

IN THE EUROPEAN COURT OF HUMAN RIGHTS

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(Application no. 459/16)

WRITTEN COMMENTS
submitted jointly by

Transgender Europe
ILGA Europe
Greek Transgender Support Association
International Committee on the Rights of Sex Workers in Europe

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I. Introduction

1. These written comments are submitted on behalf of Transgender Europe (TGEU), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), the Greek Transgender Support Association (GTSA) and the International Committee on the Rights of Sex Workers in Europe (ICRSE), pursuant to leave granted by the President of the First Section on 29 May 2017.¹ The facts of the present case are representative of wider patterns of state persecution of (trans) sex workers² in Greece and beyond, which typically include assault and arbitrary arrest. Accordingly, these written comments will outline the evidence available in that respect and describe the features of that phenomenon. Next, these written comments will analyze the positive obligations of States to protect the rights of (trans) sex workers against violence and discrimination based on gender identity under Article 14, in conjunction with Articles 3 and 5 of the Convention, from the perspective of international and comparative law.

2. In light of the information included in these written comments, the intervening organizations would urge the Court to acknowledge the institutional nature of police violence against (trans) sex workers in Greece.³ Furthermore, the Court is respectfully asked to clarify that the principles developed in its jurisprudence on Article 14 in relation to hate crime perpetrated on other grounds such as race or sexual orientation also apply in relation to violence based on gender identity, in particular the obligation to investigate the presence of impermissible bias.⁴ Although the Court has previously mentioned in passing that gender identity is a protected characteristic under Article 14 of the Convention, it has yet to find a breach in that respect.⁵ The intervening organizations would also urge the Court to integrate the notions of institutional bias and intersectional discrimination into its Article 14 analysis, including by properly framing the shortcomings of the official investigation carried out at the national level.

II. Violence against (transgender)⁶ sex workers

3. This section describes the patterns of state violence against sex workers, some of its drivers, the possible causes for a disproportionate presence of trans people among sex workers, some information regarding the prevalence of violence among the general trans

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

² The Joint United Nations Programme on HIV/AIDS (UNAIDS) defines sex workers as “female, male and transgender adults and young people who receive money or goods in exchange for sexual services, either regularly or occasionally, and who may or may not consciously define those activities as income-generating.” UNAIDS, *Sex work and HIV/AIDS*, UNAIDS Technical Update (2002), p. 3. The Special Rapporteur on the right to health also noted that “no single term adequately covers the range of transactions worldwide that involve sex work”, and that “the term “sex worker” is increasingly used within the sector, as it is considered less stigmatizing and a better descriptor of workers’ experiences than the word ‘prostitute’”, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover*, A/HRC/14/20, §28, 27 April 2010.

³ See, *mutatis mutandis*, the case *Opuz v. Turkey*, in which the Court made a finding of institutional tolerance of sexism among law enforcement authorities: “domestic violence is tolerated by the authorities and that the remedies indicated by the Government do not function effectively”; “the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence”, *Opuz v. Turkey*, no. 33401/02, §196-197, ECHR 2009

⁴ See, *mutatis mutandis*, *Identoba and Others v. Georgia*, no. 73235/12, §80, 12 May 2015 or *Turan Cakir v. Belgium*, no. 44256/06, §81, 10 March 2009.

⁵ *Identoba and Others v. Georgia*, no. 73235/12, §96, 12 May 2015; *P.V. v. Spain*, no. 38305/97, § 30, 14 November 2000.

⁶ The notions of ‘trans’ and ‘transgender’ are used interchangeably throughout this brief.

populations as well as among trans sex workers, and obstacles blocking access to justice for these groups.

