

IN THE EUROPEAN COURT OF HUMAN RIGHTS

A.D. against Georgia
and A.K. against Georgia
(Applications nos. 57864/17 and 79087/17)

WRITTEN COMMENTS

Submitted jointly by

Transgender Europe
ILGA Europe

14 March 2019

1. These written comments are submitted on behalf of Transgender Europe (TGEU) and the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe),¹ pursuant to leave granted by the President of the Fifth Section. The present case concerns the Georgian authorities' refusal to recognise the applicants' gender identity unless they agreed to undergo gender reassignment treatment. The third party interveners contrast the Georgian authorities' decisions with broader trends at the international level that favour recognising gender identity on the basis of self-determination and which operate a strict distinction between medical procedures and administrative decision-making related to legal status. In doing so, the present submission places the Court's jurisprudence in a wider legal and policy context, drawing from regional and international comparative law. The final part of the submission reviews the approaches of various courts in relation to discrimination based on gender identity beyond the male/female dichotomy, and particularly as applied to legal gender recognition (LGR) procedures.

I. The right to gender self-determination

2. The Court has established that gender identity is a fundamental personal characteristic and a basic attribute of self-determination, which is protected under the right to respect for private life according to Article 8 of the Convention.² The Inter American Court of Human Rights (IACtHR) noted that gender identity is an expression of the possibility that every human being should have "to self-determine and freely choose the options and circumstances that give meaning to their existence, according to their own convictions."³

3. Gender markers are used as an element of identification in a variety of interactions with other persons and the state. In that sense, LGR is an aspect of the right to equal recognition before the law, protected under the Universal Declaration of Human Rights and most international and regional human rights treaties.⁴

4. According to a EU-wide survey on transgender experiences conducted in 2014, using identity documents with incorrect gender markers causes widespread discrimination.⁵ One in three respondents who lacked accurate identity documents felt discriminated when they had to show their ID or an official document that identifies their

¹ The interveners gratefully acknowledge the contribution of Constantin Cojocariu in this intervention.

² *Van Kück v. Germany*, no. 35968/97, §56 and 75, ECHR 2003-VII.

³ On 24 November 2017, the IACtHR published a binding advisory opinion regarding the provisions of the American Convention on Human Rights as applied in relation to gender identity, *Corte interamericana de derechos humanos, Opinión consultativa OC-24/17 de 24 de noviembre de 2017*, §85-101 and particularly §93. This Court has often referenced IACtHR jurisprudence in order to interpret the provisions of the Convention (*European Court of Human Rights, Research Report: References to the Inter-American Court of Human Rights and Inter-American instruments in the case-law of the European Court of Human Rights*, 2016).

⁴ *The Yogyakarta Principles ['YP']*: *Principles on the application of international human rights law in relation to sexual orientation and gender identity*, 2007 and the 2017 update, *The Yogyakarta Principles plus 10: Additional principles and state obligations on the application of international human rights law in relation to sexual orientation in gender identity, gender expression, and sex characteristics to complement the Yogyakarta Principles*. The YP were mentioned by Judges Sajó, Keller and Lemmens in their dissenting opinion, §16, in *Hämäläinen v. Finland* [GC] and the CJEU in Case C-473/16, *F. v. Bevándorlási és Állampolgársági Hivatal* [2018], §62. Principle 3.

⁵ EU FRA, *Being Trans in the European Union: Comparative analysis of EU LGBT survey data - Summary*, 2014, p. 11.

sex. Furthermore, almost nine in ten transgender respondents stated that easier LGR procedures would help them to live a more comfortable life. This Court has routinely acknowledged the suffering and detriment experienced by people lacking accurate identification. More recently, in *S.V. v. Italy*, the Court held that, by denying her request for LGR, the authorities placed the applicant in “an anomalous situation, generating feelings of vulnerability, humiliation and anxiety.”⁶ In *X v. FYROM*, the Court held that the protracted examination of a trans man’s LGR claim “had long-term consequences for his mental health.”⁷

