

EUROPEAN COURT OF HUMAN RIGHTS

A.D. & A.K. v. Georgia (Application nos. 57864/17 and 79087/17)

THIRD PARTY INTERVENTION BY THE HUMAN RIGHTS CENTRE OF GHENT UNIVERSITY¹

The interveners submit that the case of A.D. & A.K. v. Georgia raises important issues under the prohibition of discrimination (Article 14 ECHR), the right to respect for private life (Article 8 ECHR) and the prohibition of inhuman or degrading treatment (Article 3 ECHR). We respectfully submit that this case provides an important opportunity for the Court to clarify standards in the area of the human rights protection of trans*² persons, a group that continues to suffer institutionalised discrimination and stigmatisation in many parts of Europe, including Georgia. In order to support our argumentation, this submission will first elaborate on the vulnerability of trans* persons in Georgia (1). Secondly, we will argue that the present case warrants several considerations in relation to Article 14 ECHR, taken together with Article 8 ECHR (2). Thirdly, we will submit that the scope of the positive obligation of legal gender recognition under Article 8 ECHR needs to be extended and that the State's margin of appreciation should be limited (3). Lastly, we will argue that mandatory surgery and medical procedures for legal gender recognition violate trans* persons' right to physical integrity (4).

1. Vulnerability of trans* persons in Georgia

Trans* persons are historically marginalised, and negative stereotypes about them are still widespread throughout Europe, causing the discriminatory restriction of their rights and encouraging violence against them. The situation concerning the rights of LGBTIQ+ persons is of serious concern in Georgia. Trans* persons in Georgia fight against stigmatisation and transphobia in many aspects of their daily life. In the next sections, we will argue that trans* persons are a vulnerable group (1.1.) and discuss the legal issue of gender marker change as a source of basic human rights violations in Georgia (1.2.).

1.1. Vulnerability under Article 8 ECHR

According to the seminal report on the human rights of trans* persons by the former Human Rights Commissioner for the Council of Europe, "*many transgender people live in fear and face violence in the course of their lives. This violence ranges from harassment, bullying, verbal abuse, physical violence and sexual assault, to hate crimes resulting in murder.*"³ Since prejudice and stigma towards a particular group in society have been indicators that have crucially informed the Court's assessment of group vulnerability, we respectfully invite the Court to apply the concept of vulnerable groups, which it already used in relation to Roma,⁴ people with disabilities,⁵ people living with HIV⁶ and asylum seekers,⁷ to trans* persons.

The Court has already recognised the personal suffering and social stigmatisation of trans* persons, holding that "*the stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law [...] cannot be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety*".⁸ These feelings of vulnerability, anxiety and humiliation are caused by the discrimination trans* persons face when they are forcibly outed by legal documents that have not been adapted to reflect their gender. This situation leads to a very high amount of prejudice and stigma. Therefore, we respectfully invite the Court to consider trans* persons to be a vulnerable group.

1.2. General vulnerability of trans persons in Georgia*

In 2014, based on the Association Agreement⁹ between the European Union and Georgia, the Georgian authorities undertook the commitment to set up an institutional mechanism to fight discrimination. Therefore, on the 7th of May

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² See on terminology, THIRD PARTY INTERVENTION BY THE HUMAN RIGHTS CENTRE OF GHENT UNIVERSITY in R.L. & P.O. v. Russia (Application nos. 36253/13 and 52516/13), <https://hrc.ugent.be/wp-content/uploads/2019/02/RLnPO-tpi.pdf>, p. 2

³ Council of Europe Commissioner for Human Rights, Human Rights and Gender Identity, 2009, p. 14.

⁴ ECtHR, D.H. and others v. Czech Republic, 57325/00, Judgment of 13 November 2007.

⁵ ECtHR, Alajos Kiss v. Hungary, 38832/06, Judgment of 20 May 2010.

⁶ ECtHR Kiyutin v. Russia, 2700/10, Judgment of 10 March 2011.

⁷ ECtHR M.S.S. v. Belgium and Greece, 30696/09, Judgment of 21 January 2011

⁸ ECtHR, Christine Goodwin v. United Kingdom, para. 77.

⁹ See https://cdn1-eeas.fpfis.tech.ec.europa.eu/cdn/farfuture/VjycjKJ-ii2865918FYZ8Phir2Qqs0f2jZUoh4un5IE/mtime:1473773763/sites/eeas/files/association_agreement.pdf.

2014, the Parliament of Georgia adopted the Law on Elimination of All Forms of Discrimination.¹⁰ Despite the fact that this antidiscrimination law has been adopted and prohibits discrimination on grounds of *sexual orientation, gender identity and expression*, the European Commission against Racism and Intolerance (ECRI) considers that Georgian authorities have no specific strategy to combat discrimination and intolerance against LGBTIQ+ persons.¹¹ Inter alia, the access to sexual and reproductive health services and information may be restricted for LGBTIQ+ persons because of their nonconforming sexual behaviour, and community members often face discriminatory attitudes from medical personnel.¹² Furthermore, the few services trans* persons can access are not covered by insurance¹³ and the lack of financial support adversely affects trans* persons' access to medical services in Georgia.

According to the Georgian Public Defender,¹⁴ the LGBTIQ+ community encounters discrimination in almost every sphere of life.¹⁵ Violence and inequality towards them is often manifested in marginalisation, bullying and social exclusion from families, public spaces and various institutions.¹⁶ Negative attitudes towards LGBTIQ+ individuals are still firmly rooted in society, which prevents them from exercising a number of their rights and incites intolerance and violence against them.¹⁷ According to the 2013 ECRI report on Georgia, 50% of the respondents said that violence towards LGBTIQ+ persons is acceptable because they endanger national values, and that the rights of sexual minorities should never be respected.¹⁸ According to a 2018 report written by the Georgian Caucasian Research Centre for the Council of Europe, LGBTIQ+ rights are clearly considered the least important for Georgia's development; in the focus groups, participants even argued that LGBTIQ+ persons "*should not bother "society" or "limit" heterosexuals' rights.*"¹⁹ In *Identoba v. Georgia*, the Court concluded that the LGBTIQ+ community is in a precarious position in Georgia, that negative attitudes towards them have become very prevalent, and that their vulnerability is particularly apparent.²⁰

Georgia faces a number of very important challenges in terms of protection of equality. Public officials have strongly encouraged discrimination by making statements that portray LGBTIQ+ individuals as diseased and contagious.²¹ The number of homophobic and transphobic attacks in Georgia has grown in recent years²², but victims often refrain from reporting cases due to a very homophobic and transphobic climate, lack of support, or even discriminatory attitudes from the police.²³ The UN Committee on Elimination of All Forms of Discrimination against Women has found it necessary to call on Georgia to "*take measures to address violence against and harassment of lesbian, bisexual and transsexual women.*"²⁴ It is obvious that discrimination and stigmatisation of trans* persons is deeply rooted among Georgians; they see this group as a threat to traditions, which in turn leads to hostility and bullying.