4. Research cited by the United Nations Special Rapporteur on the Right to Health suggests that approximately 80% of sex workers have been assaulted in the course of their work, often perpetrated by “those in a position of authority”.⁷ Detailed studies on the situation in selected countries from Eastern Europe and Central Asia confirm that sex workers are confronted with high levels of violence from the part of state and non-state actors. Thus, 41.7% (86/206) of respondents in a survey published in 2010 reported physical abuse, while 36.5% (77/211) sexual abuse perpetrated by the police.⁸ A study published in 2015 returned similar results: 40% of the respondents had been arrested during the previous year, one in five experienced physical violence and one in seven experienced sexual violence by the police.⁹ Physical and sexual violence by the police reportedly occurs in the course of arrest and detention, or under the threat of arrest and detention.¹⁰ Other commonly encountered forms of violence include extortion, seizure of condoms and safe injecting equipment, forced testing for HIV and sexually transmitted infections (STIs).¹¹

5. Violence is often the result of legal frameworks that directly or indirectly criminalize sex work, the lack of political will to create programs to support sex workers and entrenched religiously or culturally inspired stigma against sex work.¹² The U.N. Special Rapporteur on the Right to Health explained that criminalization may occur through explicit criminal law provisions banning sex work or various practices around sex work, as well as through the use of other pre-existing laws (not specific to sex work) to harass sex workers, such as vagrancy or public nuisance laws.¹³ Turkey provides a good example of how ‘facially-neutral’ regulations are misused to persecute trans sex workers. HRW noted that new legislation adopted in 2005, purporting to “protect the public order, general morality, general health, the environment, and the economic order”, introduced a whole range of misdemeanors, including begging, gambling, drunkenness, making noise, disturbing the peace, occupying the street or polluting the environment.¹⁴ In addition, in 2007, police were given wide powers to stop and search people and vehicles. The police relied on these regulations to justify detaining and fining numerous trans sex workers in Istanbul and other large cities across Turkey.

6. Deep-seated societal stigma and discrimination, as well as the absence of adequate legal gender recognition procedures or funding for gender reassignment treatment, may push trans people towards riskier or illicit occupations, including sex work. The recently appointed U.N. Independent Expert on protection against violence and discrimination based on sexual orientation and gender identify (‘the Independent Expert’) highlighted the mechanism whereby many trans people turn to sex work as follows: “*in many countries, they are often*

⁷ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, A/HRC/14/20, §41, 27 April 2010.

⁸ Sex Workers’ Rights Advocacy Network, *Arrest the Violence: Human Rights Abuses against Sex Workers in Central and Eastern Europe and Central Asia*, November 2009, p. 20.

⁹ Sex Workers’ Rights Advocacy Network, *Failures of Justice: State and Non-State Violence against Sex Workers and the Search for Safety and Redress*, May 2015, p. 13, 28-29.

¹⁰ *Idem*, p. 48.

¹¹ *Idem*, p. 30-31.

¹² Global Network of Sex Work Projects, *The Needs and Rights of Trans Sex Workers: Briefing Paper No. 09*, 2014, p. 2.

¹³ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, A/HRC/14/20, §29, 27 April 2010.

¹⁴ Human Rights Watch, “*We Need a Law for Liberation*”: *Gender, Sexuality, and Human Rights in a Changing Turkey*, 2008, p. 65-66. Also see Amnesty International, “*Not an Illness nor a Crime*”: *Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality*, 2011, p.14-15.

bullied at school, are then pushed out onto the streets and then land up in clandestine professions. They face huge hurdles in accessing other kinds of work and are challenged daily by issues such as access to health care, access to housing, getting an adequate standard of living, and personal safety."¹⁵ The Independent Expert also emphasized that "non-recognition [of trans people] is interlinked with the environment that leads to violence and discrimination".¹⁶

7. Studies suggest that trans people in general suffer from comparatively higher levels of violence. According to a comprehensive EU Agency for Fundamental Rights ('FRA'), the annual incidence rate of violence or harassment was around one incident per two trans respondents, whereas about two in five (44%) trans respondents who were victims of violence in the 12 months preceding the survey indicated that this happened three or more times during this period.¹⁷ According to information released recently under TGEU's Trans Murder Monitoring Project, 64% of the 2,343 trans people murdered in 69 countries across the world since 2008, where the profession was known, were sex workers, often also migrants.¹⁸ The European countries with the highest recorded number of homicides were Turkey with 44 and Italy with 42 reports. A recent report on hate crime against trans people documented several cases of violence perpetrated against trans sex workers in Armenia and Georgia, including one that resulted in the victim's death.¹⁹