5. Furthermore, access to certain rights and benefits is traditionally structured along the gender binary. The Court of Justice of the European Union (CJUE) has identified violations of EU law in several cases, based on faulty or absent LGR procedures leading to impermissible interferences with protected rights such as occupational pensions or retirement pensions.⁸

6. Self-determination is a key feature of the YP definition, stating that “gender identity is each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the 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.”⁹

7. In Europe, the right to gender self-determination has been affirmed by the Parliamentary Assembly¹⁰ and the Commissioner for Human Rights.¹¹ For its part, the Court has recognised gender identity as “one of the most basic essentials of self-determination,”¹² linking it to a “right to sexual self-determination.” Nonetheless, the scope of this right remains uncertain, since States are simultaneously allowed some degree of discretion in regulating LGR. However, a clear European consensus to regulate LGR is emerging with 40 Council of Europe member States having some procedure in place.¹³

8. Nine Council of Europe members have in place legislation on LGR based on self-determination.¹⁴ For example, the Maltese law provides that all citizens have the right to “the recognition of their gender identity”.¹⁵ An applicant for LGR need only provide a notary public with a “clear, unequivocal and informed declaration...that one’s gender identity does not correspond to the assigned sex in the act of birth.” An European

⁶ *S.V. v. Italy*, no. 55216/08, § 72, 11 October 2018.

⁷ *X v. the former Yugoslav Republic of Macedonia*, no. 29683/16, § 70, 17 January 2019.

⁸ See *infra*, §32.

⁹ The YP 2007, *Preamble*.

¹⁰ Resolution 2048 (2015), *Discrimination against transgender people in Europe*, §6.2.1.

¹¹ See for example the Commissioner’s statement of 22 October 2015, in which he “encouraged member states to follow the current European trend towards recognising the self-determination of trans people regarding their gender,” Annual Activity Report 2015, 14 March 2016, p. 30.

¹² *Y.Y. v. Turkey*, no. 14793/08, §102, 10 March 2015 (extracts).

¹³ Transgender Europe, *Trans Rights Europe Map & Index 2018*,

¹⁴ Portugal (2018), Luxembourg (2018), Denmark (2014), Malta (2015), Ireland (2015), Norway (2016), Belgium (2017) have legislation based purely on self-determination. Belgium and Denmark impose waiting times; France (2016) and Greece (2017) have in place judicial filters, with Greece imposing additional non-medical requirements (single status and age) – see, TGEU, *New Greek gender recognition law fails human rights*, 10 October 2017, available here: https://tgeu.org/greece_lgr/.

¹⁵ *Gender Identity, Gender Expression and Sex Characteristics Act* (2015).

Commission study published in 2019 cited the following key advantages of self-determination: it is accessible, minimising unnecessary bureaucratic encroachment, it reduces or eradicates problematic conditions that some applicants are not able to satisfy for various reasons (e.g. health, age, social economic, familial) and it presents important symbolism on personal autonomy around gender status.¹⁶

9. Self-determination is no longer confined to the gender binary. An emerging trend in Europe and beyond recognises the right of trans or intersex individuals to self-determine their gender identity as non-binary. This is illustrated by a recent judgment from the German Constitutional Court (GCC), involving an individual who identified as neither male nor female, who had been registered as female at birth, and who sought to obtain recognition of either an inter or diverse sex marker on their birth certificate.¹⁷ The GCC's reasoning centres on principles around autonomy and personhood developed first in cases involving trans people transitioning within the gender binary.

10. The GCC determined that the right to personal development in the German Basic Act also protected gender identities that were not exclusively male or female, given their paramount importance for individual identity, as perceived by oneself or by others. The GCC also found that the Basic Law did not provide for mandatory recording of gender by public authorities. However, the legislation in place did not provide non-binary individuals a positive entry corresponding to their gender identity. The GCC found that this oversight lacked justification, after having reviewed the position of third parties, as well as any bureaucratic and financial implications. Furthermore, the LGR scheme in place also breached the equality guarantee in the Basic Act, as discussed below. The GCC concluded that the legislature had several options to correct the violations found, including by dispensing with information on gender in civil status altogether, or by allowing the persons concerned to choose another positive entry that was neither male or female.