1.3. Gender marker change in official documents

In addition to the general vulnerability of trans* persons as described above, there is a specific vulnerability in Georgia that results from many trans* persons' inability to change their gender marker in official documents. The main issue is that sex reassignment surgery is required for a gender marker change, and that the criteria for sex reassignment surgery are unclear and not standardised by law. According to Article 78 of Law of Georgia on Civil Acts, a change of

¹⁰ Under to the Law, along with the courts of common jurisdiction, the Public Defender of Georgia was designed as legal mechanism for fighting discrimination in the country – Equality Body.

¹¹ ECRI Report on Georgia (fifth monitoring cycle), 2016, para. 105.

¹² Annual Report of the Public Defender of Georgia, The situation of human rights and freedoms in Georgia, English version, 2017, p. 96.

¹³ Karsay, Dodo (2018), Protecting tQI rights in Europe, Submission to the second review of the Council of Europe Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity (CM/Rec(2010)5). ILGA-Europe, Transgender Europe, OII Europe. p. 97.

¹⁴ The Public Defender is the main National Human Rights Institution in Georgia. The Public Defender of Georgia is mandated by the Constitution of Georgia and organic law to oversee the observance of human rights and fundamental freedoms in the country. The Public Defender, in the course of implementation of his/her activities is independent from the executive branch. Under the organic law, the Public Defender submits an annual report to the Parliament of Georgia on the situation of human rights and fundamental freedoms in the country.

¹⁵ Annual Report of the Public Defender of Georgia, The situation of human rights and freedoms in Georgia, English version, 2017, p. 83.

¹⁶ Annual Report of the Public Defender of Georgia, The situation of human rights and freedoms in Georgia, English short version, 2016, p. 93.

¹⁷ Public Defender of Georgia, Special Report On combating discrimination, its prevention and the situation of equality in the country, 2017, p. 21.

¹⁸ ECRI Report on Georgia (fifth monitoring cycle), 2016, para. 104 (In 2013, a survey was conducted in Tbilisi on the violence that had occurred during the International Day against Homophobia in May).

¹⁹ HATE CRIME, HATE SPEECH, AND DISCRIMINATION IN GEORGIA: ATTITUDES AND AWARENESS, Council of Europe, 2018, p.24

²⁰ ECtHR, *Identoba v Georgia*, paras. 68, 79.

²¹ ECRI Report on Georgia (fifth monitoring cycle), 2016, para. 35.

²² Annual Report of the Public Defender of Georgia, The situation of human rights and freedoms in Georgia, English version, pp. 95-96.

²³ ECRI Report on Georgia (fifth monitoring cycle), 2016, para. 53.

²⁴ Committee on the Elimination of Discrimination against Women Concluding observations on the combined fourth and fifth periodic reports of Georgia, para. 35(e).

sex is the basis for making a change in the civil record entry.²⁵ Under the existing practice, medical transition (including sex reassignment surgery) is considered a necessary condition for changing a gender marker in identity documents. However, medical procedures for sex reassignment are very expensive and are not funded by the State, or may even be undesirable.²⁶ As a result, transgender persons cannot get identification documents that indicate their gender identity, which leads to their social exclusion, discrimination in employment,²⁷ violation of their health care rights and of their right to private life.²⁸ This, in turn, is an impeding factor in obtaining an education, a job, or in any other endeavour.

Therefore, the Public Defender and non-governmental organisations recommended to the Ministry of Justice of Georgia to develop provisions that provide quick, transparent and affordable legal procedures to change gender in civil registration documents and “to disassociate this procedure from a medical transition process”.²⁹ The Public Defender of Georgia, within the scope of his competence, submitted a proposal to the Ministry of Justice on 18 May 2015 and recommended the drafting and adoption of a procedural rule of gender recognition.³⁰ Despite the proposal of the Public Defender, the existing practice has not changed and the legal status of transgender persons has not improved. The CEDAW Committee criticised the Georgian government’s unwillingness to change gender recognition procedures and called on them to “abolish restrictions for transgender persons with regard to obtaining identity documents.”³¹ The ECRI recommended that Georgia “develop clear guidelines for gender reassignment procedures and their official recognition.”³² From all these elements, we can conclude that international and national reports, as well as the Court’s case law, clearly show that the hostile environment in Georgia is prone to inciting the unequal treatment of trans* persons and that this discrimination is preconditioned by hatred and prejudices strongly rooted in Georgian society. Thus, trans* persons are one of the most vulnerable groups in Georgia, and the legislative lacuna further aggravates their situation. The State’s inactivity with regards to amending the law, their refusal to grant trans* persons clear gender recognition procedures, and the association of those procedures with medical procedures, are all factors that incite inequality and other human rights violations.

2. Article 14: The prohibition of discrimination

With regards to the discriminatory aspect of this case, we will first discuss the importance of Article 14 in conjunction with Article 8 (2.1.). We will then consider the different ways in which mandatory sex reassignment surgery as a requirement for gender recognition discriminates against trans* persons (2.2.).

