

## **Analysis of the effects of legal sex markers in detention: Single-sex detention facilities, conversion therapy, and violations of human rights**

*Cianán B. Russell*<sup>1</sup>

### **Abstract**

Conversion therapies have been classified as inhuman treatment or torture on several instances, including by the UN Special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and are explicitly prohibited by several professional bodies around the world such as the World Medical Association and the World Professional Association for Transgender Health. They have been defined as “any treatment, practice or sustained effort that aims to change, repress and, or eliminate a person’s sexual orientation, gender identity and, or gender expression” (Malta, 2016).

However, based on its functional definition, the concept of “conversion therapy” can be successfully used as a broader analytical framework to describe carceral practices that regulate gender identity and expression and, in particular, those implemented by sex-segregated detention facilities.

This paper argues that, coupled with often restrictive and sometimes impossible means for accessing legal gender recognition to change one’s identity documents, single-sex detention acts as a form of conversion therapy for trans and gender diverse people at least in two ways by coercing detainees into adopting gender expression modes that do not align with their gender identity. In that sense, it can be said that sex-segregated detention acts to change the gender identity or expression of gender diverse detainees and, therefore, can amount to inhuman treatment or torture.

### **Keywords**

Trans; transgender; conversion therapy; torture; detention; prison; gender markers

### **Biography**

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## *Introduction<sup>2</sup>*

In essentially all jurisdictions around the world, persons in closed settings - resulting from criminal activity, migration, mental illness, or other motives - are physically divided based on sex/gender registration. It is very rare that detainees have meaningful input in this placement. In some cases, this division is based on the sex/gender marker on an individual's birth certificate. In others, it is based on the current legal sex or gender, or even on the opinion of intake personnel who personally categorise detainees. These realities display the arbitrary, culturally-constructed, and personally-biased impact of sex/gender registration for detainees. Additionally, gender diverse detainees are regularly denied access to clothing or medical interventions that would validate their gender identities or expressions and are housed based on their sex assigned at birth, held in solitary confinement for "protection", or held in segregated units for vulnerable populations (though rare, these options are increasingly present globally). Thus, single-sex detention facilities have, in the majority of cases, one means of addressing gender diversity among detainees: repression.

This paper will analyse this issue from the perspective of conversion therapies, arguing that: (1) the concept of "conversion therapy" can be successfully used as a broader analytical framework to describe institutional practices that aim at regulating gender identity and expression; and (2) sex-segregated detention, in itself and through its implementation, acts as an intervention that seeks, explicitly or tacitly, to change the gender identity or expression of gender diverse detainees, amounting to State-sponsored or State-endorsed institutional "conversion therapies".

Conversion therapies are, broadly, interventions that "seek to change the gender identity or expression of an individual". They have been classified as inhuman treatment or torture on several instances, and are explicitly prohibited by several professional bodies around the world. In the clinical sense, "conversion therapy" refers to psychiatric or pharmaceutical interventions; however, this interpretation is too limited, as interventions are also present outside of (psycho)medical settings, such as within religious organisations. This paper will sustain that conversion therapies also take place in detention facilities. For example, when a detainee self-validates their

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gender expression and that results in “protective” solitary confinement, the detainee must “choose” between their rights to self-determination and freedom from torture and cruel or inhumane treatment in the form of long-term isolation. This is not a choice, but instead a coercion by State or private actors. Viewed in this light, the coercive environment itself constitutes an intervention on the part of the facility to change the gender identity and/or expression of the individual: the detainee must choose between their basic quality of life in detention and self-determination in the context of their gender identity and expression.

This is further compounded by barriers to accessing the processes related to sex and gender registration while in detention. In many cases, detainees - regardless of the type of detention - have this right curtailed through limited access to requisite medical interventions for legal gender recognition (the requirements themselves violations of international human rights law) and/or to the broader justice system. Ultimately, this means that for the duration of detention, the detainee will be saddled with the legal registration they had when entering, making access to otherwise-sexed detention facilities impossible. Though indirect, this lack of opportunity is also an intervention with the impact of changing the gender identity or expression of the detainee.

It becomes clear that detention, like any system organised on the basis of the gender binary, violates the human rights of trans and gender diverse people. To solve this problem, isolated *ad hoc* actions within a binary-based system are meaningless (and potentially even more harmful). Instead, a much more radical institutional restructuring is needed - one that involves ending police targeting, criminalisation of sex work in particular, and, more generally, the criminalisation of poverty. The Icelandic prison system, described below, provides a possible model, so long as States continue to use incarceration as a means of punishment.

### *A Note on Language*

Before deep exploration of the concepts herein, it is necessary to address some of the author’s language choices. Firstly, the phrase “trans and gender diverse” is used throughout the text to refer to any and all persons whose gender identity and/or gender expression differ from the gender socially aligned with their sex assigned at birth. This system - one of binary sex assignment based on perception of external

genitalia at birth - is a driver in many issues surrounding the rights of trans and gender diverse people. It is paramount, in discussions of trans and gender diverse people to name the systems at play rather than solely focusing on the individuals who are harmed by them. Furthermore, different issues arise based on the specifics of that assignment. As such, this paper will refer to those “assigned male at birth” (AMAB) and to those “assigned female at birth” (AFAB) to broadly describe individuals in these categories, including trans and gender diverse people therein.