11. In Europe, Malta and Denmark already have in place legislation permitting individuals to register as non-binary, by having an X marker in their documents. In the aftermath of the above-mentioned ruling, Germany adopted legislation introducing a third gender marker (“diverse”), made available to intersex people on the basis of a medical certificate. In June 2018, the Austrian Constitutional Court ruled that state authorities must make available gender options beyond male and female.¹⁸ In doing so, the Court pointed out that the Austrian Constitution protected individuals from heteronomous sex assignment.

II. The diagnosis requirement

12. Despite the trend towards self-determination, the reality for many trans persons across Europe is that LGR is conditional on a range of medical and non-medical requirements, including diagnosis, sterilisation, genital surgery or single status. Currently, 34 Council of Europe State Parties make LGR contingent on a mental health diagnosis (alternatively labelled as ‘transsexualism’ or ‘gender identity disorder’ among

¹⁶ Marjolein van den Brink, Peter Dunne, *Trans and intersex equality rights in Europe – a comparative analysis*, European Commission, 2018, p. 59.

¹⁷ Bundesverfassungsgericht [BVERFGE] [FEDERAL CONSTITUTIONAL COURT], Case No. 1 BvR 2019/16 (Oct. 10, 2017).

¹⁸ *G 77/2018-9* (Austrian Constitutional Court).

others)'.¹⁹ The Court ruled this requirement to be valid in the case *A.P., Garçon and Nicot v. France*, with arguments that the third party interveners will address in turn.²⁰

13. The Court specified that “transsexuality” is a diagnosis included in the current version of the International Classification of Diseases (ICD-10). The third party interveners respectfully point out that this remark is misconceived, seeing that the World Health Organisation (WHO) describes the ICD as the international “standard diagnostic tool for epidemiology, health management and clinical purposes.” The ICD is therefore not designed to provide guidance for administrative purposes to do with assigning gender markers. The World Professional Association for Transgender Healthcare (WPATH) warned that “medical and other barriers to gender recognition for transgender individuals may harm physical and mental health,” and it opposed “all medical requirements that act as barriers to those wishing to change legal sex or gender markers on documents, [...] including requirements for diagnosis, counselling or therapy, puberty blockers, hormones, any form of surgery (including that which involves sterilization), or any other requirements for any form of clinical treatment or letters from doctors.”²¹

14. The Court’s remark in *A.P., Garçon and Nicot* to the effect that the diagnosis requirement did not directly engage a person’s physical integrity goes against settled principle. The Oviedo Convention specifically defines diagnosis as a medical act subject to the informed consent rule.²² This Court has by and large followed this approach in its jurisprudence.²³

15. The diagnosis requirement is based on the pre-conceived idea that trans identities are inherently disordered. Pathologisation subverts an essential aspect of human personality and leads to serious human rights violations.²⁴ On 17 May 2016, the Council of Europe Commissioner for Human Rights alongside a group of United Nations and international human rights experts issued a statement calling for an urgent end to the pathologisation of trans adults and children (among others), by reforming medical classifications and adopting measures to prevent all forms of forced treatment and

¹⁹ TGEU Trans Rights Europe Map & Index, available here: <https://tgeu.org/trans-rights-map-2018/>.

²⁰ *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, §138-144, 6 April 2017.

²¹ *WPATH Identity Recognition Statement*, 15 November 2017, available here: <https://www.wpath.org/media/cms/Documents/Web%20Transfer/Policies/WPATH%20Identity%20Recognition%20Statement%2011.15.17.pdf>.

²² *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*, Articles 4 and 5. Also see the Explanatory Report, §§ 29, 34.