2.1. Importance of Article 14 in conjunction with Article 8 and protocol 12³³

When it comes to the rights of trans* persons, the prohibition of discrimination under Article 14 is particularly important. In considering this case under Article 14, the Court would address the root cause of the human rights violations affecting trans* persons. Georgian State officials have made statements that present trans* persons as mentally ill.³⁴ In keeping this narrative alive, the State feeds discrimination against trans* persons and creates the context for human rights violations committed against them. Abusive requirements for gender recognition, more specifically, are often informed by discriminatory, stigmatising and stereotypical ideas about trans* persons.³⁵ Addressing those ideas is an important step in examining the need for such requirements.

²⁵ სამოქალაქო აქტების შესახებ საქართველოს კანონი, მუხლი 78 „სამოქალაქო აქტის ჩანაწერში ცვლილების შეტანის საფუძველია ერთ-ერთი შემდეგი გარემოების არსებობა: ა) სქესის შეცვლა – თუ სქესის შეცვლასთან დაკავშირებით პირს სურს სახელის ან/და გვარის შეცვლა;“.

²⁶ The Public Defender of Georgia, Human rights in the context of sexual and reproductive health and well-being: the assessment state of affairs, Georgian version, p. 122.

²⁷ Karsay, Dodo (2018), Protecting LGBTIQ rights in Europe, Submission to the second review of the Council of Europe Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity (CM/Rec(2010)5). ILGA-Europe, Transgender Europe, OII Europe. pp. 52, 53, 73.

²⁸ Annual Report of the Public Defender of Georgia, The situation of human rights and freedoms in Georgia, English version, 2017, p. 97.

²⁹ Annual Report of the Public Defender of Georgia, The situation of human rights and freedoms in Georgia, English version, 2017, p. 98; Gender Equality in Georgia: Barriers and Recommendations I, January, 2018, p.103; Lika Jalaghania, Legal situation of LGBTI persons in Georgia, 2016, p. 61.

³⁰ Annual Report of the Public Defender of Georgia, The situation of human rights and freedoms in Georgia, English version, 2015, p. 582.

³¹ Committee on the Elimination of Discrimination against Women Concluding observations on the combined fourth and fifth periodic reports of Georgia, para. 35(e).

³² ECRI Report on Georgia (fifth monitoring cycle), 2016, paras 110-111.

³³ Georgia’s ratification of protocol 12 came into force in 2005; see https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=PKUW2yGj.

³⁴ ECRI REPORT ON GEORGIA (fifth monitoring cycle), 2015, para. 35.

³⁵ Council of Europe Parliamentary Assembly, Resolution 1728(2010) on discrimination on the basis of sexual orientation and gender identity.

The Court ruled that restrictions of the fundamental rights of a particularly vulnerable group require very weighty reasons in order to be justified.³⁶ Since, as this intervention argues, trans* persons are a particularly vulnerable group, this principle of “very weighty reasons” should be applied to them as well. In the past, the Court has found that those “very weighty reasons” may be connected to the protection of the rights of a third party (particularly the rights of children),³⁷ but in this case, only public interests have been invoked as counter-argument. Therefore, the proportionality test with regards to differential treatment of trans* persons requires particular scrutiny.

2.2. Discrimination of trans* persons on several levels:

We respectfully invite the Court to consider the ways in which mandatory sex reassignment surgery and other abusive requirements for gender recognition are not only caused by anti-trans* discrimination, but in fact lead to discrimination on several levels with regards to who gets access to legal gender recognition. It also exposes trans* persons to further discrimination by forcibly outing them and limiting their enjoyment of other human rights. First, we will consider the discrimination between trans* persons and cisgender persons (2.2.1.) Then, we will discuss the question of discrimination between transsexual persons who are willing and able to undergo sex reassignment surgery and trans* persons who are unwilling or unable to do so, with a focus on intersectional discrimination (2.2.2.). Lastly, we will show how mandatory sex reassignment surgery violates the State’s positive obligation to protect vulnerable groups against discrimination (2.2.3.).

2.2.1. Trans* persons versus cisgender persons³⁸

The first level of discrimination is the discrimination of trans* persons in relation to cisgender persons. Gender has been confirmed by the Court to be a core aspect of one’s identity, for trans* persons and cisgender persons alike,³⁹ and gender recognition has been recognised as a right by the Court in the *Christine Goodwin* case.⁴⁰ Unlike cisgender persons, however, trans* persons are obliged to undergo surgery or other medical interventions in order for that core aspect of their identity to be recognised by the State.

In §131 of its recent advisory opinion on gender identity, the Inter-American Court of Human Rights finds that the fact that a cisgender person’s autonomously developed gender identity corresponds to the sex assigned to them at birth by third parties, and a trans* person’s does not, creates unfair obstacles to the recognition and respect of trans* persons’ gender identity. Therefore, the Inter-American Court of Human Rights considers it unreasonable to establish a differentiated treatment between cisgender and trans* persons who wish to amend their records.⁴¹ The Brazilian Supreme Court recently based itself on this advisory opinion to change the terminology in its judgment on gender recognition from “transsexual” to “transgender” in order to explicitly avoid limiting the rights of all trans* persons.⁴²

In order to be justified, a differential treatment must have an objective and reasonable justification, pursue a legitimate purpose, as well as satisfy the proportionality test. In the case of gender recognition, and indeed in the present case, the accuracy of public records is often used as a legitimate aim for the limitations of the rights of trans* persons. This is a questionable argument. Whether the accuracy of public records is a legitimate purpose depends on how one defines “accuracy”. It is often taken to mean compliance between sex and gender, but assigned sex is based on one’s genitals, while gender is not. The idea that gender corresponds to genitals is informed by the views of a cisgender majority on what is “normal”. The flaw in this reasoning is, however, apparent: in social situations, we obviously do not gender people based on their genitals, but rather based on the social and physical expression of their gender. Similarly, in legal situations, gender registration is predominantly used for gender-related issues, not body-related issues. If a person’s social and physical expression of their gender does not correspond to their assigned sex anymore, keeping the gender marker corresponding to their assigned sex in public records would actually be less accurate than changing it. This reasoning has been confirmed by a number of European domestic courts.⁴³

Even if this is still considered a legitimate aim, there is still the question of proportionality. In his report on the rights of trans* persons, former Commissioner for Human Rights Thomas Hammarberg explicitly wrote that mandatory

³⁶ ECtHR, *Alajos Kiss v. Hungary*, 38832/06, Judgment of 20 May 2010, para 42.

