



European Court of Human Rights – *Savinovskikh and Others v Russia* (App. No. 16206/19)

Third-Party Intervention

[American Civil Liberties Union \(ACLU\)](#); [Canadian Civil Liberties Association \(CCLA\)](#); [Centro de Estudios Legales y Sociales \(CELS\)](#); [Centro de Estudios de Derecho, Justicia y Sociedad \(Dejusticia\)](#); [Human Rights Law Network \(HRLN\)](#); [Hungarian Civil Liberties Union \(HCLU\)](#); [Irish Council for Civil Liberties \(ICCL\)](#); [Kenya Human Rights Commission \(KHRC\)](#); [KontraS \(Commission for the Disappeared and Victims of Violence\)](#); [Legal Resources Centre \(LRC\)](#)

1. Introduction

This third-party intervention provides an overview of international, regional and comparative human rights standards on the prohibition of discrimination due to gender identity. The case, *Savinovskikh and Others v Russia*, raises important questions regarding equality for trans¹ people in their enjoyment of private and family life. This third-party intervention identifies and explains a continuing international trend towards the recognition of a right to non-discrimination on the ground of gender identity. Drawing upon case studies and jurisprudence from the United Nations (Section 2), regional (Section 3) and domestic (Section 4) rights systems, the intervention illustrates an emerging consensus in favour of equal treatment and dignity for trans individuals.

2. United Nations Human Rights System

2.1. United Nations Human Rights Council

Through a series of resolutions since 2011,² the United Nations Human Rights Council ('the Council') has 'strongly deplor[ed] acts of violence and discrimination, in all regions of the world, committed against individuals because of their...gender identity.'³ The Council has welcomed 'positive developments at the international, regional and national levels in the fight against violence and discrimination based on...gender identity.'⁴

2.2. Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity

In 2016,⁵ the Council appointed an Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity ('UN SOGI Expert') – renewing his mandate for a further three-year term in 2019.⁶

In his biannual reports to the Council and UN General Assembly, the UN SOGI Expert has



emphasised that '[w]ithin international human rights law, there is a well-established framework prescribing respect

¹ The interveners understand 'trans' as an umbrella term which includes all individuals who do not identify with the sex assigned to them at birth. This covers people whose gender identity falls outside the male-female binary, including non-binary, non gendered and agender persons.

² UN Human Rights Council, 'Resolution 17/19. Human rights, sexual orientation and gender identity' (14 July 2011) UN Doc. No. A/HRC/RES/17/19; UN Human Rights Council, 'Resolution 32/2. Protection against violence and discrimination based on sexual orientation and gender identity' (15 July 2016) UN Doc. No. A/HRC/RES/32/2; UN Human Rights Council, 'Resolution 32/2 Protection against violence and discrimination based on sexual orientation and gender identity' (15 July 2016) UN Doc. No. A/HRC/RES/32/2.

³ UN Human Rights Council, 'Resolution 32/2. Protection against violence and discrimination based on sexual orientation and gender identity' (15 July 2016) UN Doc. No. A/HRC/RES/32/2, [2].

⁴ UN Human Rights Council, 'Resolution 27/32 Human rights, sexual orientation and gender identity' (2 October 2014) UN Doc. No. A/HRC/RES/27/32 [Preamble].

⁵ UN Human Rights Council, 'Resolution 32/2 Protection against violence and discrimination based on sexual orientation and gender identity' (15 July 2016) UN Doc. No. A/HRC/RES/32/2.

⁶ UN Human Rights Council, 'Resolution 41/18 Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' (19 July 2019) UN Doc. No. A/HRC/RES/41/18.

for gender identity'⁷ – observing that the 'United Nations Treaty Bodies have affirmed in their doctrine that...gender identity, including gender expression, are prohibited grounds for discrimination.'⁸ He has called upon states to 'adopt anti-discrimination legislation that includes...gender identity.'⁹ To address discriminatory acts against trans populations, the UN SOGI Expert recommends that States 'prevent, investigate and punish...discrimination based on gender identity perpetrated by both State and non State actors'¹⁰ and that they 'eliminate the social stigma associated with gender

diversity...'¹¹ **2.3. United Nations High Commissioner for Human Rights**

The United Nations High Commissioner for Human Rights ('High Commissioner') has strongly affirmed that trans people are covered by existing guarantees against discrimination. In her report to the Council in 2011, the High Commissioner stated that '[a]ll people, including lesbian, gay, bisexual and transgender (LGBT) persons, are entitled to enjoy the protections provided for by international human rights law...'¹² She has called upon states to ensure that 'anti-discrimination legislation includes...gender identity among prohibited grounds'¹³ – observing both that 'States' responsibility to protect individuals from discrimination extends to the family sphere'¹⁴ and that 'States should also provide legal recognition and protection to same-sex couples and protect the rights of their children, without discrimination.'¹⁵

2.4. United Nations Human Rights Treaty Bodies

The UN Human Rights Treaty Bodies ('UN Treaty Bodies') have played an important role in identifying and defining the protections for trans individuals within international human rights law.