²³ As a matter of principle, even slight medical interventions, when carried out without informed consent, interfere with the right to respect for private life, requiring adequate justification. See for example *M.A.K. and R.K. v. the United Kingdom*, nos. 45901/05 and 40146/06, §75, 23 March 2010 (involving a blood test), *Y.F. v. Turkey*, no. 24209/94, §33, ECHR 2003-IX (forced gynecological examination); *Peters v. the Netherlands*, no. 21132/93 (dec.) (urine test). Also see the discussion around the notion of consent in cases of sterilization, PACE Resolution “*Putting an end to coerced sterilisations and castrations*”, 28 May 2013, at §2.

²⁴ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, § 58 available here: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/38/43 as well as Independent Expert on Sexual Orientation and Gender Identity, Victor Madrigal-Borloz, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/73/152, 12 July 2018, available here <https://daccess-ods.un.org/access.nsf/GetFile?OpenAgent&DS=A/73/152&Lang=E&Type=DOC>

procedures affecting the people in question.²⁵ The group noted that pathologisation was one of the root causes behind widespread human rights violations and an obstacle to overcoming negative attitudes, stereotypes, and the barriers preventing the realisation of their rights. In particular, pathologisation served as a justification for imposing unwanted medical treatments, hindered access to gender-affirming treatments and to LGR, contributed to marginalisation and exclusion in education, health, employment and housing among other areas, and was conducive to violence.

16. The WPATH emphasized that “the expression of gender characteristics, including identities, that are not stereotypically associated with one’s assigned sex at birth is a common and culturally-diverse human phenomenon which should not be judged as inherently pathological or negative.²⁶ Furthermore, “gender identity disorder” or equivalent diagnoses contribute to the stigmatization and social exclusion of trans people, without contributing to their physical or mental wellbeing, and called for the “de-psycho-pathologisation of gender variance worldwide.”

17. The WHO has recognised the harms of pathologisation and announced plans to amend the ICD. All trans-related diagnoses from the Mental Health Chapter in the next version of the International Classification of Diseases (ICD-11) have been removed.²⁷ A new chapter “Conditions related to Sexual Health” has been opened, including two new diagnoses Gender Incongruence in Adolescence/adulthood (GIAA) and Gender Incongruence in Childhood (GIC). The ICD-11 is due for approval at the World Health Assembly in May 2019 and to be implemented at the national level from January 2020.²⁸ The new chapter will facilitate access to medical treatment and cost coverage for those trans people who wish to undergo such therapies, while recognising that being transgender is not a mental health condition.

18. The CJUE has recently determined that forced testing of an asylum seeker for the purposes of determining their sexual orientation or gender identity was in breach of EU law. The reasoning applies *mutatis mutandis* to testing imposed in the context of LGR proceedings. The individual in question had previously claimed asylum in Hungary on the grounds of a well-founded fear of being persecuted in his country of origin on account of his homosexuality. Insofar as relevant to the present cases, the CJUE ruled that a psychological test carried out in these circumstances is *de facto* imposed under the pressure of the circumstances that applicants for international protection find themselves

²⁵ “Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness” For International Day against Homophobia, Transphobia and Biphobia - Tuesday 17 May 2016, available here <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956&LangID=E>. The statement was signed by the UN Committee on the Rights of the Child (CRC), the Special Rapporteur on extreme poverty and human rights, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, the Special Rapporteur on violence against women, its causes and consequences, the Inter-American Commission on Human Rights (IACHR), African Commission on Human and Peoples’ Rights (ACHPR), the Council of Europe Commissioner for Human Rights.

²⁶ WPATH De-psycho-pathologisation Statement, 26 May 2010, http://www.wpath.org/uploaded_files/140/files/de-psycho-pathologisation%205-26-10%20on%20letterhead.pdf.

²⁷ World Health Organisation. ICD-11 Beta Draft (Joint Linearization for Mortality and Morbidity Statistics). 2017; <http://apps.who.int/classifications/icd11/browse/1-m/en> (20.04.2017).