### ***Method***

This paper will make the argument that single-sex detention for trans and gender diverse people fits within the bounds of the legal definition of conversion therapy, as defined by Malta in 2016 for the purpose of this paper. As a result, it can be classified as torture or cruel and inhuman treatment. To build this framework, it begins by providing a background section on the legal and real-life issues relevant to the thesis, including: the right to recognition before the law; legal gender recognition; detention (practices and consequences); conversion therapy; and criminalisation.

What follows then is an analysis of the different legal gender recognition landscapes and enumeration of the difficulties faced most particularly by trans and gender diverse people who are themselves most likely to end up facing detention in one form or another due to race, poverty, transfemininity, geography, geopolitics, and/or migration status. Conversion therapy laws and legal concepts are then mapped onto single-sex detention practices, followed by a conclusion.

The article uses a global frame of reference and incorporates examples and definitions from the international human rights space and from a variety of national contexts. However, much of the data on trans and gender diverse populations cited here comes from the United States. This is, unfortunately, a largely unavoidable reality, given the significantly larger body of research on trans and gender diverse populations in a US context, and particularly the level of detailing that has been possible in this space. US data are used to provide examples where few others are available, and when possible are supplemented by research performed outside of the US.

## **Background**

### *Right to recognition as a person before the law*

The responsibility for overseeing personhood and its recognition lies with States, as States maintain the citizen-State relationships which it impacts. Legal gender recognition, further described in the next section, is principally a component of the “right to recognition as a person before the law”, which was first enshrined in Article 6 of the Universal Declaration of Human Rights and then in Article 16 of the International Covenant on Civil and Political Rights, Article 24 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and Article 12 of the Convention on the Rights of Persons with Disabilities. (UN General Assembly, 1948; UN General Assembly, 1966; UN General Assembly, 2007) This right lies as a foundation for several other personal rights, including social and economic ones. It indicates that all individuals have the fundamental right to be recognised as persons on equal and non-discriminatory grounds. Failure to respect, protect, and fulfill this right can result in being “unable to vote, marry, get an education, bring a court case, or receive medical care”. (UN Office of the High Commissioner for Human Rights, 2019)

The relationship between legal gender recognition and the right to recognition before the law comes to two main sets of consequences: (1) the personal lived impact of identification documents that are difficult to use or cannot be used for the purpose of verifying identity to the satisfaction of State and non-State actors; and (2) the societal impact of individuals being unable to identify themselves. On the individual level, satisfactory identification is required, to varying degrees across societies, to perform a wide array of daily functions, such as to send, receive or spend money, vote, assert parental or custodial rights, go to school, take public and mass forms of transportation, secure housing, marry and assert spousal rights, collect inheritance or social benefits, secure safe passage through random or mandatory identity checks by police or the military, and many others. These individual consequences map directly onto the concept of “statelessness”. (Anderson, 2007; Blitz and Lynch, 2011; UNHCR, n.d.) As an example, in the context of banking, bank tellers regularly check State-issued identification documents as part of processing transactions. When a bank client presents identification that, due to absence of legal gender recognition, does not match their appearance, the bank teller is in the position not only of assessing the identification document for the purpose of facilitating the transaction (Camminga,

2017; Whittle et al., 2007), but additionally of engaging the individual to attempt to prove or disprove the accuracy of the document. Trans and gender diverse people are consistently asked invasive questions about their medical transition history or bodies, forced to reveal and respond to names that they no longer use, and denied services. (BBC News, 2019; Taylor, 2015)

On the societal level, the existence of persons without adequate documentation increases strain on public systems, correlates with increased policing, and positions non-State actors to enforce access to the right to recognition as a person before the law without adequate information to perform the task. These societal consequences, similarly, map closely to the concept of “undocumented migration”, though admittedly at an individual, and thus much smaller, scale. (Joly, 2000; Peralta-Gallego et al., 2018) For example, following on the individual banking example in the previous paragraph, when individuals are not in possession of adequate identification documents and thus unable to bank by traditional means, their income becomes removed from bank-based circulation, which has broad consequences on the banking industry in terms of lending and saving power, and beyond.

For all persons, individual presentation changes dramatically throughout the lifecycle. When these changes follow a socially constructed and accepted timeline, individuals are not only allowed but encouraged or even required by the State to update their identification documents; in doing so, the State meets its positive obligation to preserve the right to recognition as a person before the law. However, trans and gender diverse persons are regularly hindered in or barred from this practice, be it by law, policy, or individual bias on the part of State actors.