³⁷ ECtHR, *Fretté v. France*, 36515/97, Judgment of 26 February 2002.

³⁸ With regards to terminology, we refer to the Third Party Intervention by the Human Rights Centre of Ghent University in the case of R.L. & P.O. v. Russia, <http://www.hrc.ugent.be/wp-content/uploads/2018/02/tpi-RLPOvRussia.pdf>.

³⁹ ECtHR, *X v. the Former Yugoslav Republic of Macedonia*, Judgment of 17 January 2019, para. 38.

⁴⁰ ECtHR, *Christine Goodwin v. United Kingdom*, 28957/95, Judgment of 11 July 2002.

⁴¹ Inter-American Court for Human Rights, Advisory Opinion OC-24/17 of 24 November 2017 on gender identity and equality and non-discrimination of same-sex couples, para. 131.

⁴² Supreme Court of Brazil, Direct Unconstitutionality Lawsuit 4275, Judgment of 1 March 2018.

⁴³ Austrian Administrative High Court, VwGH 27.2.2009, Judgment of 27 February 2009; German Federal Supreme Court, BVerfG, 1 BvL 3/03, Judgment of 6 December 2005; Civil Court of Athens, No 418/2016, Judgment of 30 June 2016.

medical procedures are disproportionate.⁴⁴ The Council of Ministers and the Parliamentary Assembly support this reasoning: they have published recommendations and resolutions concerning the discrimination of trans* persons that urge Member States to review and abolish “changes of a physical nature⁴⁵” and “compulsory medical treatment⁴⁶” as requirements for gender recognition. It can, indeed, not possibly be considered proportionate to de facto and de iure force someone to sacrifice body parts against their will for the sake of the “accuracy” of public records.

2.2.2. Transsexual persons who are willing and able to undergo sex reassignment surgery versus trans* persons who are unwilling or unable to do so⁴⁷

Mandatory sex reassignment surgery as a requirement for gender recognition leads to discrimination between trans* persons based on whether they are willing and able to undergo sex reassignment surgery. Willingness is related to a person’s level of physical dysphoria. Transsexual persons experience severe physical dysphoria and, as such, need and desire medical interventions to change their sex characteristics. Transgender persons, by contrast, do not experience (the same level of) physical dysphoria and do not want to (fully) medically transition.⁴⁸ Ability notably depends on a person’s health and socio-economic status. Certain medical procedures might, for example, be counter-indicated, dangerous or even potentially fatal for trans* persons with certain disabilities or health issues. Moreover, as long as the medical procedures required for gender recognition are not covered by social security and health insurance, many trans* persons will not be able to afford them. We would like to stress that this discriminates against those persons not only on the ground of their gender identity, but also based on their health and socio-economic status. This kind of intersectional discrimination is explicitly prohibited in Article 2.E of the Yogyakarta Principles⁴⁹, and intersectional discrimination in general has been recognised and prohibited by the ECtHR⁵⁰.

All trans* persons require gender recognition in order to be able to fully enjoy their human rights. According to the principle that the Convention protects concrete rights, not illusory ones⁵¹, it is highly important to make gender recognition a right for *all* trans* persons, not an abstract right that many trans* persons do not have actual access to. If gender marker changes are made conditional upon sex reassignment surgery, healthy, able-bodied, wealthy transsexual persons need to undergo procedures they are willing and able to undergo anyway in order to be legally recognised as their gender, while transgender persons must submit to heavy procedures they would not undergo otherwise and ill, disabled or poor trans* persons are simply excluded from the process. Using the situation of only healthy, able-bodied, wealthy transsexual persons as a baseline for the rights of *all* trans* persons excludes many individuals. Firstly, there are more transgender persons than transsexual persons: according to a recent Belgian study, the number of transgender persons amounts to 0.6-0.7% of the population, while the number of transsexual persons lies at 0.05-0.1%.⁵² Secondly, though there are currently no statistics about the health or socio-economic status of trans* persons, the Committee of Ministers has urged States to take financial and medical situations into consideration.⁵³

The Court has confirmed that treating people in significantly different situations the same way is discriminatory, unless there is a reasonable and objective justification for that treatment.⁵⁴ Transsexual persons and transgender persons are fundamentally different: transsexual persons experience severe physical dysphoria that makes them want to undergo sex reassignment surgery, while transgender persons experience a lower level of physical dysphoria, or even none. The purpose of medical treatment that makes changes to the concerned person’s body is to alleviate severe physical dysphoria. Basing the requirements for gender recognition on such medical treatment does not take transgender persons’ lower level of physical dysphoria and consequent lack of desire for sex reassignment surgery into account, and is therefore discriminatory.

⁴⁴ Council of Europe Commissioner for Human Rights, Human Rights and Gender Identity, 2009, p. 8.

⁴⁵ Council of Europe Committee of Ministers, Recommendation (2010)5 on measures to combat discrimination on grounds of sexual orientation and gender identity, 20.

⁴⁶ Council of Europe Parliamentary Assembly, Resolution 2048 (2015) on Discrimination against transgender people in Europe, 6.2.2.

⁴⁷ With regards to terminology, we refer to the Third Party Intervention by the Human Rights Centre of Ghent University in the case of R.L. & P.O. v. Russia, <http://www.hrc.ugent.be/wp-content/uploads/2018/02/tpi-RLPOvRussia.pdf>.

⁴⁸ Council of Europe Commissioner for Human Rights, Human Rights and Gender Identity, 2009, p. 8.

⁴⁹ <http://www.yogyakartaprinciples.org/principles-en/>.

⁵⁰ ECtHR, N.B. v. Slovakia, 29518/10, Judgment of 12 June 2012; ECtHR, B.S. v. Spain, 47159/08, Judgment of 24 July 2012

⁵¹ ECtHR, Artico v. Italy, Judgment of 13 May 1980, 6694/74, para. 33.