²⁸ WHO, ICD-11 *Revision Conference Report Tokyo*, Japan, 12-14 October, 2016.

in.²⁹ Besides being unreliable, the test was an excessive interference with the right to respect for private life, purporting to establish an essential, and intimate, element of personal identity. The CJUE held that such a test was at odds with the Asylum Qualification Directive and the Charter of Fundamental Rights. Similar arguments as those deployed by the CJUE apply mutatis mutandis to testing aimed at diagnosing “gender identity disorder” in the context of LGR. In fact, the CJUE specifically called attention to Principle 18 of the YP “which states, inter alia, that no person may be forced to undergo any form of psychological test on account of his sexual orientation or gender identity.”

19. For its part, the IACtHR noted that medical or psychological certification runs counter to the principle of self-determination and that of the free development of one’s personality.³⁰ In particular, certification pre-requisites are invasive and call into question the person’s identity, while resting on the assumption that having an identity contrary to the sex assigned at birth is inherently pathological. As such, gender identity certification perpetuates the prejudices associated with the gender binary.

20. Turning to the *A.P., Garçon and Nicot* ruling, the Court also reasoned that the diagnosis requirement aims to protect the interests of the persons concerned by preventing them from engaging in the process of changing their gender markers “accidentally,” as well as based on the principle of legal security. However, the practice in those countries that have recently adopted legislation based on self-declaration does not bear out these concerns. For example, a recent Irish Government review on the operation of the Gender Recognition Act 2015 found that during a period of two years and four months there had been a total of 298 applications for a gender recognition certificate, of which all but one were granted, 11 were lodged by people aged 16 and 17 and 55 by non-Irish born residents of the Ireland.³¹ During the same period, there had been no revocation under section 14 of the Act, applying to cases where information is received that would have led to the refusal of the certificate. In addition, there had only been 2 applications to revoke a gender recognition certificate by individuals who wanted to revert to their previously recorded gender. The report actually recommended that the gender recognition scheme be extended to children and non-binary persons, as well that the process be streamlined further.

III. Gender reassignment treatment requirements

21. In *A.P., Garçon and Nicot v. France*, the Court ruled that the requirement to undergo sterilisation or treatment involving a very high probability of sterility as a precondition to LGR was in breach of the right to respect for private life under Article 8. In doing so, the Court noted that consent given to medical treatment in these circumstances was invalid, as it forced trans people to choose between their right to bodily integrity and their right to gender identity recognition.

22. The Court referred approvingly to *A.P., Garçon and Nicot* in two recently decided cases: *S.V v Italy* and *X v. FYROM*.³² The former judgment is particularly instructive,

²⁹ Case C-473/16, *F. v. Bevándorlási és Állampolgársági Hivatal* [2018], §47-71.

³⁰ IACtHR Advisory Opinion OC-24/17, §130.

³¹ *Review of the Gender Recognition Act 2015*, Report to the Minister for Employment Affairs and Social Protection, June 2018.

³² *X v. the former Yugoslav Republic of Macedonia*, § 38; *S.V. v. Italy*, § 56.

seeing that the Court determined, on the facts of the case, that trans people seeking LGR needed not wait until genital surgery was completed. The case involved a trans woman who complained about the national authorities' refusal to grant her forename change request before finalising her genital surgery, which she desired. There was a violation of Article 8 considering the rigid manner in which the national authorities construed domestic regulations preventing any LGR before surgery took place. While the Italian Government relied on "purely formalistic arguments," the Court was unable to detect any general interest justifications for the authorities' inflexible approach.

23. Other recent regional developments suggest that the scope of the discretion available to States in the area of LGR is becoming narrower. In *Transgender Europe and ILGA-Europe v. the Czech Republic* (2018), brought under the collective complaint protocol, the European Committee of Social Rights directly endorsed the reasoning in *A.P., Garçon and Nicot*. On very similar facts, the Committee held that the forced sterilisation requirement was in breach of Article 11 of the European Social Charter on the right to protection of health.³³ Echoing the *A.P., Garçon and Nicot v. France* judgment, the Committee noted that trans people should not be forced to choose between their gender identity and physical integrity. Also in 2018, the CJEU held that requiring a trans woman to divorce before being recognised in her self-identified gender identity, a necessary pre-condition for becoming eligible for a retirement pension from the statutory age available to women, constituted discrimination based on sex.³⁴ In doing so, the CJUE specifically considered the contrasting outcome in this Court's *Hämäläinen* judgment.