2.4.1. Human Rights Committee



In *G v Australia*,¹⁶ the UN Human Rights Committee – which oversees compliance with the International Covenant on Civil and Political Rights (‘ICCPR’) – affirmed that ‘the prohibition against discrimination under article 26 [of the Covenant] encompasses discrimination on the basis of...gender identity, including transgender status.’¹⁷ In its recent General Comments on the ICCPR, the Committee has affirmed that state parties must guarantee the rights to life (art. 6),¹⁸ liberty and security of the person (art. 9)¹⁹ and peaceful assembly (art. 21)²⁰ without distinction based on gender identity or the fact that a person is ‘transgender’.²¹ Furthermore, in its Concluding Observations, the Committee has affirmed the

⁷ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, ‘Protection against violence and discrimination based on sexual orientation and gender identity’ (12 July 2018) UN Doc No. A/73/152, [17].

⁸ *ibid.*

⁹ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (12 May 2018) UN Doc No. A/HRC/38/43, [96].

¹⁰ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, ‘Protection against violence and discrimination based on sexual orientation and gender identity’ (12 July 2018) UN Doc No. A/73/152, [80].

¹¹ *ibid.*, [79(b)].

¹² United Nations High Commissioner for Human Rights, ‘Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity’ (17 November 2011) UN Doc No. A/HRC/19/41, [5].¹³ Report of the Office of the United Nations High Commissioner for Human Rights, ‘Discrimination and violence against individuals based on their sexual orientation and gender identity’ (4 May 2015) UN Doc No. A/HRC/29/23, [79(c)].¹⁴ *ibid.*, [66].

¹⁵ *ibid.*, [17].

¹⁶ Human Rights Committee, Communication No. 2172/2012, UN Doc. No. CCPR/C/119/D/2172/2012 (15 June 2017).¹⁷ *ibid.*, [7.12].

¹⁸ Human Rights Committee, ‘General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life’ (30 October 2018) UN Doc. No. CCPR/C/GC/36, [61].

¹⁹ Human Rights Committee, ‘General comment No. 35 Article 9 (Liberty and security of person)’ 16 December 2014 UN Doc. No. CCPR/C/GC/35, [3].

²⁰ Human Rights Committee, ‘General comment No. 37 (2020) on the right of peaceful assembly (article 21)’ (17 September 2020) UN Doc. No. CCPR/C/GC/37, [25].

²¹ Human Rights Committee, ‘General comment No. 35 Article 9 (Liberty and security of person)’ 16 December 2014 UN Doc. No. CCPR/C/GC/35, [3]. Paragraph 3 states that ‘...Article 9 guarantees those rights to everyone. “Everyone” includes, among others...lesbian, gay, bisexual and transgender persons...’

equality and non-discrimination rights of trans populations²² - recommending that state parties ‘[e]nact comprehensive legislation providing full and effective protection against discrimination in all spheres and containing an exhaustive list of prohibited grounds of discrimination, including...gender identity.’²³

2.4.2. Committee on Economic, Social and Cultural Rights

In its ‘General Comment No. 20 on Non-discrimination in economic, social and cultural rights’, the



Committee on Economic, Social and Cultural Rights ('CESCR Committee') – which oversees compliance with the International Covenant on Economic, Social and Cultural Rights ('CESCR') – confirmed that the guarantee that 'rights enunciated in the present Covenant will be exercised without discrimination of any kind as to...other status' includes protection on the basis of gender identity.²⁴ Trans individuals, the CESCR Committee has noted, 'often face serious human rights violations, such as harassment in schools or in the workplace.'²⁵

In the context of sexual and reproductive health, the CESCR Committee affirms that '[n]on discrimination...encompasses the right of all persons...to be fully respected for their...gender identity...'²⁶ Where state parties criminalise 'the expression of one's gender identity' or require that trans persons 'be treated as mental or psychiatric patients', they engage in a 'clear violation of human rights.'²⁷ In its recent Concluding Observations, the CESCR Committee has called upon states to 'develop and implement dedicated legal provisions, policies and programmes to ensure protection from discrimination based on gender identity...'²⁸ and 'ensure that no one is discriminated against in terms of the enjoyment of economic, social and cultural rights...on the basis of sexual orientation or gender identity.'²⁹

2.4.3. Committee on the Elimination of Discrimination against Women

The Committee on the Elimination of Discrimination against Women ('CEDAW Committee') – which oversees compliance with the Convention on the Elimination of All Forms of Discrimination against Women – has acknowledged that discrimination against women is 'inextricably linked to other factors that [affect] their lives', including 'being... transgender...'.³⁰ In recent General Recommendations – on issues such as asylum,³¹ education,³² and disaster risk reduction in the context of climate change³³ – the CEDAW Committee has recognised the unique positionality and needs of trans women. It recommends 'comprehensive anti-discrimination legislation that prohibits all forms of discrimination and ensure equal rights and opportunities for...transgender women'³⁴ The CEDAW Committee has called

²² See e.g. Human Rights Committee, 'Concluding observations on the third periodic report of the Central African Republic' (30 April 2020) UN Doc. No. CCPR/C/CAF/CO/3, [12(a)]; Human Rights Committee, 'Concluding observations on the fifth periodic report of Uzbekistan' (1 May 2020) UN Doc. No. CCPR/C/UZB/CO/5, [9(a)].