8. According to another study, trans sex workers in Eastern Europe and Central Asia face higher levels of violence by police than their cisgender peers, as well as being the object of public humiliation and taunting based on their gender identity or gender expression.²⁰ Human Rights Watch ('HRW') reported that trans sex workers in Turkey are vulnerable to police abuse in the form of "arbitrary arrest, prohibitive fines, and repressive regimes of medical testing."²¹ Half of the 233 respondents in a 2014 survey among trans women sex workers in Turkey stated that they had experienced physical violence from police officers.²² A third of the respondents stated that they had experienced violence inside police stations. At the same time, the vast number of incidents of violence experienced on the streets were also perpetrated by the police.

9. This brief account suggests that violence perpetrated on trans sex workers is trebled based on an intersection of personal factors, including transphobia and deeply seated societal stigma against sex work. The Independent Expert emphasized the fact that violence and

¹⁵ *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, A/HRC/35/36, 19 April 2017, §59.

¹⁶ *Idem*, §57.

¹⁷ European Union Agency for Fundamental Rights, *Being Trans in the EU: Comparative Analysis of the EU LGBT survey Data (Summary)*, 2014, p. 6-10.

¹⁸ *Trans Day of Visibility 2017 Press Release: 2,343 trans people reported murdered in the last 9 years*, 30 March 2017, available here: <http://transrespect.org/en/tdov-2017-tmm-update/>.

¹⁹ TGEU, *For the record: Documenting violence against trans people - Experiences from Armenia, Georgia, Germany, Moldova, Russia, and Ukraine*, December 2016, p. 16 and 23.

²⁰ Sex Workers' Rights Advocacy Network, *Arrest the Violence: Human Rights Abuses against Sex Workers in Central and Eastern Europe and Central Asia*, November 2009, p.28-29. As opposed to cisgender men and women, who often occupy more secure, indoor sex work locations, trans sex workers often work outdoors. The added visibility may also help explain the higher rates of violence against them. Global Network of Sex Work Projects, *The Needs and Rights of Trans Sex Workers: Briefing Paper No. 09*, 2014, p. 4.

²¹ Human Rights Watch, *"We Need a Law for Liberation": Gender, Sexuality, and Human Rights in a Changing Turkey*, 2008, p. 9.

²² Balzer, C./LaGata, C. and Dutta, J. S. (2015), *Transrespect versus Transphobia: The Social Experiences of Trans and Gender-diverse People in Colombia, India, the Philippines, Serbia, Thailand, Tonga, Turkey and Venezuela*, Berlin: Flyeralarm, p. 70.

discrimination become aggravated when “intersecting in a variety of ways, and most clearly where the victim is not only attacked or discriminated against for having a different sexual orientation and gender identity but also on grounds of race, ethnic origin, age, gender, or membership of a minority or indigenous community.”²³ Other constituencies among trans sex workers, such as ethnic minorities or migrants, similarly suffer from additional disadvantage based on multiple characteristics. A report published in 2009 that interviewed twenty-seven Roma sex workers from Bulgaria, Serbia, Macedonia and Slovakia concluded that they suffered higher level of physical and sexual violence, as well as racist treatment.²⁴ According to another study, the main vulnerability factors for migrant sex workers in 25 European countries were the increased risk of violence, the precarious legal status, the social exclusion, lack of access to health and social services and increased discrimination.²⁵

10. The FRA found that hate crime targeting trans people remains mostly unreported, with one out of five having reported the most recent hate-motivated incident and one in four the most serious one.²⁶ Reasons for not reporting include a deep mistrust of police authorities, fear of a homophobic and/or transphobic reaction from the police, or, in the case of hate-motivated harassment, respondents most often say that the incident was too minor to be reported, or that it did not occur to them that they could report it. According to another report, among the major factors explaining the high rate of under-reporting of violence perpetrated by the police are the risk of retaliation, threats from the part of police and other relevant parties such as brothel owners, as well as the structural nature of violence, often perpetrated under an appearance of legality.²⁷ Even when complaints are duly lodged, police often refuse to register or investigate the allegations in question, effectively blocking the victims’ access to justice and safety.