24. The third party interveners recall that "gender affirming treatment", also known as "gender reassignment treatment," is an umbrella term designating a combination of hormonal and surgical treatments, which may include bilateral mastectomy and reconstruction ("top surgery"), hysterectomy (removal of uterus and other internal pelvic organs) and phalloplasty (creation of a penis) for trans men and breast augmentation, penectomy (removal of penis), orchiectomy (removal of the testicles) or vaginoplasty (creation of a vagina) for trans women. These are major medical interventions, involving substantial health risks. The reasoning in *A.P., Garçon and Nicot* applies *mutatis mutandis* to any gender reassignment treatment procedures required for the purposes of LGR, including diagnosis as discussed above, as long as carried out without the full and informed consent of the person concerned.

25. In *A.P., Garçon and Nicot*, the Court pointed out that the sterilisation requirement engaged Article 3.³⁵ This is consistent with previous jurisprudence, as well as authoritative pronouncements from national and international human rights bodies.³⁶ However, the Court was prevented from deciding that point in the absence of an explicit claim from the applicants in that case. On the other hand, the present case offers an opportunity to clarify that point by ruling that sterilisation, or treatment that entails sterilisation as the case may be, is inhuman and degrading treatment in all circumstances.

³³ European Committee of Social Rights, *Transgender Europe and ILGA-Europe v. the Czech Republic*, complaint no. 117/2015, 15 May 2018.

³⁴ CJEU, Case C-451/16, *MB v. Secretary of State for Work and Pensions* [2018].

³⁵ *A.P., Garçon and Nicot v. France*, § 127.

³⁶ See for example *V.C. v. Slovakia*, no. 18968/07, §105, ECHR 2011 (extracts), CEDAW Committee, *A.S. v. Hungary*, Comm. No. 4/2004, 12 February 2004, 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, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF, WHO. Eliminating forced, coercive and otherwise involuntary sterilization – An interagency statement, 2014.

26. In some countries, medical treatment required as a precondition to LGR may be unavailable in practice, rendering LGR exceedingly hard or even impossible to achieve. According to a TGEU study on insurance coverage for trans specific healthcare in seventeen European countries,³⁷ only a handful of European countries, such as the UK, the Netherlands, Germany, or Belgium, have public health insurance in place that covers most trans specific healthcare costs. In most other countries, public insurance only covers a limited number of procedures, and in some, such as Georgia, Russia, or Poland virtually nothing is covered. Further, even in countries where insurance coverage is available, trans people routinely face excruciatingly long waiting periods and humiliating treatment. Across the board, they are subjected to pathologisation and find themselves at the mercy of doctors, who routinely act as gatekeepers between them and the healthcare they want to access. Insurance coverage is subject to discriminatory limitations and often provided on an ad hoc basis. Trans people who are poor, live outside big cities, non-binary people, and trans people with disabilities face additional barriers in accessing affordable care. While going private might mean better quality services, accessing private doctors is unaffordable for the vast majority of trans people. The same applies for private insurance, which is usually expensive and often excludes trans specific healthcare from coverage.

IV. The prohibition of discrimination as applied in the context of LGR

27. This section looks at the emergence of gender identity as a protected ground under international anti-discrimination law, with a focus on LGR cases. In light of this evidence, the third party interveners submit that trans people qualify as “a particularly vulnerable group in society, whose members have suffered considerable discrimination in the past”, and should therefore be afforded strict protection under Article 14 of the Convention, and that the barriers restricting access to LGR constitute prohibited discrimination.

28. Multiple studies, reports, position papers and other research, including by the Parliamentary Assembly,³⁸ the Commissioner for Human Rights,³⁹ the FRA,⁴⁰ as well as national and international NGOs,⁴¹ consistently indicate that trans people suffer from disproportionately high levels of violence, harassment and discrimination in all fields of life. The TGEU Trans Murder Monitoring Project,⁴² which has been documenting thousands of murders across the world, concluded that trans and gender-diverse people are victims of horrifying hate violence, including extortion, physical and sexual assaults, and murder, which often go unreported. This data suggests that trans people should qualify for heightened protection under Article 14 of the Convention.