### *Legal gender recognition*

Access to legal gender recognition is commonly recognised as a reliable measure in the assessment of the rights of trans and gender diverse people within a jurisdiction. This process, commonly known as “LGR”, typically includes changing one’s name, sex or gender marker, and/or any sex-specific characteristics (such as a sex-specific number in one’s identity number) on one’s identification documents, including the birth certificate, family registry, identification card and passport. According to the Independent Expert on Protection against violence and discrimination based on sexual orientation and gender identity, as presented to the United Nations Human

Rights Council, the gold standard for this process is accessible, transparent, fast, and administrative, and allows access to male, female, and at least one other registration option. (Madrigal-Borloz, 2018) A third option, in addition to male and female, is valuable for several reasons, including the existence of modern and historical gender identities and practices that are not easily or willingly classified in the European colonial binary system (such as *muxe*, *travesti*, *kathoey*, Two Spirit, *fa'afafine*, non-binary, and many others; Madrigal-Borloz, 2018) and the identities of some intersex persons<sup>3</sup> which fall outside of the socially constructed choices of “male” and “female”.

Unfortunately, in most cases globally, the gold standard for LGR procedures remains unmet.<sup>4</sup> According to the Trans Legal Mapping Report, 2nd Edition (2017), only 2 states offer LGR procedures that at least in text meet with that standard (Malta and Argentina<sup>5</sup>); Uruguay<sup>6</sup> joined this list in 2018. Another state, Denmark, allows LGR with best practice procedures for adults and those of the age of majority, but not for minors. Further, an additional 5 states allow access via a near-gold standard process, but with no third gender or non-binary option (Luxembourg and Norway have no age restrictions, while Colombia, Ecuador, and Ireland only offer the near-gold standard to persons of the age of majority). Outside of these 9 states, citizens in the remainder of the world (98.25% of the population) experience government-imposed restrictive requirements such as forced sterilisation, forced surgeries or hormone treatment, forced divorce, third party intervention and/or assent, and/or forced psychiatric diagnosis, treatment, or hospitalisation, or they have no access by policy or procedure, or only have access in extraordinary circumstances as assessed by a judge. (ILGA, 2017; UN Department of Economic and Social Affairs, Population Division, 2017)

Furthermore, when it comes to non-binary and third gender recognition, only 7 states allow access at all, accounting for the 3 gold standard countries mentioned above, as well as India and Pakistan (not based on self-determination), Denmark (not open to minors), and Nepal (no free movement among male, female, and third gender markers; trans people can only take the third gender marker). It is also important to

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<sup>3</sup> Intersex people are those “born with physical sex characteristics that don’t fit medical and social norms for female or male bodies”. (Intersex Human Rights Australia, 2013)

<sup>4</sup> As of 31 December 2018. Laws that are passed but not yet implemented are not included. Similarly, non-federal laws and regulations are not included, as these are rarely relevant to detention placement.

<sup>5</sup> As is often the case, implementation varies from the text of the law in the case of Argentina. This statement refers to the text directly.

<sup>6</sup> To date, there are no recorded cases of the provision being used.

note that as these processes are typically open only to citizens; they are rarely accessible to migrants, refugees or asylum seekers, unless and until they are granted citizenship (not only asylum, except in a few unique situations; Camminga, 2017) in the state where they reside. (Kohler et al., 2016) Given these restrictions, only 0.6% (UN Department of Economic and Social Affairs, Population Division, 2017) of the global population currently have full access to LGR in a manner that does not in any way violate the fundamental human rights of the individual. (ILGA, 2017; Transgender Europe, 2019; Yeung, 2016)

### *Conversion therapy*

Conversion therapy, sometimes referred to as “corrective” or “reparative” therapy<sup>7</sup>, is defined in Maltese law as “any treatment, practice or sustained effort that aims to change, repress and, or eliminate a person’s sexual orientation, gender identity and, or gender expression”. (House of Representatives of Malta, 2016) These practices are generally considered to be conducted by family members and/or religious, medical, psychiatric, or educational actors. One specific technique for trans conversion therapy is, in fact, to coerce trans and gender diverse people to live in the gender culturally associated with their sex assigned at birth. (Zinck and Pignatiello, 2015)

There is a long history of conversion therapy-like practices used to coerce trans and gender diverse people into living as though they were cis. (Kohli, 2012; Schwartzapfel, 2013) The historical (and modern; Hoffman, 2009) conflation of trans and gender diverse identities with same-sex sexual orientations also leads to a diminished representation of trans-specific conversion therapy in historical records. In modern times, restrictive regulations on access to public toilets (Huffingtonpost.com, 2017) continue the trend of punishment for embodiment of gender diversity and constitutes a violation of the right to safe drinking water and sanitation. (Heller, 2016)

When it comes specifically to gender identity and gender expression, Malta, Ireland, and Uruguay, as well as parts of the US, Canada, and Spain, ban conversion therapy by law. (ILGA-Europe, 2019; Ashley, 2019) These practices are explicitly

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<sup>7</sup> The phrasing on these practices, whether referred to as “conversion”, “corrective” or “reparative” therapy, is contested due to the inaccurate implications of each of the phrases. For the purpose of this paper, “conversion therapy” is used for accessibility and clarity purposes only.