III. Violations of trans sex workers’ rights in Greece

11. Trans people in Greece experience severe isolation, discrimination, prejudice and exclusion on the basis of their gender identity, particularly in relation to accessing and holding employment. Notably, until March 2013, when gender identity as an aggravating circumstance was added to the law on hate crime, Greece lacked any references to trans people in its national law.²⁸ According to a FRA study, 37% of trans respondents from Greece felt discriminated against in the year preceding the survey, 43% said it was not safe to express their gender identity in specific places, while 32% avoided it altogether.²⁹ Robust and accessible gender recognition procedures are still lacking, leaving many trans people without documents and educational certificates that match their gender identity and thus hindering

²³ *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, A/HRC/35/36, 19 April 2017, §39.

²⁴ Sex Workers’ Rights Advocacy Network, *Arrest the Violence: Human Rights Abuses against Sex Workers in Central and Eastern Europe and Central Asia*, November 2009, p.28-29.

²⁵ European Network for HIV/STI Prevention and Health Promotion among Migrant Sex Workers, *Sex work in Europe: A mapping of the prostitution scene in 25 European countries*, 2009, p. 39-42. Also see the detailed testimony in TGEU, *For the record: Documenting violence against trans people - Experiences from Armenia, Georgia, Germany, Moldova, Russia, and Ukraine*, December 2016, p. 16.

²⁶ European Union Agency for Fundamental Rights, *Being Trans in the EU: Comparative Analysis of the EU LGBT survey Data (Summary)*, 2014, p. 8-9.

²⁷ Sex Workers’ Rights Advocacy Network, *Arrest the Violence: Human Rights Abuses against Sex Workers in Central and Eastern Europe and Central Asia*, November 2009, p. 52-54.

²⁸ GTSA Press release of 7 March 2013. All GTSA press releases referenced in this section are available here: <https://transgendersupportassociation.wordpress.com>.

²⁹ FRA, *Being Trans in the EU-Comparative analysis of the EU LGBT survey data*, 2014, <http://fra.europa.eu/en/publication/2014/being-trans-eu-comparative-analysis-eu-lgbt-survey-data>, p. 25.

their access to the regular job market.³⁰ In order to make ends meet, many trans women turn to sex work, suffering additional stigma as a result.

12. Trans sex workers often face systematic persecution, in the form of police crackdowns targeting marginalized groups. An early example is the Operation Xenios Zeus, launched on 4 August 2012, which focused on controlling illegal immigration, but which also had one component aimed at “remaking Athens a city of law and improving the quality of life for residents and visitors.”³¹ The Greek Centre of Control and Disease (CDC) and the police rounded up hundreds of women and force-tested them for HIV and other STIs, based on regulation Order GU/39A on the transmission of infectious diseases that has in the meantime been overturned.³² Seventeen women who tested positively were detained for months and had their photos and names published on the grounds of protecting public health. High-level officials referred to sex workers specifically during speeches given on that occasion. For example, the prime minister at the time, Antonis Samaras, stated that: “We must take back our cities, where the illegal trade in drugs, prostitution, and counterfeit goods is booming. There are many diseases and I am not only speaking about Athens, but elsewhere too.”³³

13. On 9 August 2012, twenty-five trans women were arrested for no other reason than being present in an area of the Athens where soliciting for sex was taking place. The trans women were taken to the police station, where they were retained for three to four hours for I.D. verification and force-tested for HIV and other STIs.³⁴ Although they were informed that no charges would be brought against them and they were not suspected of having violated a law, their case-files were sent to the court without their knowledge. Police officers insulted and verbally abused the women because of their gender identity and misgendered them in the police report, clearly intending to humiliate them. They were ultimately acquitted of all charges brought against them (prostitution, acts against public morality and harassment of passers-by). In one of those cases, the court accepted the defendant’s argument that the gender identity of a trans person and her presence in a specific location did not mean that she practiced sexual work, let alone that she “harassed” passers-by. On the contrary, pressing charges merely on the basis of this coincidence criminalized gender identity, which could not be tolerated in a democratic society³⁵.

Police officers also threatened the victims with press charges for resistance and non-compliance with a lawful order in case they lodged complaints.