29. Gender identity is protected under Article 14, although the language used by the Court to date has been uneven. In *P.V. v. Spain*, a child visitation case involving a trans

³⁷ TGEU, *Trans healthcare lottery: insurance coverage for trans specific healthcare: An overview on the basis of 17 countries in Europe*, advance pre-publication copy, available upon request.

³⁸ Parliamentary Assembly, *Discrimination against transgender people in Europe: Report*, 2015.

³⁹ Commissioner for Human Rights, *Human Rights and Gender Identity*, CommDH/IssuePaper(2009)2, 29 July 2009.

⁴⁰ EU FRA, *Being Trans in the European Union: Comparative analysis of EU LGBT survey data - Summary*, 2014.

⁴¹ A recent example is TGEU, *Overdiagnosed but underserved - Trans Healthcare in Georgia, Poland, Serbia, Spain and Sweden: Trans Health Survey*, 2017.

⁴² According to date available on the website of the project, <http://transrespect.org/en/>.

parent, the Court stated that Article 14 “undoubtedly” covered “transsexuality”.⁴³ In *Identoba and others v. Georgia*, concerning the homophobic harassment that took place during a LGBT rights event, the Court mentioned in passing that Article 14 “duly covers questions related to sexual orientation and gender identity.”⁴⁴ In *Hämäläinen v. Finland*, a LGR case, the Court appeared to suggest that gender identity should be encompassed within the grounds of “gender or sexual orientation”, with the consequence that strict scrutiny applied to the differential treatment alleged.⁴⁵ This area of jurisprudence would benefit from some clarity.

30. The *Convention on Preventing and Combating Violence against Women* (‘the *Istanbul Convention*’) defines the notion of “gender” as “the socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for women and men.” The Convention must be implemented without discrimination based on gender identity, among other grounds.⁴⁶ The Committee of Ministers⁴⁷ and the Parliamentary Assembly⁴⁸ adopted documents urging Member States to combat discrimination based on gender identity in all areas of life.

31. Notably, the applicant’s Article 14 claim in *Hämäläinen* was rejected on the grounds that her situation was not comparable to that of cisgender people, whom, she alleged, were not forced to comply with additional requirements in order to have their gender identity legally sanctioned. A minority of judges dissented on this point, arguing that the applicant and her wife’s situation was comparable to that of heterosexual couples, whose relationship was secure, as well as that of homosexual couples, who were treated in a similar manner despite their different circumstances. Other courts have adopted a richer understanding of gender that is more in line with the dissenters’ views.

32. Transgender people are protected under EU gender equality legislation. In 1996, the CJEU held that discrimination against people who intend to undergo, are undergoing and have undergone gender reassignment may amount to sex discrimination.⁴⁹ *P. v. S.*

⁴³ *P.V. v. Spain*, no. 35159/09, § 30, 30 November 2010.

⁴⁴ *Identoba and Others v. Georgia*, no. 73235/12, § 96, 12 May 2015.

⁴⁵ *Hämäläinen v. Finland* [GC], no. 37359/09, § 109, ECHR 2014. That judgment also contained a dispute between the majority and a minority of the Court around the question of determining an adequate comparator for the situation that the applicant, a trans woman, and her wife, found themselves in, see joint dissenting opinion of judges Sajó, Keller and Lemmens, §17-20.

⁴⁶ *Council of Europe Convention on preventing and combating violence against women and domestic violence*, Articles 3 and 4§3.

⁴⁷ *Rec. 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*, 31 March 2010, Section I.A.

⁴⁸ Parliamentary Assembly, *Discrimination against Transgender people in Europe*, Resolution 2048(2015), §6.1.