²³ Human Rights Committee, 'Concluding observations in the absence of the initial report of Dominica' (24 April 2020) UN Doc. No. CCPR/C/DMA/COAR/1, [15(b)].

²⁴ Committee on Economic, Social and Cultural Rights, 'General Comment No. 20 Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)' (2 July 2009) UN Doc. No. E/C.12/GC/20, [32].

²⁵ *ibid.*

²⁶ Committee on Economic, Social and Cultural Rights, 'General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)' (2 May 2016) UN Doc. No. E/C.12/GC/22, [23].

²⁷ *ibid.*

²⁸ Committee on Economic, Social and Cultural Rights, 'Concluding observations on the third periodic report of Slovakia' (14 November 2019) UN Doc. No. E/C.12/SVK/CO/3*, [15].

²⁹ Committee on Economic, Social and Cultural Rights, 'Concluding observations on the fourth periodic report of Cameroon'



(25 March 2019), UN Doc. No. E/C.12/CMR/CO/4, [24].

³⁰ Committee on the Elimination of Discrimination against Women, 'General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19' (14 July 2017) UN Doc No. CEDAW/C/GC/35, [12]. ³¹ Committee on the Elimination of Discrimination against Women, 'General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women' (14 November 2014) UN Doc. No. CEDAW/C/GC/32, [6], [16] and [38].

³² Committee on the Elimination of Discrimination against Women, 'General recommendation No. 36 (2017) on the right of girls and women to education' (27 November 2017), UN Doc. No. CEDAW/C/GC/36, [45], [46(i)] and [66]. CEDAW/C/GC/36

³³ Committee on the Elimination of Discrimination against Women, 'General recommendation No. 37 (2018) on the gender related dimensions of disaster risk reduction in the context of climate change' (13 March 2018) UN Doc. No. CEDAW/C/GC/37, [57(e)] and [68(f)].

³⁴ Committee on the Elimination of Discrimination against Women, 'Concluding observations on the combined fourth to seventh periodic reports of Antigua and Barbuda' (14 March 2019), UN Doc. No. CEDAW/C/ATG/CO/4-7, [47]. upon state parties to '[e]stablish processes to eliminate discriminatory rulings and practices against...transgender women...in the justice system.'³⁵ It advocates the urgent implementation of 'targeted measures to achieve substantive equality for women and girls in all stages of life who face intersecting forms of discrimination, such as...transgender women...'³⁶

2.4.4. Committee on the Rights of the Child

In its General Comment No. 20, the Committee on the Rights of the Child ('CRC Committee') – which oversees compliance with the Convention on the Rights of the Child – asserted the entitlement of 'all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy.'³⁷ The CRC Committee has recommended that state parties 'repeal all laws criminalizing or otherwise discriminating against individuals on the basis of their...gender identity'³⁸ and that they 'adopt laws prohibiting discrimination on those grounds.'³⁹ In its Concluding Observations, the CRC has called upon states to 'adopt a proactive and comprehensive strategy containing specific and well-targeted actions, including affirmative social actions, to eliminate discrimination against children in marginalized or vulnerable situations, including...children of unmarried couples, children of same-sex couples and lesbian, gay, bisexual, transgender and intersex children.'⁴⁰

3. Regional Human Rights Systems

In addition to UN-level jurisprudence, there is a growing body of evidence that trans persons enjoy non discrimination protections under regional human rights systems. This section explores equality guarantees within the: (3.1) Council of Europe, (3.2) European Union, (3.3) Organisation of American States, and (3.4) the African Union.

3.1. Council of Europe

The institutions of the Council of Europe ('COE') are amongst the most prominent global advocates for the rights of trans people. Led by the European Court of Human Rights ('ECtHR'), the COE institutions have affirmed that individuals must have access to key entitlements – such as healthcare and education – irrespective of gender identity.



3.1.1. European Court of Human Rights

Through a series of rulings since the early 1990s, the ECtHR – which oversees compliance with the European Convention on Human Rights (‘ECHR’) – has affirmed that trans persons enjoy core human rights protection. In *PV v Spain*, the ECtHR held that ‘transsexuality is a notion which is, without doubt, covered by Article 14 [prohibition of discrimination] of the Convention.’⁴¹ In the subsequent judgment, *Identoba and Others v Georgia*, the ECtHR expanded the scope of recognition to acknowledge that art. 14 ECHR ‘duly covers questions related to... gender identity.’⁴² In the recent case of *AM and Others v Russia*,⁴³ the ECtHR found a violation of art. 14, read in conjunction with art. 8 ECHR, where domestic courts terminated contact between a trans woman and her children without properly evaluating the potential harm to the children or the scientific basis for supporting termination.⁴⁴ The court found a violation where the Russian courts ‘relied on [the woman’s] gender transition, singled her out on the

³⁵ Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the seventh periodic report of Chile’ (14 March 2018) UN Doc. No. CEDAW/C/CHL/CO/7, [15(d)].

³⁶ Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the eighth periodic report of Bulgaria’ (10 March 2020) UN Doc. No. CEDAW/C/BGR/CO/8, [40].