⁵² The number of gender ambivalent (non-binary) persons even amounts to 1.9-2.2% of the population. See E. Van Caenegem, K. Wierckx, E. Elaut, A. Buysse, A. Dewaele, F. Van Nieuwerburgh, G. De Cuyper and G. T’Sjoen, “Prevalence of Gender Nonconformity in Flanders, Belgium”, *Archives of Sexual Behavior* 2015, Vol. 44(5), p. 1281-1287.

⁵³ Council of Europe Committee of Ministers, Recommendation (2010)5 on measures to combat discrimination on grounds of sexual orientation and gender identity, 35 and 36.

⁵⁴ ECtHR, Thlimmenos v. Greece, 34369/97, Judgment of 6 April 2000, para. 44.

Medical requirements for gender recognition, such as mandatory sex reassignment surgery, also fail to take into account the significantly different situations of ill, disabled and poor trans* persons. Health issues make such requirements unachievable for many disabled and chronically ill trans* persons. This leads to a situation where only healthy, able-bodied trans* persons get access to gender recognition, which is discrimination based on disability. The Council of Europe has recognised that States have obligations to ensure reasonable accommodations to allow persons with disabilities the opportunity to fully realise their rights, and that failure to do so amounts to discrimination.⁵⁵ The prohibition of discrimination based on disability and health status has also been confirmed in the ECtHR's jurisprudence.⁵⁶ It would therefore be unthinkable to bar disabled and chronically ill trans* persons from the enjoyment of the human rights ensured by gender recognition on the basis that their health status makes sex reassignment surgery impossible or dangerous for them.

Medical transition (including sex reassignment surgery) is often very expensive and not always covered by social security or health insurance. Consequently, many trans* persons simply cannot afford it, and as such, poor trans* persons may never get access to gender recognition. Article 14 of the Convention explicitly states that discrimination on the ground of "social origin" is prohibited. The role of socio-economic status in discrimination has also been addressed by the Court in the case of *Horvath and Kiss v. Hungary*⁵⁷, and in the cases of *Soares de Melo v. Portugal*⁵⁸ and *R.M.S. v. Spain*⁵⁹, the Court has indirectly ruled that discrimination based on poverty cannot be accepted. De facto barring trans* persons from gender recognition and all the rights they could consequently enjoy, simply because they cannot afford medical transition, would clearly be discriminatory.

The accuracy of public records cannot be a legitimate aim to justify this differential treatment. Whether or not someone has medically transitioned is, indeed, irrelevant to public records: as argued above, in social and legal situations, we do not gender people based on their genitals, but rather based on their gender expression. Gender expression does not depend on whether someone has had sex reassignment surgery or not; therefore, one's willingness or ability to undergo sex reassignment surgery is of no importance with regards to the accuracy of public records.

Even if the preservation of accuracy of public records were considered to be a legitimate aim, the requirement of such an invasive procedure as sex reassignment surgery is still not proportionate. We would like to point out the recent case of *S.V. v. Italy*, in which the Court stated that S.V. had been exposed to vulnerability, anxiety and humiliation because she had socially transitioned but her papers did not reflect that reality.⁶⁰ This situation also applies to transgender persons, whose lack of desire to medically transition does not stop them from socially transitioning, and to ill, disabled or poor trans* persons, who are not able to medically transition but still socially transition. Thomas Hammarberg also stressed in his report that "*medical treatment must always be administered in the best interests of the individual and adjusted to her/his specific needs and situation. It is disproportionate for the State to prescribe treatment in a 'one size fits all' manner.*"⁶¹ Several European domestic courts have confirmed this idea.⁶² We respectfully invite the Court to do the same, so as to avoid treating certain trans* persons less favourably based on their unwillingness or inability to undergo such a heavy surgery.

2.2.3. Exposure to other kinds of discrimination as a violation of the positive obligation to protect vulnerable groups from discrimination

Mandatory sex reassignment surgery as a requirement for gender recognition does not only expose trans* persons to all kinds of discrimination with regards to gender recognition. It also exposes trans* persons to discrimination, vulnerability, and potentially even violence and abuse in their daily lives. Medical transition is a lengthy process, involving hormone therapy and several surgeries, and sex reassignment surgery is often the last of these procedures. Many trans* persons have fully socially transitioned long before they can schedule sex reassignment surgery. As long as this sex reassignment surgery remains a requirement for gender recognition, all trans* persons face a period of "legal limbo", during which their appearance and social role do not match up with their official documents. This leads

⁵⁵ ECtHR, *Çam v. Turkey*, 51500/08, Judgment of 23 February 2016; ECtHR, *Horváth and Kiss v. Hungary*, 11146/11, Judgment of 29 January 2013.

⁵⁶ ECtHR, *Glor v. Switzerland*, 13444/04, Judgment of 30 April 2009; *Çam v. Turkey*, 51500/08, Judgment of 23 February 2016; ECtHR, *Guberina v. Croatia*, 23682/13, Judgment of 22 March 2016.

⁵⁷ ECtHR 29 January 2013, no. 11146/11, *Horváth and Kiss v. Hungary*, para. 128; see also : L. LAVRYSEN, "Strengthening the protection of human rights of persons living in poverty under the ECHR", *Netherlands Quarterly of Human Rights* 2015, vol. 33, ed.3, p. 293-325.

⁵⁸ ECtHR, *Soares de Melo v. Portugal*, 72850/14, Judgment of 16 February 2016

⁵⁹ ECtHR, *R.M.S. v. Spain*, 28775/12, Judgment of 18 June 2013.

⁶⁰ ECtHR, *S.V. v. Italy*, 55216/08, Judgment of 11 October 2018, para. 72.

⁶¹ Council of Europe Commissioner for Human Rights, *Human Rights and Gender Identity*, 2009, p. 8.

⁶² Austrian Administrative High Court, *VwGH 27.2.2009*, Judgment of 27 February 2009; German Federal Supreme Court, *BVerfG, 1 BvL 3/03*, Judgment of 6 December 2005; Civil Court of Athens, *No 418/2016*, Judgment of 30 June 2016.

to those trans* persons being forcibly outed in every situation in which they have to show their documents, and this, in turn, leads to heavy discrimination against them.