prohibited by professional bodies in countries such as the United Kingdom (British Association for Counselling Psychotherapy et al., 2017) and the United States (Daniel and Butkus, 2015; American Psychoanalytic Association, 2012), as well as by the World Professional Association for Transgender Health (WPATH). (Coleman et al., 2012) Additionally, there is considerable interest, particularly in European states as well as the Americas, to implement further bans on these practices, as they are seen as inhumane treatment and in violation of personal autonomy and the right to self-determination. (Ashley, 2019)

### *Criminalisation*

It is worth noting, in discussions of criminality and detention, that trans people are detained not only for crimes for which all citizens may be detained, but that there are also detention mechanisms that are more or less reserved for those whose gender expression deviates from societal norms and expectations. For many trans and gender diverse people, simply the reality of being trans and/or gender diverse results in criminalisation. This may be explicit within the law, as in at least 17 jurisdictions (national or local laws prohibiting certain gender expressions exist in Brunei, the Gambia, Indonesia, Jordan, Kuwait, Lebanon, Malawi, Malaysia, Myanmar, Nigeria, Oman, Saudi Arabia, South Sudan, Sri Lanka, Uganda, United Arab Emirates, United States of America). (Human Dignity Trust, 2019) These laws have been clearly and firmly condemned by international law mechanisms for nearly two decades. (Rodley, 2001) This presents, however, an incomplete picture.

Criminalisation may also occur through indirect means. One indirect means is through criminalisation of offenses against the public order, vagrancy, or other misdemeanor offenses, whereby trans and gender diverse people - as well as those perceived to be such - are targeted by police for over-policing under these laws or by use of laws criminalising consensual same-sex sexual activity. There is evidence of use of these kinds of laws by state actors in 26 and 9 states, respectively, to criminalise trans people. (Human Dignity Trust, 2019)

The second indirect means, which occurs much more widely and simultaneously is also much more difficult to document, is when law enforcement and state agents harass, detain, or otherwise abuse trans and gender diverse people without any reference to the law. This builds from personal anti-trans or transphobic

bias held by law enforcement officers, which can lead them to harass or discriminate against trans and gender diverse people without any legal basis. (Carpenter and Marshall, 2017)

Finally, *de facto* criminalisation is extremely widespread for trans women and gender diverse people assigned male at birth (AMAB) in the context of criminalisation of sex work and the criminalisation of consensual same-sex sexual activity (Human Dignity Trust, 2019). Social bias, which impacts on all areas of life including access to education, housing, employment, and health, regularly forces trans women - most particularly trans women of color and trans and AMAB gender diverse people in the global south - to survive via participation in informal economies (Fedorko and Berredo, 2017). This systemic pressure, which is perpetuated on a global scale, is a significant factor both in the high incidence of anti-trans murder worldwide, with 369 reported murders of trans and gender diverse people collected by civil society in 2018 (Transphobia versus Transrespect, 2018), and in the extremely high HIV / AIDS burden carried by trans women and gender diverse AMAB people, with estimates indicating globally 19% of trans women are infected with HIV (48.8 times the general public average disease burden; Baral et al., 2013). It also, not surprisingly, significantly contributes to criminalisation. In only 3 jurisdictions around the world is sex work completely decriminalised: Niue, New Zealand, and New South Wales (Australia) (NSWP, 2019). One oft-reported experience of trans women and AMAB gender diverse people is that simply presenting a gender expression that is interpreted by others as that of a trans woman regularly results in others assuming that one is selling sex (Fedorko and Berredo, 2017; Human Dignity Trust, 2019). These assumptions are not limited to the general public, but also come from law enforcement and agents of the state (Carpenter and Marshall, 2017). As such, there is a significant over-policing of trans women and AMAB gender diverse people under the presumption of participation in sex work.

### *Detention - practices*

Drawing together how criminalisation and pathologisation may result in increased incarceration, as well as noting that legal gender recognition has a specific and tangible impact in terms of conversion therapy, may help us understand how this impacts trans and gender diverse prisoners in practice. Detention is one context where access to legal gender recognition has a specific and tangible impact - be it psychiatric, carceral, asylum, or military. In 2017, the global prison population was estimated at

10.74 million persons (Walmsley, 2017). Nearly all detention facilities are sex-segregated, providing housing for “men” and “women”. When placing detainees into a sex category, in the vast majority of cases, this classification takes place only on the basis of the sex or gender marker on the detainee’s official documents (Blight, 2000; Chitsawang, n.d.; National Center for Transgender Equality, 2019).

There have been efforts in a small number of States (Canada, Iceland, Malta, Scotland, England, and certain jurisdictions within Brazil and India) to institute policies that account for and adequately protect trans and gender diverse detainees. Canada (Correctional Service Canada, 2017), Malta (Correctional Services, Malta, 2016), Scotland (Scottish Prison Service, 2014) (under revision; Taylor, 2018), and the UK (National Offender Management Service, 2016)<sup>8</sup> have explicit policies pertaining to trans and gender diverse inmates that address a variety of issues related to detention, such as access to transition-related medical treatment, housing, and social support services.