14. In August 2012, Operation Xenios Zeus was replaced with Operation Theseus, which targeted crime in Athens, particularly drug use and offences associated with sex work, and which was heavily based on overly broad police powers to stop people, require them to provide proof of their identity and take them to the police stations for further verification.³⁶ HRW documented abusive stops and searches, police ill treatment, and arbitrary deprivation of liberty in the context of this operation. In particular, although Greek law does not

³⁰ See for example Bureau of Democracy, Human Rights and Labour, *Country Reports on Human Rights Practices for 2014: Greece*, available here:

<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dliid=236530>.

³¹ Human Rights Watch, *Unwelcome Guests: Greek Police Abuses of Migrants in Athens*, 2013, https://www.hrw.org/sites/default/files/reports/greece0613_ForUpload.pdf, p. 13.

³² Available here: http://www.dsnet.gr/Epikairothta/Nomothesia/ya39a_12.htm (in Greek).

³³ Human Rights Watch, *Unwelcome Guests: Greek Police Abuses of Migrants in Athens*, 2013, https://www.hrw.org/sites/default/files/reports/greece0613_ForUpload.pdf, p. 12

³⁴ GTSA press release of 17 August 2012.

³⁵ GTSA press release of 15 April 2013.

³⁶ Human Rights Watch, *Greece: Police Abusing Marginalized People*, 6 March 2015, <https://www.hrw.org/news/2015/05/06/greece-police-abusing-marginalized-people>.

criminalize sex work or homelessness, it does include vague administrative and criminal offenses that affect people selling sex and the destitute. According to HRW, a person engaging in sex work on the street without a work permit may be fined up to €3,000. One of the individuals interviewed who said she sold sex, stated that in May 2014, police were stopping her at least three or four times a day. Only a handful of the identity checks that took place during this time led to arrest or prosecution for offenses related to sex work, drug use or other offences. In early February 2015, shortly after coming to power, the Tsipras Government announced that Operation Theseus would be replaced with a policing plan for the centre of Athens that included targeted operations against people suspected of engaging in illegal trade such as selling pirated or copyright-protected products, using or selling drugs, or begging, as well as “women sex workers”.

15. Between 30 May and 21 July 2013, the Thessaloniki police organized daily “sweeping” operations targeting trans women, not dissimilar to the above-mentioned practices of their counterparts in Athens. The present case took place against the background of these police operations. Trans women were routinely arrested and detained in the police station of Demokratias Square for three to four hours or even longer, for the purposes of I.D. verification and identification as sex workers. There, trans women were subjected to harassment, including taunting and intentional misgendering. Police also reportedly stopped trans women while they were driving and arrested them without providing any justification. Any complaints of ill treatment were met with threats of retaliation.

16. Trans women, backed by civil society, challenged the police’s abusive actions. On 18 June 2013, several trans women organized a peaceful street sit-in.³⁷ Representatives of GTSA met with the head of the Thessaloniki police, who acknowledged that the police had acted improperly and committed to take measures to resolve the problem.³⁸ After this meeting, the systematic harassment of trans women stopped. The victims initiated several lawsuits that ended however with the perpetrators’ acquittal.³⁹ The Prosecutor of the Thessaloniki First Degree Court, stated that the police officers were right to suspect the authenticity of the trans women’s IDs, taking into account the circumstances (place, late night hours, trying to leave when police arrive, I.D.s with male pictures).⁴⁰ The Prosecutor reasoned that the arbitrary arrest of trans women who were present in a specific location at night-time was justified solely based on their gender identity, even in cases where they were pulled out of their cars. The Prosecutor also considered the police officers’ practice of misgendering the victims as justified by the gender markers recorded in their ID documents. This assessment is in breach of specific instructions issued by the Greek Ombudsman, to the effect that “the concept of gender identity must be taken into consideration and gender self-identification must be respected, regardless of the gender marker found in the person’s ID or other identification documents.”⁴¹

17. Responding to questions raised by some MPs, the Minister of Public Order and Citizen Protection, Nikos Dendias, defended the “targeted police actions” of the “Special Operational Action Plan” by the Thessaloniki police “tackling, among others, prostitution and exploitation of the sexual life of socially and economically vulnerable individuals, enhancing

³⁷ GTSA press release of 19 July 2013.