Part 1 of this intervention extensively describes the consequences of being forcibly outed as trans* and how this bars trans* persons from enjoying other fundamental human rights. Those examples show that trans* persons are particularly vulnerable to all kinds of stigma, discrimination and violence. This aspect is particularly important, because the Court has found in several cases that there is a positive obligation for States to counter discrimination against vulnerable groups⁶³. As we have argued above, trans* persons should be considered a vulnerable group. Therefore, the State should have a positive obligation to counter discrimination of trans* persons. The Yogyakarta Principles also refer to this obligation: Article 2.F urges States to “take all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.”⁶⁴

3. The need to limit the State’s margin of appreciation and to extend the positive obligation under Article 8 ECHR

With this submission, we respectfully invite the Court to extend the positive obligation concerning legal gender recognition under Article 8 of the Convention (3.1.), in order to include transgender persons (who do not wish to undergo sex reassignment treatment) and transsexual persons who are unable to undergo sex reassignment treatment. We also ask the Court to restrict the State’s margin of appreciation in gender recognition cases (3.2.).

3.1. The need to extend the positive obligation

Over the last fifteen years, the European Court of Human Rights has continuously held that a person’s gender identity belongs to the personal sphere as protected by Article 8 ECHR.⁶⁵ In *A.P., Garçon, Nicot v. France*, the Court even held that Article 8 ECHR holds “a right to self-determination, of which the freedom to define one’s gender identity is one of the most essential elements” (para. 93)⁶⁶ and that gender identity is “an essential aspect of intimate identity of all persons, if not of their existence” (para. 123). In its landmark ruling in the case of *Christine Goodwin*, the Court held that States have a positive obligation under Article 8 ECHR to foresee a procedure for legal gender recognition, yet left the matter of the appropriate means to implement this obligation to the State’s margin of appreciation.⁶⁷ Importantly, in *A.P., Garçon, Nicot v. France*, the Court found that the requirement of the ‘irreversibility of the transformation of the bodily appearance’, i.e. treatment involving (a high risk of) sterility, violated Article 8 ECHR. However, the Court has not yet found a violation in the compulsory diagnosis of the ‘syndrome of transsexuality’⁶⁸ and/or compulsory sex reassignment treatment.⁶⁹ Very recently, in the case of *X v. the Former Yugoslav Republic of Macedonia*, the Court once again refrained from appraising the applicant’s petition about mandatory sex reassignment surgery as a requirement for gender recognition.⁷⁰ The ECtHR thus remains consistent in its reticence to rule decisively on the matter.

We respectfully argue that the scope of this positive obligation to enact a procedure of legal gender recognition is under-inclusive, leading to a gap in the human rights protection of trans* persons. While the scope of the positive obligation established in the *Christine Goodwin* case requires adequate respect for the gender identity of (post-operative) transsexuals, it has hitherto not been extended to similarly require adequate respect for the gender identity of transgender persons who do not wish to undergo sex reassignment therapy and transsexual persons who are unable to do so. It is respectfully submitted that such under-inclusiveness can no longer be upheld, taking into account the fact that, as with post-operative transsexuals, transgender persons are confronted with “[a] conflict between social reality and law” which similarly places them in “an anomalous position in which [they] may experience feelings of vulnerability, humiliation and anxiety” (*mutatis mutandis Christine Goodwin*, § 77).

⁶³ ECtHR, *D.H. and others v. Czech Republic*, 57325/00, Judgment of 13 November 2007; ECtHR, *Nachova and others v. Bulgaria*, 43577/98, Judgment of 26 February 2004; ECtHR, *Horváth and Kiss v. Hungary*, 11146/11, Judgment of 29 January 2013.

⁶⁴ <http://www.yogyakartaprinciples.org/principles-en/>.

⁶⁵ ECtHR, *Christine Goodwin v. United Kingdom*, para. 90: “in the twenty first century, the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved”.

⁶⁶ See also, ECtHR, *Van Kück v. Germany*, 35968/97, Judgment of 12 June 2003, para. 73.

⁶⁷ ECtHR, *Christine Goodwin v. United Kingdom*, no. 28957/95

⁶⁸ ECtHR, *A.P., Garçon, Nicot v. France*, para. 144.

⁶⁹ ECtHR, *Nuñez v. France*, 18367/06, Decision of 27 May 2008.

⁷⁰ ECtHR, *X v. the Former Yugoslav Republic of Macedonia*, 29683/13, judgment of 17 January 2019.

3.2. The limits of the margin of appreciation

We respectfully submit that the Contracting States' margin of appreciation in cases relating to the legal recognition of gender identity needs to be limited. We argue that this finding naturally results from the Court's existing case law (3.2.1), the international trend towards full self-determination with regard to gender identity (3.2.2), and the fact that trans* persons form a particularly vulnerable group in society who have suffered considerable discrimination in the past due to their gender identity (3.2.3).

3.2.1. The Court's case law

The Court has already addressed the extent of the Contracting States' margin of appreciation in several cases relating to gender identity. As mentioned above, it has continuously held that a person's gender identity belongs to the personal sphere protected by Article 8 ECHR. Moreover, it regards gender identity as one of the most basic essentials of self-determination.⁷¹ In this light, the Court pointed out that "*in the twenty first century, the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved*".⁷² While the Court in *Christine Goodwin v. United Kingdom* held that the States have a wide margin of appreciation, conversely, in *A.P., Garçon, Nicot v. France*, the Court pointed out that medical requirements directly involving the individual's (right to) physical integrity require special consideration and thus a narrow margin of appreciation (para. 123). In this regard, the Court pointed out the impossible dilemma for transsexual persons and held that conditioning the recognition of the gender identity of transsexual persons on the realisation of a sterilising operation or treatment that they do not want to undergo, comes down to conditioning the full exercise of their right to respect for their private life under Article 8 of the Convention on the renouncement of the full exercise of their right to integrity under Article 8 and Article 3 of the Convention (para. 131). We respectfully argue that the same reasoning necessarily applies to all forms of medical requirements, as these also involve – as with a condition of compulsory sterility for legal gender recognition – pitting the right to respect for one's gender identity against the right to respect for one's physical integrity, especially when persons are unwilling/unable to undergo such requirements.