In Iceland, much of carceral detention is not sex-segregated (Fangelsismálastofnun Rískins, 2018). In all jails as well as Hólmsheiði Prison, where the majority of incarcerated persons serve their sentences, all detainees have single cells, and the cells are in mixed-sex wards, with the exception of a small single-sex area designated for women who are victims of gender-based violence and unable to mix with the general population of detainees due to histories of trauma (Fangelsismálastofnun Rískins, 2018). To date, there have not been any openly trans or gender diverse inmates in Iceland; however, a prison structure without sex-based segregations promises to allow these detainees to experience detention more similarly to the general population and without the consequences described in this paper of single-sex detention. Furthermore, many trans and gender diverse people do not identify or present along lines that are acceptable in the context of the gender binary;<sup>9</sup> it is reasonable to expect that non-binary and early-transition inmates could experience fewer negative gender-based consequences in detention facilities based on the Icelandic system.

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<sup>8</sup> This document is in the process of being updated, with a formal consultation to take place in November 2019.

<sup>9</sup> In the largest survey of trans people to date, conducted online in the United States, of the 28,000 respondents, 35% identified as non-binary (James et al., 2016).

Similarly, there are certain states in Brazil and India which have implemented trans-friendly detention policies. In Rio de Janeiro, Brazil, policies have been in effect since 2015 that allow trans and gender diverse persons assigned male at birth in detention to access hormone treatments, go by their current name, and be transferred to women's facilities (if they choose) (The Guardian, 2015). A 2019 preliminary ruling (The Rio Times, 2019) by a judge on the Federal Supreme Court of Brazil indicated that policies must protect trans women inmates; at the time of writing, the judgment awaits review by the full Federal Supreme Court panel. In Kerala, India, some prisons in the state have separate prison blocks for trans and gender diverse detainees (Babu, 2015). However, the rest of India does not yet have these facilities (Express News Service, 2019).

After instituting human rights-based processes in 2017, the US Federal Bureau of Prisons revised its Transgender Offender Manual (US Department of Justice, 2018) in 2018, reverting to a process based on "biological sex". This concept is not defined in the document, and requires trans and gender diverse detainees to have made "significant progress toward transition as demonstrated by medical and mental health histories" to receive consideration for placement in a sex-segregated detention facility based on their gender identity. This is problematic for trans and gender diverse people, as well as many intersex people, given that there is no set of clear benchmarks for "progress" and no universally agreed target for the transition process (particularly among trans and gender diverse people themselves). Moreover, many trans and gender diverse people are unable to access medical transition processes (White Hughto et al., 2017) due to medical issues including but not limited to hypertension, cardiovascular disease, and diabetes (Coleman et al., 2012), economic barriers, and social barriers.

Immigration, and specifically immigration detention, is also a context in which trans and gender diverse people experience human rights violations due to their gender identity and/or gender expression (Camminga, 2017). There have been some efforts to incorporate gender-appropriate housing into refugee and asylum detention facilities, but to date, the UNHCR Detention Guidelines (last updated in 2012) do not explicitly address this issue (UNHCR, 2012). Furthermore, there are multiple high-profile reports of deaths of trans women asylum seekers in the custody of United States Immigration and Customs Enforcement (ICE) in recent years (Fitzsimons, 2019; Albarrán Torres, 2019).

A long history of psychopathologisation also creates conditions for the detention of trans people in psychiatric hospitals, either under the guise of fulfilling legal gender recognition requirements, as in Ukraine<sup>10</sup> (EuroVisionary, 2017), or at the behest of family members opposed to transition (Council of Europe, Committee on Bioethics, 2015). These detentions are specifically targeted at assessing the reality of a trans or gender diverse person's gender identity and/or expression, and in themselves constitute human rights violations (Willging et al., 2006; Pūras, 2017).

### *Detention - consequences*

For trans and gender diverse prisoners, there are myriad negative consequences to being housed in single-sex detention facilities based on sex assigned at birth. In both men-only and women-only facilities, these include threat or experience of physical violence, sexual violence, or psychological violence (Rodley, 2001; National Center for Transgender Equality, 2018); limited or barred access to gender affirming medical treatment (The Nation Thailand, 2019); limited or no access to psychological support services (McCauley et al., 2018); forced genital examinations (Roy, 2017); long-term solitary confinement (for "protection") (Magpantay, 2019); limited or no access to clothing, hairstyle, or other things fitting for one's gender expression (Blanc, 2018; Chambers, 2018); showers and bathrooms shared with only persons having a different gender, gender identity, or gender expression (Blanc, 2018); segregated and unequal housing (for "protection") (Blanc, 2018); and sexual and physical violence and humiliation by guards and staff (Blanc, 2018; Rodley, 2001).