³⁸ GTSA press release of 22 July 2013 (in Greek).

³⁹ GTSA press release of 27 February 2015 (in Greek).

⁴⁰ *Idem*.

⁴¹ Greek Ombudsman, *Diversity Guide for Civil Servants to Combat Discrimination*, available here: <https://www.synigoros.gr/resources/web.pdf> (in Greek).

citizens' feeling of safety and to improve the image of the above mentioned areas".⁴² These operations, including most prominently the applicants' arrest on 4 June 2013, received strong criticism from national and international human rights organizations⁴³, and Members of the European Parliament.⁴⁴

18. GTSA reports further that those trans women who have pressed charges have been pressured by police officers to either change their testimonies or to withdraw their lawsuits. As a result, at least one victim changed her original testimony, she told GTSA: "I wish the criminal prosecution of the perpetrators of these crimes against us and our lawyer, although I fear that I will face retaliation, because such things should not happen in a democracy."⁴⁵ The disciplinary investigation into the conduct of the police officers for potential violations of the law on hate crimes revealed further flaws. Questions put forward to the police officers were phrased as "do you hate them personally", which disorientated the investigation, as the answers that were given were regarded as "personal hatred" and not motivated by the gender identity of the victims.

19. In its last report on Greece, the European Commission on Racism and Intolerance (ECRI) noted that "harassment [of trans people] by the police is a common phenomenon" and urged the Greek authorities "to issue a clear instruction to all police officers that transgender persons should not be fined for alleged prostitution offences merely due to their identity and appearance."⁴⁶ For its part, the Human Rights Committee noted the high prevalence in Greek society of stereotypes and prejudice against transgender people and expressed concern about "the lack of an adequate official response to complaints relating to discrimination on the grounds of sexual orientation and gender identity."⁴⁷ Consequently, it called on the Greek authorities "to provide appropriate training to public officials to end social stigmatization of lesbian, gay, bisexual and transgender persons" and to "ensure that all reports of violence against [transgender persons be] promptly and effectively investigated and that perpetrators of violence on the grounds of sexual orientation [be] prosecuted and sanctioned."⁴⁸

IV. Positive obligations to protect trans sex workers under comparative and international law

20. This section begins by outlining regional and global standards underpinning the states' positive obligation to protect trans sex workers from violence. Next, it enumerates selected judgments from this Court and national tribunals grappling with claims resulting from the climate of insecurity blighting sex workers' lives, often caused by pervasive legal vacuum and considerable stigma. These judgments provide a useful illustration for the patterns of violence and inequality outlined above.

⁴² GTSA press release of 6 July 2013.

⁴³ GTSA press releases of 21 June 2013 and 25 June 2013.

⁴⁴ LGBT Intergroup of the European Parliament, *Greece: MEPs concerned by police harassing and arresting trans women*, <http://www.lgbt-ep.eu/press-releases/greece-meps-concerned-police-harassing-arresting-trans-women/>, 28 June 2013

⁴⁵ GTSA Press release of 27 February 2015, paragraph 6

⁴⁶ *ECRI Report on Greece*, 24 February 2015, p. 10-11.

⁴⁷ *Concluding observations on the second periodic report of Greece*, CCPR/C/GRC/CO/2, 3 December 2015, §11.

⁴⁸ *Idem*, §12.

a) Legal standards

21. The Committee of Ministers 2010 recommendation on measures to combat discrimination on grounds of sexual orientation and gender identity highlighted the need for effective investigation of transphobic crime, particularly when perpetrated by law-enforcement agents, as well as for taking into account a bias motive related to gender identity at the sentencing stage.⁴⁹ By a resolution adopted in 2015, the Parliamentary Assembly called on Council of Europe Member States to “enact hate crime legislation which affords specific protection for trans people against transphobic crimes and incidents” as well as “provide specific training to sensitize law-enforcement officials and members of the judiciary”⁵⁰ Notably, thirteen Council of Europe Member States currently take into account gender identity as an aggravating factor in their hate crime legislation.⁵¹