3.2.2. International trend towards full depathologisation of trans* persons

In its case law regarding the legal recognition of trans* persons, the Court has consistently taken into account the changing legal and social circumstances concerning gender nonconformity. Indeed, already in *Rees v. United Kingdom* (1986), it held that "*the Court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and social developments*" (para. 47). In *A.P., Garçon, Nicot v. France*, the fact that an increasing number⁷³ – yet not a majority – of Contracting States reformed their legislation in a short period of time (*in casu* seven years) was of particular importance.⁷⁴

Although the Court referred to various international instruments in its *A.P., Garçon, Nicot* judgment, it regrettably only deduced from these instruments that there is an agreement among human rights actors on the unacceptability of a(n) (implicit) condition of compulsory sterility for legal gender recognition (para. 125).⁷⁵ However, we respectfully submit that the international trend⁷⁶ is towards the *full depathologisation* of trans* persons. The UN Committee on Economic, Social and Cultural Rights (CESCR),⁷⁷ the CEDAW Committee⁷⁸ and the Yogyakarta Principles +10⁷⁹ actually call for a total abolishment of *all forms of pathologisation* in the context of legal gender recognition, in order to

⁷¹ ECtHR, *Van Kück v. Germany*, 35968/97, Judgment of 12 June 2003, para. 7.

⁷² ECtHR, *Christine Goodwin v. United Kingdom*, para. 90.

⁷³ ECtHR, *A.P., Garçon, Nicot v. France*, para. 71. At the time of the judgment, 22 Contracting States required sterilisation for legal gender recognition, whilst 18 States did not.

⁷⁴ ECtHR, *A.P., Garçon, Nicot v. France*, para. 124.

⁷⁵ ECtHR, *Christine Goodwin v. United Kingdom*, para. 90; *Hämäläinen v. Finland*, para. 59; *Y.Y. v. Turkey*, 14793/08, Judgment of 10 March 2015, para. 108; *A.P., Garçon, Nicot v. France*, para. 97-100.

⁷⁶ See, THIRD PARTY INTERVENTION BY THE HUMAN RIGHTS CENTRE OF GHENT UNIVERSITY in R.L. & P.O. v. Russia (Application nos. 36253/13 and 52516/13) case, pp. 4-6.

⁷⁷ E.g. CmESCR on Germany, E/C.12/DEU/CO/5 (2011).

⁷⁸ E.g. CmEDAW on Switzerland CEDAW/C/CHE/CO/4-5 (2016), on Slovakia, CEDAW/C/MNE/CO/2 (2016), p. 12 and on Montenegro, CEDAW/C/SVK/CO/5-6 (2017), p. 14.

⁷⁹ Although the Court is yet to refer to the Principles, Judges Sajó, Keller and Lemmens already pointed out their relevance in their dissenting opinion in the case *Hämäläinen v. Finland*.

include all trans* persons. The Committee of Ministers,⁸⁰ the Parliamentary Assembly (PACE)⁸¹ and the Human Rights Commissioner of the Council of Europe⁸² have also consistently adopted important guidelines with regard to conditions for legal gender recognition. In its aforementioned advisory opinion the Inter-American Court concluded that the only requirement for gender marker change should be self-determination.⁸³ In 2018, the European Committee of Social Rights found, in a case relating to legal gender recognition, that “*Medical treatment without free informed consent breaches physical and psychological integrity, and may in certain cases be injurious to health both physical and psychological. Guaranteeing free consent is fundamental to the enjoyment of the right to health, and is integral to autonomy and human dignity and the obligation to protect the right to health*” (para. 82).⁸⁴

In recent years, an increasing number of States worldwide have reformed their legal framework concerning gender recognition by abolishing medical requirements.⁸⁵ Within the Council of Europe, 20 countries⁸⁶ do not require compulsory medical or surgical intervention. Progressive amendments were made in Denmark (2014), Ireland (2015), Malta (2015), Norway (2016), Belgium (2018), Portugal (2018) and Luxembourg (2018),⁸⁷ where the only requirement for gender marker change is self-determination.

We therefore respectfully invite the Court to recognise the clear international trend among human rights actors and States towards the *full* depathologisation of trans* persons and argue that the State’s margin of appreciation in cases regarding gender identity recognition is limited.

3.2.3. The vulnerability of trans* persons

In Section 1 of this intervention, we argued that trans* persons are particularly vulnerable and respectfully invited the Court to apply to them the principles applied to other vulnerable groups. According to the Court’s case law, “*if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, [...], then the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question.*”⁸⁸ According to the abovementioned international and national reports on Georgia, trans* persons suffer considerable transphobia in the form of discrimination, stigmatisation and stereotyping on the basis of their gender identity⁸⁹; consequently, they belong to a *particularly vulnerable group in society, whose members have suffered considerable discrimination*⁹⁰. Therefore, we respectfully reiterate our request to the Court to find that trans* persons form such a particularly vulnerable group, in Europe in general and in Georgia in particular, and to accordingly restrict the State’s margin of appreciation in cases regarding gender identity.

4. Article 3: protection of physical integrity

We respectfully invite the Court to consider this case under Article 3 of the Convention. Indeed, several sources support the idea that the infringement of physical integrity caused by mandatory sex reassignment surgery is sufficient to be considered a violation of Article 3 (4.1.), particularly as it violates trans* persons’ right to informed consent to medical treatment and forces them into an impossible dilemma (4.2.).

⁸⁰ Council of Europe Committee of Ministers, Recommendation (2010)5 on measures to combat discrimination on grounds of sexual orientation and gender identity.

⁸¹ Council of Europe Parliamentary Assembly, Resolution 1728(2010) on discrimination on the basis of sexual orientation and gender identity; Resolution 2048(2015) on discrimination against transgender people in Europe; Resolution 2191(2017) promoting the human rights of and eliminating discrimination against intersex people.

⁸² Council of Europe Commissioner for Human Rights, Human Rights and Gender Identity, 2009.

⁸³ Inter-American Court for Human Rights, Advisory Opinion OC-24/17 of 24 November 2017 on gender identity and equality and non-discrimination of same-sex couples, para. 146.