³⁷ Committee on the Rights of the Child, ‘General comment No. 20 (2016) on the implementation of the rights of the child during adolescence’ (6 December 2016) UN Doc No. CRC/C/GC/20, [34].

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ Committee on the Rights of the Child, ‘Concluding observations on the combined fourth and fifth periodic reports of Singapore’ (28 June 2019) UN Doc. No. CRC/C/SGP/CO/4-5, [20(b)].

⁴¹ *PV v Spain* App No. 35159/09 (ECtHR 30 November 2010), [30].

⁴² *Identoba and Others v Georgia* [2015] 39 BHRC 510, [96].

⁴³ *A.M. and Others v Russia*, App. No. 47220/19 (ECtHR, 6 July 2021).

⁴⁴ *ibid.*, [79]. See generally: [54] – [62] and [74] – [81].

ground of her status as transgender person and made a distinction which was not warranted in the light of the existing Convention standards.’⁴⁵

3.1.2. Committee of Ministers of the Council of Europe

In 2010, the Committee of Ministers of the Council of Europe (CoM) issued a recommendation ‘on measures to combat discrimination on grounds of sexual orientation or gender identity.’⁴⁶ Recommendation CM/Rec(2010)5 called upon the Member States of the COE to examine, review and analyse their national laws ‘in order to monitor and redress any direct or indirect discrimination on grounds of...gender identity.’⁴⁷ COM urged Member States to ensure that ‘legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of...gender identity...’⁴⁸ In the sphere of family law, COM observed that ‘the child’s best interests should be the primary consideration in decisions regarding the parental responsibility for, or guardianship of a child’ and it recommended that Member States ‘ensure that such decisions are taken without discrimination



based on...gender identity.⁴⁹

3.1.3. Parliamentary Assembly of the Council of Europe

In its 2015 resolution, ‘Discrimination against Transgender People in Europe’,⁵⁰ the Parliamentary Assembly of the Council of Europe (‘PACE’) requested that Member States ‘explicitly prohibit discrimination based on gender identity in national non-discrimination legislation.’⁵¹ In particular, COE countries should ‘provide effective protection against discrimination on grounds of gender identity...in access to housing, justice and health care.’⁵² PACE also recommended that Member States ‘amend classifications of diseases used at national level and advocate the modification of international classifications, making sure that transgender people, including children, are not labelled as mentally ill, while ensuring stigma-free access to necessary medical treatment.’⁵³ In a subsequent resolution on ‘Private and Family Life: Achieving Equality Regardless of Sexual Orientation’, PACE called upon Member States of the COE to ‘ensure that their constitutional, legislative and regulatory provisions and policies governing the rights of partners, parents and children are applied without discrimination on grounds of sexual orientation or gender identity, eliminating all unjustified differences in treatment based on these grounds.’⁵⁴

3.1.4. Congress of Local and Regional Authorities

In 2015, the Congress of Local and Regional Authorities (‘CLRA’) invited local and regional authorities to ‘adopt a clear, holistic action plan for their towns and regions which commits to diversity, promotes respect and rejects discrimination, being guided by the policies and practices contained in the appendix to CM/Rec(2010)5...’⁵⁵ According to CLRA, there should be multi-level and multi-stakeholder cooperation to ‘ensure legislation fully respects LGBT people’s human rights and that legislative provisions at all levels are complementary and comprehensive.’⁵⁶ Furthermore, the Congress has clearly rejected the notion that the values or rules ‘of a “dominant culture” [could] be invoked to justify... any other form of discrimination, including on grounds of...gender identity.’⁵⁷ More recently, through Resolution 470(2021), the Congress has called upon local and regional authorities to ‘mainstream

⁴⁵ *ibid*, [79].

⁴⁶ 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, adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers’ Deputies.

⁴⁷ *ibid*, Recommendation [1].

⁴⁸ *ibid*, Recommendation [2].

⁴⁹ Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe, *Appendix to Recommendation CM/Rec(2010)5*, [26].

⁵⁰ Resolution 2048 (2015), Discrimination against Transgender People in Europe, adopted on 22 April 2015 (15th Sitting). ⁵¹ *ibid*, [6.1.1.].

⁵² *ibid*, [6.1.5.].

⁵³ *ibid*, [6.3.3].

⁵⁴ Resolution 2239 (2018), Private and Family Life: Achieving Equality Regardless of Sexual Orientation, adopted on 10 October 2018 (33rd Sitting), [4.4.1.].



⁵⁵ Resolution 380(2015) of the Congress of Local and Regional Authorities on Guaranteeing lesbian, gay, bisexual and transgender (LGBT) people's rights: a responsibility for Europe's towns and regions, [11.a.i.].

⁵⁶ *ibid.*, [11.b.i.].

⁵⁷ *ibid.*, [2].