⁴⁹ CJEU, Case C-13/94 *P. v S. and Cornwall County Council* [1996]; see further, Silvan Agius, Christa Tobler, *Trans and intersex people: Discrimination on the grounds of sex, gender identity and gender expression*, European Commission, 2011. The notion of ‘gender identity’ is expressly mentioned in EU law: *Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime. Preamble, §9; Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, [2011], Article 10(1)(d). The EU Commission explicitly acknowledged that it would treat *gender identity* discrimination materially the same as *gender reassignment* discrimination, European Commission, *Report on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services (COM(2015) 190 final)*, 05 May 2015, p. 4

and Cornwall County Council concerned a trans person who had been dismissed from work for having proposed to undergo gender reassignment treatment. The CJUE reasoned that, considering “its purpose and the nature of the rights which it seeks to safeguard,” the scope of the directive in question “cannot be confined to discrimination based on the fact that a person is of one or other sex.” Therefore, “such discrimination is based, essentially, if not exclusively, on the sex of the person concerned.” Those findings were reiterated, with some variation, in three other cases: *K.B.*,⁵⁰ concerning the access of the trans partner to a survivor’s occupational pension, *Richards*,⁵¹ concerning the access to a statutory retirement pension, and *MB*, concerning the access of a married trans woman to a statutory retirement pension.⁵² In *MB*, the CJUE found that the situation of the claimant in the main proceedings was comparable to that of a cisgender person who is married.

33. The GCC’s finding of a breach of the guarantee against unequal legal treatment based on gender in the 3rd gender marker case mentioned above represents an element of novelty.⁵³ The GCC determined that since Art 3(3) of the Basic Act was designed to protect social categories that were particularly vulnerable to discrimination, it also covered persons who did not identify as male or female. Nonetheless, the impugned regulations disadvantaged persons who were neither male nor female precisely because of their gender, given that they could not - unlike men and women - be registered in accordance with their gender.

34. UN Treaty Bodies consistently mention gender identity among the protected characteristics of anti-discrimination clauses in Universal Treaties.⁵⁴ In 2016, the Human Rights Council established an Independent Expert mandate working on the protection against violence and discrimination based on sexual orientation and gender identity. The HRC dealt with the issue of discrimination based on gender identity in the case *G. v. Australia*, concerning the validity of provisions in Australian law that restricted access to legal gender recognition to people who were not married. On this occasion, the HRC stated that “the prohibition against discrimination under Article 26 [of the ICCPR] encompasses discrimination on the basis of marital status and gender identity, including transgender status.”⁵⁵ The HRC noted that the restriction in question differentiated between married and unmarried transgender persons without reasonable and objective justification, constituting discrimination on the basis of marital and transgender status. Finally, the above-mentioned IACtHR advisory opinion noted that gender identity and gender expression were protected grounds under the American Convention on Human Rights, and that any differential treatment based on these grounds called for strict scrutiny.⁵⁶

⁵⁰ CJEU, Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004].

⁵¹ CJEU, Case C-423/04 *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2006].

⁵² CJEU, Case C-451/16, *MB v. Secretary of State for Work and Pensions* [2018].

⁵³ See *supra*, §9-10.

⁵⁴ See for example CESCR/General Comment No. 23 (2016) on the right to just and favorable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), §11; CEDAW/Estonia – Concluding Observations – 65th session, 9 November 2016, 6th reporting cycle, CEDAW/C/EST/CO/5-6, §29; CRC/France – Concluding Observations – 71st session, 13–14 January 2016, 5th reporting cycle, CRC/C/FRA/CO/5, §23-24; CRPD/ General comment No. 3 (2016) Article 6: Women and girls with disabilities, §4-5. Also see International Lesbian, Gay, Bisexual, Trans and Intersex Association: Kirichenko K, *United Nations Treaty Bodies: References to sexual orientation, gender identity, gender expression and sex characteristics 2016* (Geneva: ILGA, November 2017).

⁵⁵ HRC, *G. v. Australia*, Communication no. 2172/2012, 17 March 2017, §7.12-7.15.

⁵⁶ *Opinión consultativa OC-24/17*, §64-81.