22. The *Convention on Preventing and Combating Violence against Women* (‘the *Istanbul Convention*’), which enjoins State Parties to take comprehensive measures to prevent violence against women, protect its victims and prosecute the perpetrators, operates with a definition of gender as “socially-constructed” and is to be implemented without discrimination based on gender identity.⁵² The *Victims’ Rights Directive* establishing minimum standards on the rights, support and protection of victims of crime, applies to all individuals “without discrimination of any kind, including on the grounds of gender, gender identity and gender expression.”⁵³

23. The above-mentioned Committee of Ministers Recommendation also called on states to take measures that facilitate the reporting of transphobic crimes, including through training law enforcement officers and providing victim support.⁵⁴ In that respect, some states adopted specific guidelines covering the interactions between police and trans people in various circumstances. For example, guidelines adopted in the United Kingdom acknowledge that trans sex workers face “severe stigmatization” and “isolation”, while noting that “sex work is one of a few viable options for trans people in order to fund their treatments and experiencing difficulty in finding other forms of employment”.⁵⁵ The guidelines offer advice in relation to identifying crime that trans sex workers may be a victim of, providing multi-disciplinary support or adequate pronoun usage.

24. At the U.N. level, a mandate of Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity was established by the Human Rights Council in 2016. In 2017, the Independent Expert published his first report,

⁴⁹ *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, 31 March 2010, Section I.A.

⁵⁰ Parliamentary Assembly, *Discrimination against Transgender people in Europe*, Resolution 2048(2015), §6.1.4.

⁵¹ TGEU, *Trans Rights Europe Index 2017*, available here: <http://tgeu.org/wp-content/uploads/2017/05/Index-online.png>.

⁵² *Council of Europe Convention on preventing and combating violence against women and domestic violence*, Articles 3 and 4§3

⁵³ *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, Recital 9. Notably, another piece of E.U. law, the *Asylum Qualification Directive* (2011/95/EU), mentions gender identity. Thus, Art. 10d provides that “gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.”

⁵⁴ *Recommendation CM/Rec(2010)5*, Section I.A.

⁵⁵ The National Police Chiefs’ Council (NPCC), *National Policing Sex Work Guidance*, 2015, available here: <https://www.app.college.police.uk/app-content/major-investigation-and-public-protection/prostitution/>.

outlining the nature of the problems his mandate was designed to address and setting out a programme of work.⁵⁶ Notably, the Human Rights Committee has recently clarified for the first time, in a legal gender recognition case, that “prohibition of discrimination under Art. 26 [of ICCPR] covers marital status and gender identity, including transgender status.”⁵⁷

25. Even before the Independent Expert mandate was established, different Treaty Bodies highlighted the issue of violence based on gender identity in different countries. For example, in its concluding observations on Kyrgyzstan, the CEDAW Committee highlighted the disadvantaged situation of different groups of women including trans women, calling on the State party to “ensure access to sustainable, non-discriminatory and non-prejudiced services, such as shelters, sexual and reproductive health services, legal aid and counseling, and employment [...], and protect them from violence, abuse and exploitation.”⁵⁸ Notably, in the same report, the Committee also drew attention to “the widespread violence and discrimination against women in prostitution, in particular by the police, the performance of illegal forced testing for HIV/AIDS and other sexually transmitted diseases on them, the limited assistance available to them, including the absence of specific shelters and crisis centers adapted for their needs.”⁵⁹

26. During a public hearing held on 23 March 2017, the Inter-American Commission on Human Rights heard information about the critical situation of female sex workers in the Americas, including with respect to the high rate of killings, the barriers faced in terms of access to justice and the institutional violence carried out by security forces, judicial officials and other state agents.⁶⁰ On this occasion, the Commission called on States in the region to design regulations and public policies that guarantee sex workers’ human rights, including measures to protect their lives, their integrity, and their honor and dignity, as well as to put an end to the stigma and discrimination against them.

b) Relevant jurisprudence

27. The applicant in *Halat v. Turkey*,⁶¹ a trans woman, complained that she had been arrested while on her way home and held at the police station for approximately eight hours under the pretext that she was a sex worker. She claimed that during this time a police officer ill-treated her by pressing a truncheon against her genitals and chest, forcing her to show him her breasts, ordering her to leave her home and the area, threatening to kill her and to dispose of her body in a forest, and by hitting her on the hands, back and buttocks, allegations corroborated by medical evidence. The Court found a procedural violation of Article 3 of the Convention based on the excessive length of the official investigation (more than eight years) and the authorities’ failure to undertake crucial investigatory steps.