LGBTI equality and human rights in local and regional public policies and monitor the implementation of existing legislation regarding anti-discrimination...⁵⁸

3.1.5. Commissioner for Human Rights of the Council of Europe

In 2009, the Commissioner for Human Rights of the Council of Europe ('Commissioner') called upon Member States to '[i]mplement international human rights standards without discrimination and prohibit explicitly discrimination on the ground of gender identity.'⁵⁹ In his subsequent 2011 report on 'Discrimination on grounds of sexual orientation and gender identity in Europe',⁶⁰ the Commissioner recommended that states '[e]nact comprehensive national legislation on non-discrimination and include...gender identity among the prohibited grounds...'⁶¹ He advocated screening 'national legislation to detect and correct possible inconsistencies with non-discrimination legislation in force to prevent discrimination on grounds of...gender identity.'⁶² In the sphere of private and family life, the Commissioner encouraged Member States to '[r]ecognise the parental rights of same-sex parents, individually or jointly, including their rights of guardianship and custody without discrimination on grounds of...gender identity.'⁶³

3.2. European Union

3.2.1. Secondary Legislation

Directive 2006/54 ('Recast Directive') implements the principle of equal opportunities and equal treatment of men and women in employment and occupation.⁶⁴ Recital 3 thereto provides that, '[i]n view of [the] purpose and the nature of the rights which [the principle of equal treatment for men and women] seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.'⁶⁵

3.2.2. Case Law

The Recast Directive builds upon an earlier decision of the European Court of Justice ('ECJ') in *P v S and Cornwall County Council*.⁶⁶ Addressing the scope of equality protection in the field of employment [former Directive 76/207⁶⁷ now consolidated into the Recast Directive], the ECJ held that 'the scope of [Directive 76/207] cannot be confined simply to discrimination based on the fact that a person is of one or other sex.'⁶⁸ Rather, having regard to the 'purpose and the nature of the rights which it seeks to safeguard', the directive (and the principle of non-discrimination between men and women) must 'apply to discrimination arising...from the gender reassignment of the person concerned.'⁶⁹ Where an employer discriminates against an individual who undertakes a medical transition, '[s]uch discrimination is based, essentially if not exclusively, on the sex of the person concerned.'⁷⁰ Since 1996, the Court of Justice of the European Union has extended non-discrimination protections for trans individuals in *KB v National Health Service Pensions Agency and Another*,⁷¹ *Richards v*



*Secretary of State for Work and Pensions*⁷² and *MB v Secretary of State for Work and Pensions*.⁷³

⁵⁸ Resolution 470(2021), adopted by on 16 June 2021 (2nd sitting), [7(a)].

⁵⁹ Commissioner for Human Rights of the Council of Europe, Human Rights and Gender Identity, CommDH/IssuePaper(2009)2 (Commissioner for Human Rights, 2009), 44.

⁶⁰ Commissioner for Human Rights of the Council of Europe, Discrimination on grounds of sexual orientation and gender identity in Europe (2nd, Council of Europe Publishing, 2011).

⁶¹ *ibid*, 11.

⁶² *ibid*.

⁶³ *Ibid*, 14.

⁶⁴ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).⁶⁵ Directive 2006/54 does not define the concept of 'gender reassignment'

⁶⁶ [1996] 2 CMLR 247.

⁶⁷ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. ⁶⁸ [1996] 2 CMLR 247, [20].

⁶⁹ *ibid*.

⁷⁰ *ibid*, [21].

⁷¹ [2004] 1 CMLR 28.

⁷² [2006] 2 CMLR 49.

⁷³ Case C-451/16 (European Court of Justice, 26 June 2018).

3.3. Organisation of American States

Within the Organisation of American States ('OAS') human rights system, numerous actors have identified and affirmed non-discrimination protections for trans people.

3.3.1. Inter-American Court of Human Rights

In *Atala Riffo and Daughters v Chile*, the Inter-American Court of Human Rights ('IACtHR') confirmed that the 'gender identity of persons is a category protected by the [American Convention on Human Rights ('American Convention')]'.⁷⁴ The IACtHR noted expert evidence, including a policy statement of the American Psychology Association, 'that living with homosexual parents per se does not affect a child's emotional and psychological development.'⁷⁵ In a subsequent Advisory Opinion to the Republic of Costa Rica,⁷⁶ the IACtHR emphasised that the 'Convention prohibits any discriminatory law, act or practice based on a person's...gender identity, as this would be contrary to the provisions of Article 1(1) of the American Convention.'⁷⁷ According to the Court, 'no provision, decision or practice under domestic law, either by state authorities or private individuals, can reduce or restrict in any way the rights of a person on the grounds of their...gender identity...'⁷⁸ Indeed, the IACtHR specifically observes that 'at the current stage of evolution of international law, the fundamental principle of equality and non discrimination has entered the domain of ius cogens. The whole legal structure of national and international public order rests on this premise and it permeates every legal system.'⁷⁹ The IACtHR has reiterated these protections for trans people in the recent cases of *Azul Rojas Marin et al v Peru*⁸⁰ and *Vicky Hernandez et al v Honduras*.⁸¹ It has also acknowledged that the American



Convention protects the ‘right of each person to define his or her sexual and gender identity autonomously and that the personal information in records and on identity documents should correspond to and coincide with their self-defined identity.’⁸²