### *Analysis*

#### *Landscapes for LGR and their consequences*

For trans and gender diverse people, as described in the introduction, there are broadly three possible landscapes in regards to legal gender recognition: (1) the gold standard, where the process is accessible, transparent, quick, and affordable; (2) where there are restrictions that limit the accessibility, transparency, and affordability of the process; and (3) where there is no access at all. Landscape 1 exists only where the non-

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<sup>10</sup> Ukraine repealed legally mandatory psychiatric hospitalisation for access to gender affirming surgeries in January 2017.

binary-inclusive gold standard is in place - Uruguay, Malta, and Argentina - which account for a mere 0.64% of the global population (UN Department of Economic and Social Affairs, Population Division, 2017) and 0.87% of the global prison population (Walmsley, 2017). Trans and gender diverse people in the remainder of the world, accounting for more than 99% of the global population, are subject to something of a paradox.<sup>11</sup>

In Landscape 1, where trans people do have access to legal gender recognition based on a gold standard process, criminalisation can be at its lowest, with trans and gender diverse people subject mostly to indirect and *de facto* criminalisation (Arístegui et al., 2017). Even at its lowest, however, *de facto* criminalisation and discrimination are widespread, with for example 23% of respondents in a 2018 UK survey indicating that they would not be comfortable being around a trans person (Ipsos.com, 2018). Additionally, it is vital to note that the legal landscape comprises only part of the picture regarding the criminalisation and subsequent detention of trans people, with public opinion and bias making significant impacts as well.

In Landscapes 2 and 3, indirect and *de facto* criminalisation (as well as direct in parts of Landscape 3) are more widespread. Trans and gender diverse people who are unable to access LGR or are subject to significant barriers in the process are also thus further exposed to types of criminalisation that hinge on unmatched identity documents (which are inherently more common in these contexts, as additional barriers cumulatively limit the number of people who can access a process). The structural complexity in which trans and gender diverse people in these contexts exist becomes apparent when considering how multiple systems working from several angles collaborate to create lives for trans and gender diverse people that are inherently criminal, and thus force or coerce a change in gender identity and/or gender expression.

Once detained, trans and gender diverse people held in single-sex facilities based on their sex assigned at birth are subject to a variety of pressures and structural limitations that impact their safety and physical and mental health. Detention policies in some places prohibit access to transition-related medical care or only allow said

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<sup>11</sup> This paper is not arguing that detention conditions in Landscape 1 countries are consistently or inherently better than those in the other Landscapes, but rather to present the nuances of the problems which occur and the many moving pieces at the intersection of access to legal gender recognition, criminalisation, and single-sex detention.

access for those who began their medical transition prior to entering the facility (US Department of Justice, Federal Bureau of Prisons, 2018; McCauley et al., 2018). When access is available, it is often hindered by structural, interpersonal, and individual barriers (Clark et al., 2017). It is important to note here that this requirement does not simply hinge on starting a process, but also depends on having sufficient financial means to do so. Transition-related medical care is regularly accessed out-of-pocket for trans and gender diverse people as States often do not see it as medically necessary (Davy, 2011). Additionally, many trans and gender diverse people resort to informal markets to accessing transition-related medical care (Emmer et al., 2011); this generally fails to meet the requirement of “starting hormones before detention”, given that there is no official medical paper trail (McCauley et al., 2018).

To present a composite, fictional scenario<sup>12</sup>: Celeste is a person assigned male at birth who comes out as a trans woman while living with her parents in Switzerland, where she is a citizen. Her family is not accepting, and she ends up experiencing homelessness. To earn sufficient income to survive, Celeste enters sex work. During this time, she is able to access transition-related medical care only via informal markets, due to underemployment and provider bias against both trans people and sex workers. This informal care is insufficient for legal gender recognition, and LGR in Switzerland requires a mental health diagnosis and medical interventions, which also incur costs. She is arrested for sex work and detained in a single-sex male facility, in line with her legal documents. Once inside the detention facility, she is unable to access transition-related medical care because she was receiving this care informally. She is housed with men, who sexually, physically, and mentally harass and assault her. In one moment during her detention, Celeste is placed in solitary confinement as an attempt to protect her from the violence of other inmates. She has no access to legal gender recognition while in detention due to refusal of transition-related medical care, which is a State requirement for accessing LGR. Additionally, the male detention facility bans make-up, long hair, and feminine clothing, forcing the detainee to adopt a masculine gender expression.

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<sup>12</sup> This composite is based on 18 years of involvement in work related to the human rights of trans and gender diverse people by the author in 4 countries (USA, Thailand, Germany, Belgium), including 4 years of international work at the United Nations and regional work in Asia and the Pacific as well as Europe. The composite was created to protect the identities of individuals and to explain a series of potential consequences in a concise manner. A correlation of the full scenario to a specific individual's story is coincidental.

As is evident, trans and gender diverse detainees face not one but a series of impossible circumstances - “impossible” because the systems in place in detention contexts force detainees to exist precisely within narrowly defined sex and gender norms that correspond with the detainee’s sex/gender marker (which for over 97% of the world prison population (Walmsley, 2017)<sup>13</sup> is most likely to be their sex assigned at birth, regardless of if the detainee is trans or gender diverse).