28. The case *B.S. v. Spain*⁶² concerned a sex worker of Nigerian origin who complained that two police officers repeatedly physically ill-treated and racially abused her while she was working on a street in Palma de Mallorca. The Court found a procedural violation of Article 3

⁵⁶ *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, A/HRC/35/36, 19 April 2017.

⁵⁷ HRC, *G. v. Australia*, Communication no. 2172/2012, 17 March 2017, §7.12.

⁵⁸ *Concluding observations on the fourth periodic report of Kyrgyzstan*, CEDAW/C/KGZ/CO/4, 11 March 2015, §33-34.

⁵⁹ *Idem*, §21.

⁶⁰ *IACHR Holds First Hearing on the Rights of Sex Workers in the Americas*, 23 March 2017, press release available here: http://www.oas.org/en/iachr/media_center/PReleases/2017/036.asp.

⁶¹ *Halat v. Turkey*, no. 23607/08, 8 November 2011.

⁶² *B.S. v. Spain*, no. 47159/08, 24 July 2012.

on account of various shortcomings in the official investigation, as well as a procedural violation of Article 14 in conjunction with Article 3, based on the authorities' failure to investigate the police officers' allegedly racist attitudes. Notably, the Court noted that the authorities failed to undertake an intersectional analysis, by taking into account the applicant's "special vulnerability inherent in her situation as an African woman working as a prostitute."⁶³

29. In *Sex Worker Education and Advocacy Taskforce v. Minister of Safety and Security and Others*,⁶⁴ a non-governmental organization complained about the police practice of arresting sex workers with the knowledge that prosecutions would not follow, for the ulterior purpose of harassing, punishing or intimidating them. Some sex workers had been arrested hundreds of times for short periods of time, only to be released without prosecution and without the arrest being properly recorded in police registers. Fourie, J., for the High Court of South Africa, noted "the police officers, who effected the arrests of the sex workers during the relevant period, did not do so with the required object or purpose of having the sex workers prosecuted," seeing that "they knew with a high degree of probability that no prosecutions would follow". Fourie, J. concluded that "a police officer who arrests a person, knowing with a high degree of probability that there will not be a prosecution, acts unlawfully even if he or she would have preferred a prosecution to have followed the arrest" and ordered the respondents to discontinue the impugned practice. On this point, it is worth mentioning that the *Yogyakarta Principles* emphasized the States' duty under international law to "take all necessary legislative, administrative and other measures to ensure that sexual orientation or gender identity may under no circumstances be the basis for arrest or detention, including the elimination of vaguely worded criminal law provisions that invite discriminatory application or otherwise provide scope for arrests based on prejudice."⁶⁵

30. In a recent judgment,⁶⁶ the Supreme Court of Canada struck down as unconstitutional several provisions regulating sex work in the Criminal Code. The Supreme Court reasoned that the provisions in question "do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing dangerous conditions on prostitution; they prevent people engaged in a risky – but legal – activity from taking steps to protect themselves from the risks." For example, the prohibition on operating or being found in a "bawdy house", although animated by a legitimate purpose, that of preventing community disruption or harm to the community in the form of a nuisance, was disproportionate, considering the negative impacts in terms of the sex workers' "health, safety and lives".

⁶³ *Idem*, §62.

⁶⁴ *The Sex Worker Education and Advocacy Taskforce v Minister of Safety and Security and Others* (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009).

⁶⁵ International Commission of Jurists, *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, March 2007, Principle 7.A. Notably, the *Yogyakarta Principles* have been referred to by the Court, in an implicit acknowledgment of their status as an authoritative articulation of international law as applied to LGBT people - see *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014, joint dissenting opinion of Judges Sajó, Keller and Lemmens.

⁶⁶ *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101.