3.3.2. Inter-American Commission on Human Rights/ General Assembly of the OAS

The Inter-American Commission on Human Rights (‘IACmHR’) has been particularly active in promoting equality for trans people. The IACmHR has created a specific Rapporteurship on the Rights of LGBTI Persons, which became fully operational in 2014.⁸³ The Commission has called upon states to ‘repeal, and if not possible, to annul, legal provisions that discriminate on the basis of...gender identity, gender expression or body diversity.’⁸⁴ It has stated that it is important to include ‘gender expression as a specific and distinct basis for discrimination in antidiscrimination legal provisions...’⁸⁵ Furthermore, since 2008, the General Assembly of the OAS has adopted numerous resolutions on the ‘protection of persons against discriminatory treatment based on their sexual orientation and gender identity’,⁸⁶ requiring states to take ‘specific measures to ensure effective protection against discriminatory acts.’⁸⁷

⁷⁴ Inter-American Court of Human Rights, Series C No. 254 (24 February 2012), [91].

⁷⁵ *ibid.*, [128] and FN 148. See: American Psychology Association, Council of Representatives, ‘Policy Statement on Sexual Orientation, Parents, & Children’ (adopted by the APA Council of Representatives on 28/30 July 2004). ⁷⁶ Inter-American Court of Human Rights, Gender identity, and equality and non-discrimination of same-sex couples, Advisory Opinion OC-24/17, Series A No. 24 (24 November 2017).

⁷⁷ *ibid.*, [68].

⁷⁸ *ibid.*, [78].

⁷⁹ *ibid.*, [61].

⁸⁰ Inter-American Court of Human Rights, Series C No. 422 (26 March 2021).

⁸¹ Inter-American Court of Human Rights, Serie C No. 402 (12 March 2020).

⁸² Inter-American Court of Human Rights, Gender identity, and equality and non-discrimination of same-sex couples, Advisory Opinion OC-24/17, Series A No. 24 (24 November 2017), [115]. See ‘provisions that ensure the free development of the personality (Articles 7 and 11(2)), the right to privacy (Article 11(2)), the recognition of juridical personality (Article 3), and the right to a name (Article 18)’, [115].

⁸³ ‘Rapporteurship on the Rights of Lesbian, Gay, Trans, Bisexual, and Intersex Persons’ (*OAS Website*) <https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/r/DLGBTI/default.asp> accessed 01 July 2021. ⁸⁴ Inter-American Commission of Human Rights, *Recognition of the Rights of LGBTI Persons*, OEA/Ser.L/V/II.170 Doc. 184 (7 December 2018), 133.

⁸⁵ Inter-American Commission of Human Rights, *Report on Trans and Gender Diverse Persons and Their Economic, Social, Cultural, and Environmental Rights*, OEA/Ser.L/V/II. Doc. 239 (August 2020), [64].

⁸⁶ Advisory Opinion OC-24/17, Series A No. 24 (24 November 2017), [72].

⁸⁷ *ibid.* For recent examples, see: AG/RES. 2928 (XLVIII-O/18), Derechos humanos y prevención de discriminación y violencia contra personas LGBTI, aprobada en la cuarta sesión plenaria, celebrada el 5 de junio de 2018; AG/RES. 2908 (XLVII-O/17), Promotion and protection of human rights, June 21, 2017; AG/RES. 2887 (XLVI-O/16), Promotion and protection of human

3.3.3. Inter-American Convention Against All Forms of Discrimination and Intolerance

In 2013, the Inter-American Convention against All Forms of Discrimination and Intolerance was adopted. This regional treaty, which came into force in 2020, establishes that Member States should



‘undertake to prevent, eliminate, prohibit, and punish’ all acts and manifestations of discrimination and intolerance.⁸⁸ The Convention expressly provides, through art. 1(1), that the prohibition of discrimination encompasses discriminatory acts grounded on ‘sex; sexual orientation; gender identity and expression...’

3.4. African Union

Although there has been less consideration of gender identity non-discrimination within the African Union’s human and people’s rights system, there have been recent important developments to affirm core protections for trans individuals.

3.4.1. African Commission on Human and People’s Rights

In 2014, the African Commission on Human and People’s Rights (‘ACmHRR’) adopted a resolution, ‘[s]trongly urg[ing] States to end all acts of violence and abuse...including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real...gender identities.’⁸⁹ According to the UN SOGI Expert, Resolution 215 ‘takes as its point of departure the premise that, under the African Charter [on Human and People’s Rights (‘African Charter’)], sexual orientation and gender identity are grounds for protection from violence and other human rights violations, including discrimination.’⁹⁰ In its 2017 General Comment No. 4 on the ‘Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)’, the ACmHPR included ‘gender identity’ within its non-exhaustive list of grounds of discrimination.⁹¹

3.4.2. African Court on Human and Peoples’ Rights

In a 2020 Advisory Opinion on the compatibility of vagrancy laws with the African Charter and other human rights instruments,⁹² the African Court on Human and Peoples’ Rights observed that such laws effectively punish ‘the poor and underprivileged’, including ‘gender-nonconforming’ individuals, who are ‘already challenged in enjoying their other rights including more specifically their socio-economic rights.’⁹³ Vagrancy laws ‘serve to exacerbate’ the situation of these people ‘by further depriving them of their right to be treated equally before the law.’⁹⁴

4. National Human Rights Systems

While the primary focus of this third-party intervention is the emerging international trend toward protections against discrimination on the basis of gender identity, there is a growing body of national jurisprudence, which affirms a right to equality for trans populations. This section sets out landmark domestic judgments from five jurisdictions – chosen to cover the different regions from which the ten signatory intervener organisations are drawn. In providing this information to the European Court of

rights, June 14, 2016; AG/RES. 2863 (XLIV-O/14), Human Rights, Sexual Orientation, and Gender Identity and Expression, June 5, 2014.