⁸⁴ European Committee of Social Rights, 117/2015, Transgender Europe and ILGA-Europe v. the Czech Republic.

⁸⁵ Marjolein van den Brink, Peter Dunne, A comparative analysis of Trans and Intersex Equality Rights in Europe, 2018, pp.60-63, Among the European Union and EFTA jurisdictions only 7 States require surgery as a condition for gender marker change.

⁸⁶ See <https://tgeu.org/trans-rights-map-2017/>.

⁸⁷ European network of legal experts in gender equality and non-discrimination, Trans and intersex equality rights in Europe – a comparative analysis, November 2018, European Commission, p. 59.

⁸⁸ E.g. ECtHR, Alajos Kiss v. Hungary, para. 42.

⁸⁹ Council of Europe Commissioner for Human Rights, Human Rights and Gender Identity, 2009, p. 14. and Council of Europe Parliamentary Assembly, Resolution 1728(2010) on discrimination on the basis of sexual orientation and gender identity.

⁹⁰ E.g. ECtHR, Horváth and Kiss v. Hungary, para. 128.

4.1. Council of Europe recommendations and previous ECtHR gender recognition cases

Former Commissioner for Human Rights, Thomas Hammarberg⁹¹, the Committee of Ministers⁹² and the Parliamentary Assembly⁹³ all stress the fact that mandatory medical procedures that go against the wishes of the affected persons violate those persons' right to physical integrity. This idea can also be found in the case of *A.P., Garçon and Nicot v. France*. In its analysis of the proportionality, the Court states that medical procedures that lead to "irreversible changes in appearance" interfere with a person's right to physical integrity, which is protected not only under Article 8 but also under Article 3 of the Convention.⁹⁴ It is important to note that in this case, the request to examine the case under Article 3 was only declared inadmissible on the grounds of non-exhaustion of domestic remedies.⁹⁵ If, in the present case, the petition under Article 3 of a trans* person who does not want to undergo sex reassignment surgery is found admissible, we respectfully invite the Court to find that mandatory surgery as a requirement for gender recognition violates their physical integrity under Article 3 of the Convention.

4.2. Vulnerability, consent and the "impossible dilemma" as factors in Article 3 considerations

With regards to the essential aspect of consent in medical procedures, we would like to point to the reasoning of the Court in the cases regarding the non-consensual sterilisation of Roma women.⁹⁶ In these cases, the Court stated that situations where members of vulnerable groups could be affected by medical procedures require particular scrutiny with regards to obtaining those persons' full and informed consent. Since the Roma women's full and informed consent had not been obtained, the Court ruled that there had been a violation of their physical integrity under Article 3 in every one of these cases.

Sex reassignment surgery is undeniably a medical procedure. As we have argued, the discrimination, stigmatising and stereotyping faced by trans* persons make them a particularly vulnerable group. Furthermore, organs of the Council of Europe have stated that making gender recognition dependent on mandatory surgery violates the principle of full and informed consent.⁹⁷ Consequently, using the weight of gender recognition to pressure a trans* person into undergoing a surgery they would otherwise not want goes against the full and informed consent of a member of a vulnerable group, and therefore violates that person's right to physical integrity under Article 3. This line of reasoning has also been confirmed in the European Committee of Social Rights' recent decision in the case of *Transgender Europe and ILGA-Europe v. Czech Republic*: "The Committee considers that the condition attached for the recognition of a transgender person's gender identity vitiates free consent, and therefore such a requirement violates physical integrity [and] operates contrary to the notion of human dignity."⁹⁸

The ECSR also refers to the impossible dilemma trans* persons face when gender recognition is made dependent on medical treatment.⁹⁹ Trans* persons who do not want to undergo certain procedures are forced to make an impossible choice. Do they undergo painful, time-consuming, often expensive procedures that permanently alter their body? Or do they renounce being recognised as their gender and give up all the rights gender recognition would afford them? This is an inhuman choice that no one should be forced to make. In this regard, the ECSR points to the fact that the ECtHR has already acknowledged the existence of this impossible dilemma with regards to mandatory sterilisation in the case of *A.P., Garçon and Nicot v. France*, and has explicitly condemned it.¹⁰⁰ This reasoning can be applied similarly to mandatory sex reassignment surgery and other compulsory medical procedures¹⁰¹, which therefore violate Article 3 of the Convention.

⁹¹ Council of Europe Commissioner for Human Rights, Human Rights and Gender Identity, 2009, p. 8.

⁹² Council of Europe Committee of Ministers, Recommendation (2010)5 on measures to combat discrimination on grounds of sexual orientation and gender identity, para. 35.

⁹³ Council of Europe Parliamentary Assembly, Resolution 2048 (2015) on Discrimination against transgender people in Europe, para. 3.

⁹⁴ ECtHR, *A.P., Garçon, Nicot v. France*, 79885/12, Judgment of 6 April 2017, para. 126-127.

⁹⁵ ECtHR, *A.P., Garçon, Nicot v. France*, 79885/12, Judgment of 6 April 2017, para. 89-90.

⁹⁶ ECtHR, *V.C. v. Slovakia*, 18968/07, Judgment of 16 June 2009; ECtHR, *N.B. v. Slovakia*, 29518/10, Judgment of 12 June 2012; ECtHR, *I.G., M.K. and R.H. v. Slovakia*, 15966/04, Judgment of 13 November 2012.

⁹⁷ Council of Europe Committee of Ministers, Recommendation (2010)5 on measures to combat discrimination on grounds of sexual orientation and gender identity, 35.

⁹⁸ European Committee of Social Rights, 117/2015, *Transgender Europe and ILGA-Europe v. the Czech Republic*, para. 86.

⁹⁹ European Committee of Social Rights, 117/2015, *Transgender Europe and ILGA-Europe v. the Czech Republic*, para. 77.

¹⁰⁰ European Committee of Social Rights, 117/2015, *Transgender Europe and ILGA-Europe v. the Czech Republic*, para. 83.

¹⁰¹ European Committee of Social Rights, 117/2015, *Transgender Europe and ILGA-Europe v. the Czech Republic*, para. 83.