¹²²

The World Professional Association for Transgender Health (WPATH) has issued a public call, stressing that trans pathologization “reinforces or can prompt stigma, making prejudice and discrimination more likely, rendering transgender and transsexual people more vulnerable to social and legal marginalisation and exclusion, and increasing risks to mental and physical well-being.”¹²³ The UN Special Rapporteur on health made a similar link to increased vulnerability at the clinical level, where “paternalism and even patriarchal approaches, which dominate the relationship between psychiatric professionals and users of mental health services (...) disempower users and undermines their right to make decisions about their health, creating an environment where human rights violations can and do occur.”¹²⁴

UN human rights mechanisms, in a joint statement with the Inter-American Commission on Human Rights, the African Commission on Human and Peoples’ Rights and the Council of Europe Commissioner for Human Rights, have called on States to:

“decriminalize and depathologize trans and gender diverse identities and expressions, including for young transgender people, prohibit ‘conversion therapies’ and refrain from adopting new criminalizing laws and pathologizing medical classifications, including in the context of the upcoming review of the International Classification of Diseases.”¹²⁵

In a General Comment on the right to sexual and reproductive health, CESCR has noted that regulations requiring that trans persons “be treated as mental or psychiatric patients, or requiring that they be “cured” by so-called “treatment”, are a clear violation of their right to sexual and reproductive health.”¹²⁶ The OHCHR has also called for “medical guidance and standards (to) be revised” to ensure that being a trans person “is not considered a pathology or medical condition.”¹²⁷

In recent reports, the UN Independent Expert on sexual orientation and gender identity has drawn attention to the need to ensure access to comprehensive care for all, including gender affirming care, “without resorting to labels that give rise to stigma.”¹²⁸ As the Independent Expert noted, “the invitation to destigmatize and depathologize opens the door to more cooperation with the medical, scientific and ethics sectors, to promote shared understanding that sexual orientation and gender identity are part of the natural state of being human, and correlatively, to ensure respect for all persons without distinction.”

The position of international and regional human rights bodies on the application of human rights law in this matter is thus unequivocal: medical classifications must be revised to remove gender identity from the list of mental illnesses. This is an imperative step in the promotion and protection of the human rights of trans and gender diverse people worldwide.

120 *Joint statement* (2016).

121 Report of the UN Special Rapporteur on the right to health (A/HRC/35/21), 28 March 2017, para.18.

122 Council of Europe. Parliamentary Assembly. Discrimination against transgender people in Europe, Resolution 2048, 22 April 2015, para.1.

123 World Professional Association for Transgender Health (WPATH). *Statement urging the de-psychopathologisation of gender variance worldwide*, 26 May 2010. Retrieved from: <https://tgeu.org/wpath-urges-for-de-psychopathologisation-of-gender-variance-worldwide/>

124 Report of the UN Special Rapporteur on the right to health (A/HRC/35/21), 28 March 2017, para.22.

125 *Joint statement* (2017).

126 UN Committee on Economic, Social and Cultural Rights, General Comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), (E/C.12/GC/22), 2 May 2016, para.23.

127 *Living Free and Equal* (2016), page 128.

128 Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (A/HRC/35/36), 19 April 2017, para.58.

“Social or political disapproval has at times resulted in the abuse of diagnoses – especially psychiatric diagnoses – to harass, silence or imprison people whose behaviour violates social norms or challenges existing authority structures”

S.D. Cochran, J. Drescher, E. Kismodi, A. Giami, C. Garcia-Moreno, E. Atalla. Proposed declassification of disease categories related to sexual orientation in the International Statistical Classification of Diseases and Related Health Problems (ICD-11). *Bulletin of the World Health Organization*. 92: 2014; 672–679.

CONCLUSION

This paper reiterates the call for States to decriminalize and depathologize trans and gender diverse identities and expressions, including for young transgender people, prohibit ‘conversion therapies’ and refrain from adopting new criminalizing laws and pathologizing medical classifications, including in the context of the upcoming review of the International Classification of Diseases.

The ICD has always been an evolving document. Trans identities were pathologized in the most recent edition of the ICD (ICD-10) without full understanding or awareness of the breadth of human rights infringements that would consequently unfold in the name of medical classifications.

However, a relative wealth of scholarship has emerged in recent years illustrating the multifarious problems with classifying trans identities as mental disorders. The ICD presents clear cultural bias, not only in ignoring the contemporary breakdown of binary and cisgender normativity in Western societies, but in redefining the broad diversity of gender identities and expressions celebrated in cultures and traditions across the world throughout history.