⁸⁸ Inter-American Convention against All Forms of Discrimination and Intolerance, art. 4.



⁸⁹ African Commission on Human and People’s Rights, ‘Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity’ (2014) Resolution 275. ⁹⁰ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, ‘Protection against violence and discrimination based on sexual orientation and gender identity’ (12 July 2018) UN Doc No. A/73/152, [47].

⁹¹ African Commission on Human and People’s Rights, ‘General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)’ (2017), [20].

⁹² African Court on Human and People’s Rights, *Request for Advisory Opinion by the Pan African Lawyers Union (PALU) on the Compatibility of Vagrancy Laws with the African Charter on Human and People’s Rights and Other Human Rights Instruments Applicable in Africa*, No. 001/2018, Advisory Opinion (4 December 2020).

⁹³ *ibid*, [70].

⁹⁴ *ibid*, [70].

Human Rights, the interveners acknowledge that, despite increasing national-level protections for trans individuals, there are also countries around the world where gender identity rights are either stagnating or regressing.⁹⁵

4.1. United States

In 2020 – in the case, *Bostock v Clayton County, Georgia* – the Supreme Court of the United States confirmed that trans individuals are covered by the prohibition on ‘sex’ discrimination in employment under Title VII of the federal Civil Rights Act of 1964.⁹⁶ According to the majority opinion, ‘it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.’⁹⁷ The Biden Administration has issued an executive order directing all federal agencies to extend prohibitions on sex discrimination in housing, education, and health care to cover discrimination against trans people, consistent with the *Bostock* ruling.⁹⁸

4.2. India

In India, art. 14 of the national constitution provides that the ‘State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.’ In its 2014 decision, *National Legal Services Authority v Union of India*,⁹⁹ the Supreme Court of India observed that art. 14 does ‘not restrict the word “person” and its application only to male or female.’¹⁰⁰ Rather, ‘Hijras/transgender persons who are neither male/female fall within the expression “person” and, hence, [are] entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country.’¹⁰¹

The Supreme Court affirmed that art. 14 provides for ‘equal protection and hence a positive obligation on the State to ensure equal protection of laws by bringing in necessary social and economic changes, so that everyone including TGs may enjoy equal protection of laws...’¹⁰²

4.3. South Africa

Under s. 9(3) of the Constitution of South Africa, the ‘state may not unfairly discriminate directly or



indirectly against anyone on one or more grounds, including...sexual orientation...' In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*,¹⁰³ the South African Constitutional Court held that 'sexual orientation' within s. 9(3) 'must be given a generous interpretation of which it is linguistically and textually fully capable of bearing.'¹⁰⁴ As such the constitutional protection against sexual orientation discrimination, in addition to covering heterosexual and homosexual individuals, would also cover 'the orientation of persons who are bi-sexual, or transsexual.'¹⁰⁵

⁹⁵ See e.g. Hungary, Omnibus Bill, art. 33 (voted by Parliament on 19 May 2020) [terminating the right to legal gender recognition]. In the United States, there have been a number of high-profile enacted and proposed laws to restrict the rights of trans people, particularly trans youth, to access single-sex services and accommodations, single-sex sporting activities and gender affirming healthcare, see Wyatt Ronan, '8 Bills Across 7 States: Coordinated Anti-Transgender, Anti-LGBTQ Legislative Push Ramps Up in State Houses Across the Country' (*Human Rights Campaign website*, 10 February 2021) <https://www.hrc.org/press-releases/8-bills-across-7-states-coordinated-anti-transgender-anti-lgbtq-legislative-push-ramps-up-in-state-houses-across-the-country> accessed 18 July 2021.

⁹⁶ 590 U. S. ____ (2020).

⁹⁷ *ibid*, 17.

⁹⁸ 'Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation' (*The White House website*, 20 January 2021)

<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/> accessed 15 July 2021. ⁹⁹

National Legal Services Authority (NALSA) v Union of India and others Supreme Court of India, Writ Petition (Civil) No. 400 of 2012 (15 April 2014).

¹⁰⁰ *ibid*, [54].

¹⁰¹ *ibid*,

¹⁰² *ibid*. The Supreme Court uses the term 'TG' as short for 'Transgender Community' (see: [2]). At para. 12, the Court observes that the 'TG Community comprises of Hijras, eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis etc. and they, as a group, have got a strong historical presence in our country in the Hindu mythology and other religious texts.'¹⁰³ (CCT11/98) [1998] ZACC 15.

¹⁰⁴ *ibid*, [21].

¹⁰⁵ *ibid*.