Returning to the definition of conversion therapy, which is a practice that aims to change an individual's sexual orientation to heterosexual or gender identity to cisgender, it becomes clear that single-sex detention facilities based on sex assigned at birth force trans and gender diverse detainees into a specific kind of conversion therapy. From the previous example, Celeste was unable to access gainful formal work, and thus unable to start formal transition-related medical care or access legal gender recognition. Access to transition-related medical or legal processes in itself is a bidirectional problem, as insufficient financial resources limit access to transition processes, and inability to avail of transition processes results in limited access to employment and thus financial resources (Winter et al., 2018). She was unable to start or continue her medical care in detention, and unable to pursue LGR due to limited access to the aforementioned medical care (which would give her access to transition-related medical care, if she could access it) - another paradoxical situation which Celeste cannot escape. As such, she is forced by restrictive systems to live in a detention environment with other detainees not of her gender - one that is violent precisely due to the gendered component of detention - and she is barred from both medical and legal transition processes. She is furthermore forced to alter her gender expression based on facility rules and regulations, and coerced to alter her gender expression in response to the violence inflicted by other detainees and the ‘protective measures’ offered by the facility (long-term solitary confinement). The result is clear: trans and gender diverse detainees are structurally limited in their freedom of expression, denied access to recognition as a person before the law, and subjected to systemic conversion therapy practices while in detention.

A free choice cannot be made between one’s own fundamental human rights, and a State which creates a situation where its citizens must make such a choice is implicitly violating those rights. For example, if a trans or gender diverse person is required to undergo psychiatric treatment and diagnosis to receive legal gender

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<sup>13</sup> Argentina, Columbia, Denmark, Ecuador, Ireland, Luxembourg, Malta, Norway, and Uruguay, where legal gender recognition processes are gold standard or near-gold standard.

recognition, this sets the right to recognition as a person before the law against the right to the highest standard of mental and physical health, as forced or coerced treatment never meets this standard (UN Office of the High Commissioner for Human Rights, 2018). As another example, if a person in detention is required to go into solitary confinement or change their gender expression for their own “protection”, this sets the rights to freedom from torture and to the highest attainable standard of health against the right to freedom of expression (Fuller, 2018; UN General Assembly, 2015; Méndez, 2016).

In a similar sense, single sex detention inherently creates direct violations of human rights for trans and gender diverse people. When a non-binary detainee is detained in a single-sex male or female facility, this compromises the right to freedom from torture. The same is true when trans and gender diverse AMAB people are detained in male facilities, and when trans and gender diverse AFAB people are detained in female facilities. Worth noting as well is the extreme risk of violence experienced by AFAB trans and gender diverse people in male prisons, with risk varying to some degree based on which surgeries the detained person has undergone (International Network of Civil Liberties Organizations, 2019). In fact, given a choice between male and female facilities, both AFAB and AMAB trans people have been known to choose the facility based on their sex assigned at birth, though for different reasons (trans and gender diverse AFAB people can fear for their safety in male facilities and feel safer in female ones, while the similar fear for safety among trans and gender diverse AMAB people housed in male facilities can be solved by doing sex work for self-protection while in detention - something that would not be possible for them generally in female facilities) (International Network of Civil Liberties Organizations, 2019).

In the context of international human rights law, it is the duty of the State to ensure full, unhindered access to human rights. Having to choose one right or another, as an individual, is only possible when human rights are not being upheld by the State, and thus the State fails to meet its obligations under international law. The detention of trans and gender diverse persons in single-sex facilities inherently creates one of these choice-points, and thus always constitutes a violation of international human rights law.

*Mapping single-sex detention practices to legal definitions of conversion therapy*

As presented above, conversion therapy is “any treatment, practice or sustained effort that aims to change, repress and, or eliminate a person’s sexual orientation, gender identity and, or gender expression” (House of Representatives of Malta, 2016). There are two main components of this definition that must be analysed in assessing the thesis: (1) what constitutes “treatment, practice or sustained effort”; and (2) applicability of “aims to change, repress and, or eliminate”.

Firstly, on “treatment, practice or sustained effort”, while ‘treatment’ in an international law context generally requires active action, neither “practice” nor “sustained effort” have this requirement. Given the above discussion of systematic response in places of detention to trans and gender diverse persons and their needs, “practice” refers to policies which place individuals on the basis of their legal sex/gender marker, as well as to policies banning certain haircuts or manners of dress based on stereotypical constructions of gender-based presentation. “Treatment” thus also refers to policies which respond to security concerns and incidents of violence by placing the trans or gender diverse detainee in long-term or indeterminate solitary confinement. Furthermore, policies that disallow access to transition-related medical and psychiatric care fall under banners of both “practice” and “sustained effort”.