The lack of demonstrable clinical utility in diagnosing trans people as mentally ill has been proved, including through the success of legislation guaranteeing trans people the right to legally change gender and access gender affirming care in countries such as Argentina, Malta, Denmark, Ireland, Colombia, Norway, and Bolivia. Research has shown that gender diverse children may fare better when provided with support in exploring their gender, compared to the high levels of anxiety and depression experienced by children who are diagnosed as having “gender identity disorder,” as reported in previous studies.

Moreover, existing medical classifications are recognised as doing harm– in contravention of international human rights standards as well as the very constitution of the World Health Organization:

“The objective of the World Health Organization ... shall be the attainment by all peoples of the highest possible level of health.”¹²⁹

In particular, the unnecessary dependence on a mental health diagnosis for the realization of the right to legal gender recognition has been criticized by leading human rights bodies. Obligatory requirements of associated medical procedures, such as incarceration in psychiatric facilities, forced surgery and sterilization, and so-called “corrective” therapies, have been recognized as tantamount to torture, cruel, inhuman or degrading treatment, when undertaken with the consent of the State.

Under international law, States should ensure affordable access to the highest attainable standard of gender affirming care without the requirement of a diagnosis. Furthermore, States should ensure that medical practitioners and health care workers are sufficiently trained and sensitized on questions relating to gender diversity, with respect to the dignity to trans people, as well as their personal, physical and psychological integrity and autonomy.

Regional and international human rights mechanisms have drawn a direct link between discriminatory medical classifications and rights violations against trans individuals, including violence, stigma, criminalization and discrimination in the realization of economic and social rights, specifically naming pathologization as a “root cause” of abuses.

Violations documented by the UN human rights mechanisms include, *inter alia*, killings, attacks, sexual assault, police violence, arbitrary detention, criminal laws, forced medical treatment, lack of legal recognition, discrimination in education, access to public facilities and services, employment, travel and access to justice.

¹²⁹ WHO. *Basic Documents*, Forty-fifth edition, Supplement, October 2006. Constitution. Article 1. Retrieved from: http://www.who.int/governance/eb/who_constitution_en.pdf

A range of regional and international human rights bodies have now called for classifications pathologizing trans identities and expressions to be revised. In light of the growing consensus on this matter in the field of human rights law, the path for the WHO should be clear. The 11th revision of the ICD must not classify gender diversity as a disorder, illness or disease. The diagnostic classification of gender diversity in childhood should be completely removed. States voting on the adoption of a document containing such classifications will be in contravention of their obligations and commitments under international human rights law, as well as the WHO constitution. States retaining such classifications at the national level will equally be in breach of international law.

As a matter of due diligence in promoting and protecting the rights of trans and gender diverse people, States should be encouraged to work with civil society to:

Revise medical classifications at the national and international level that classify gender diversity as an illness, disorder or disease;

Repeal any medical classifications on gender diversity in children;

Take the relevant legislative and administrative measures to ensure the right to quick, transparent, private and accessible legal gender recognition without abusive pre-conditions, including the need for a diagnosis;

Ensure access to the highest attainable standard of gender affirming care, and that such care is reimbursable under private and public health insurance schemes, and is based on self-determination;

Undertake training and sensitization on medical practitioners and other health care providers on gender diversity, gender affirming care, and respecting the dignity, self-determination, and personal, physical and psychological integrity and autonomy of trans and gender diverse people;

Undertake training and awareness-raising for the judiciary, police and other law enforcement officials on gender diversity and the human rights of trans and gender non-conforming people;

Take all necessary measures to ensure that violence and discrimination based on gender identity and expression are investigated, that perpetrators are prosecuted, and that victims are afforded appropriate remedies and redress;

Ensure access to justice, including relevant remedies, redress and compensation, for trans people who have undergone forced sterilization or surgery;

Repeal laws that may be used to criminalize people on the basis of gender identity or expression;

Take measures to address discrimination based on gender expression or identity in the public and private spheres, including in access to healthcare, education, employment and the use of public facilities and services.

“Psychiatry has also been use or misused by authorities and by society at large, but instead of only criticising and demeaning Psychiatry, it should be understood that traditional practices of Psychiatry are not the best way of addressing individual variations and diversities in behaviours and identities. The fact that many of these variations are not in conformity with the prevailing concept of “normality” leads to the trap of criminalizing or medicalizing, often on the basis of psychiatric diagnosis supported by outdated concepts of “mad” or “bad”. There is an urgent need for the global community, including the global psychiatric community, to implement modern public health and human rights approaches.”

Dainius Puras, UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health.
Interview with GATE, 26 October 2015