4.4. Brazil

In Brazil,¹⁰⁶ art. 5 of the national constitution states that '[a]ll persons are equal before the law, without any distinction whatsoever...the law shall punish any discrimination which may attempt against fundamental rights and liberties.'¹⁰⁷ Federal hate crimes legislation, Law 7716 of 1989, prohibits discrimination on the basis of race, colour, ethnicity, religion or national origin.¹⁰⁸ In 2019, the Supreme Federal Court ruled that discrimination on the basis of sexual orientation and gender identity constitutes a form of 'social racism'.¹⁰⁹ As such, it falls within the scope of protection set out in Law 7716 (under an expansive understanding of the concept of 'race').¹¹⁰ An individual who discriminates against another person because of their gender identity – in a broad range of areas, including access to services, accommodations and employment¹¹¹ – commits a criminal offence.



4.5. Colombia

In Colombia,¹¹² the Constitutional Court has been particularly active in affirming the equality rights of trans individuals.¹¹³ In recent years, petitioners who experience discrimination because of their gender identity have made extensive use of the Court's 'tutela' action procedure in order to protect their constitutional rights. In 2011, the Constitutional Court affirmed that gender identity is a prohibited ground of discrimination.¹¹⁴ The Court has required that the Ministry of Defence adopt non-discriminatory policies for accessing military service,¹¹⁵ affirmed the right of trans children to attend education,¹¹⁶ challenged the notion that 'transgenderism constitutes a disease or a psychiatric category',¹¹⁷ permitted individuals to amend the gender markers in their identity documents¹¹⁸ and authorised people to wear clothes in prison which align with their gender identity.¹¹⁹

5. Conclusion

This third-party intervention has identified and detailed a continuing international trend towards the recognition of a right to non-discrimination on the ground of gender identity. The intervention has illustrated that – within the jurisprudence and soft law of the United Nations, regional and domestic human rights systems – there is now an emerging consensus in favour of equal treatment and dignity for trans individuals.

¹⁰⁶ This paragraph has been written making extensive use of the English-language case summary set out in Thiago Amparo, 'Brazil's top court uses anti-racism legislation to make discrimination against LGBT people a criminal offence' (*OxHRH Blog*, 17 June 2019) <https://ohrh.law.ox.ac.uk/brazils-top-court-uses-anti-racism-legislation-to-make-discrimination-against-lgbt-people-a-criminal-offence/> accessed 2 July 2021.

¹⁰⁷ Constitution of the Federative Republic of Brazil, art. 5 (XLI).

¹⁰⁸ Law N° 7.716, of 5 of January 1989, art. 1.

¹⁰⁹ Thiago Amparo, 'Brazil's top court uses anti-racism legislation to make discrimination against LGBT people a criminal offence' (*OxHRH Blog*, 17 June 2019) <https://ohrh.law.ox.ac.uk/brazils-top-court-uses-anti-racism-legislation-to-make-discrimination-against-lgbt-people-a-criminal-offence/> accessed 2 July 2021.

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

¹¹² This paragraph has been written making extensive use of the English-language case summaries set out in OutRight Action International, *Mapping Trans Rights in Colombia* (OutRight Action International, 2016).

¹¹³ The Constitutional Court has also been active in affirming family rights without distinction on the basis of sexual orientation, issuing decisions relating to individual adoption (*Decision T-276/12*), consent adoption for second same-sex parents (SU 617/14) and equal adoption by same-sex couples (*Decision C-683/15*). Regarding the concept of 'family', the Constitutional Court has issued, inter alia, three important decisions. *Decision C-075/07* extends the concept of a 'marital union' to same-sex couples. *Decision C-577/11* recognises same-sex couples as family. *Decision SU-214/16* recognises that same-sex couples have a right to marry.

¹¹⁴ Constitutional Court of Colombia, *Decision T – 314 of 2011* (4 May 2011) [see *Mapping Trans Rights in Colombia*, 9]. ¹¹⁵ Constitutional Court of Colombia, *Decision T-099 of 2015* (10 March 2015) [see *Mapping Trans Rights in Colombia*, 15]. ¹¹⁶ Constitutional Court of Colombia, *Decision T-562/13 of 2013* (23 August 2013) [see summary in *Mapping Trans Rights in Colombia*, 16-17]; see also: Constitutional Court of Colombia, *Decision T-363/16 of 2016* (11 July 2016). See also: Constitutional Court of Colombia, *Decision T – 443 of 2020* (14 October 2020), Constitutional Court of Colombia, *Decision T*



– 192 of 2020 (23 June 2020), Constitutional Court of Colombia, *Decision T – 804 of 2014* (4 November 2014), Constitutional Court of Colombia, *Decision T – 804 of 2014* (4 November 2014).

¹¹⁷ Constitutional Court of Colombia, *Decision T – 918 of 2012* (8 November 2021) [see *Mapping Trans Rights in Colombia*, 28-29].

¹¹⁸ Constitutional Court of Colombia, *Decision T – 063 of 2015* (13 February 2016).

¹¹⁹ Constitutional Court of Colombia, *Decision T – 062 of 2011* (4 February 2011).