Secondly, “aims to change, repress and, or eliminate” clearly applies to policies which harm a trans or gender diverse individual’s ability to express their gender (e.g. gender expression). This includes, but is not limited to, policies which (a) place individuals on the basis of their legal sex/gender marker, policies (b) ban certain haircuts or manners of dress based on stereotypical constructions of gender-based presentation, (c) respond to security concerns and incidents of violence by placing the trans or gender diverse detainees in long-term or indeterminate solitary confinement, and (d) disallow access to transition-related medical and psychiatric care.

Furthermore, the Maltese law goes on to state that:

3. *It shall be unlawful -*

*(a) for any person to:*

*(i) perform conversion practices on a vulnerable person; or*

*(ii) perform involuntary and, or forced conversion practices on a person; or*

(iii) *advertise conversion practices* (House of Representatives of Malta, 2016)

As persons in detention have a recognised limitation in their ability to participate in voluntary choices with full, free, and informed consent, as dissected and detailed thoroughly in the context of the Nuremberg Trials following World War II (Green, 1948; International Military Tribunal, 1950), the Maltese ban clearly addresses all detention-related practices in point 3(a)ii.

International human rights mechanisms have for years acknowledged that conversion therapies can be classified as torture (UNHCR, 2012b; UN Joint Statement, 2015). For example, a 2015 report from the Office of the High Commissioner for Human Rights on sexual orientation and gender identity states that “[Conversion] therapies have been found to be unethical, unscientific and ineffective and, in some instances, tantamount to torture” (UN Office of the High Commissioner for Human Rights, 2015). Additionally the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez made explicit calls to the United Nations for the banning of conversion therapies as early as 2013 due to their relevance to his mandate (Méndez, 2013; Méndez, 2016). The UN Committee against Torture has called for legal bans on conversion therapy on multiple instances (UN Committee Against Torture, 2016a; UN Committee Against Torture, 2016b; UN Committee Against Torture, 2017).

Given the landscape surrounding legislation related to conversion therapy, as well as international human rights law, it is thus possible to see a clear legal link between conversion therapy practices and single-sex detention practices. Furthermore, assessments in relation to the legality and classification of single-sex detention practices for trans and gender diverse persons map directly to those same assessments of conversion therapy. As such, single-sex detention arguably equates to conversion therapy and thus equates to torture or inhuman treatment.

## *Conclusions*

The argument proposed in this paper is that single-sex detention for trans and gender diverse people fits within the definition of “conversion therapy”. However, single-sex detention for trans and gender diverse people is typically framed as an administrative

issue - where or how to house trans and gender diverse detainees, how to provide or deny access to gender-affirming healthcare, and how to adequately protect them from increased risk of violence within detention facilities, for example. This paper argues that single-sex detention for trans and gender diverse people can be viewed through a different lens: that of the consequences of the single-sex closed context and its inherent rules and the impact of those rules on trans and gender diverse individuals and populations. The impact is one of coercion by the facility, and thus by the State responsible for said facility, on the detainee to change or modify their gender expression to avoid the potential consequences of its maintenance. This force occurs consistently around the world in medical, psychiatric, and religious contexts, and has been clearly denounced; however, so far, too little attention has been paid to the structural form of conversion therapy that exists within detention facilities.

It must be understood that decisions about punishment and the fitness of a punishment for a certain crime are decisions made by the State. The international human rights law framework clearly establishes the responsibility to both create and maintain these systems. However, for trans and gender diverse detainees, another layer of punishment is implicit in any and all single-sex detention - and more specifically, a punishment that is recognised by the same international frame as constituting torture or other cruel, inhuman or degrading treatment or punishment. Thus, housing trans and gender diverse people in any kind of single-sex detention is in violation of the principles of fundamental human rights, and as a result, must be completely eliminated in the process of meeting State human rights obligations. What is framed as a set of “complex administrative choices” is, in fact, far from innocent.

As a result of this equation, the next logical step is for bodies charged with the prevention of torture and reparations to torture victims to investigate, assess, provide guidance, and legislate to prevent further human rights abuses in this context. Furthermore, it is paramount that, so long as detention is deemed necessary, that all detention systems create methods to manage trans and gender diverse persons without institutionalising violations of their fundamental human rights. This requires meeting the fundamental principles of self-determination, the right to recognition before the law, and the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment, as enshrined in the Universal Declaration of Human Rights.

The argument that all single-sex detention circumstances for trans and gender diverse people of course raises the question of solutions. This paper does not seek to present ideas for modifying carceral systems, given the structural barriers presented here and consequently that the most obvious solution would be for trans and gender diverse people to be housed with other trans and gender diverse people – which would require increasing incarceration rates within this community, and that cannot be presented as a solution. Instead, the States must ask themselves about the feasibility of keeping trans and gender diverse people in carceral institutions at all in the context of their responsibilities under international human rights law. Thus, this is a call on States to consider non-carceral means of meting “justice” for trans and gender diverse populations, assessing thoroughly the state-based understanding of torture, cruel or inhumane treatment, and finally making radical attempts to de-institutionalise all minority populations, including trans and gender diverse people, and ultimately incarcerated populations altogether.

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