

**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**Lili MINASYAN and others *versus* Armenia**

(Application no. 59180/15)

WRITTEN COMMENTS

Submitted jointly by

ILGA-Europe (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association)

TGEU (Transgender Europe)

20 July 2018

By mail and fax

## Introduction

1. These written comments are submitted jointly by the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) and Transgender Europe (TGEU), hereinafter the “Interveners”.
2. The present case involves the harassment and persecution of certain LGBT and women’s rights activists in Armenia (the “Applicants”). The Applicants have been victims of insulting and defamatory statements made by a number of parties, including members of the Armenian Parliament and ruling Republican Party, which incited the public to discriminate against them on the grounds of their association with the LGBT community and/or their actual or perceived sexual orientation or gender identity. The civil proceedings initiated against the newspaper and its editor-in-chief responsible for the hateful comments were ineffective, because the Armenian courts failed to give due consideration to the discrimination claims brought by the Applicants. This is in part because the current legal framework in Armenia does not provide a remedy for discrimination and/or hate speech on the basis of perceived sexual orientation or gender identity.
3. As set out in the application to intervene dated 16 May 2018, this submission discusses the following:
  - (a) The humiliating and stigmatising effect of homophobic and transphobic statements on people based on their (actual or perceived) sexual orientation or gender identity under Articles 8 and 14 of the Convention.
  - (b) The positive obligations of the States under Article 8 of the Convention in protecting people from homophobic and transphobic expression, including the obligation to prevent, investigate, prosecute, punish and remedy such acts.
  - (c) Contextual information concerning the attitudes and practices in responding to homophobic or transphobic speech in Armenia, including a brief commentary on the draft anti-discrimination law.
4. This intervention draws upon the Court’s case-law, and other authoritative sources of international law and guidance.

### **I. Homophobic and transphobic statements constitute hate speech, which may violate Articles 8 (respect for private and family life) and 14 (prohibition of discrimination) of the Convention**

#### **A. Homophobic and transphobic statements constitute hate speech**

5. In *Vejdeland and Others v. Sweden*, the Court explicitly extended the notion of hate speech to offensive speech directed towards person’s sexual orientation. In the context of homophobic statements the Court noted that, “*inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner*”.<sup>1</sup>
6. This has also been accepted within Europe and beyond, with numerous authoritative bodies recognising that homophobic and transphobic statements targeted against LGBT people amount to hate speech:
  - (a) The European Commission against Racism and Intolerance (“ECRI”) in its General Policy Recommendation No. 15 on combating hate speech (“GPR No. 15”)<sup>2</sup> defined hate speech as covering “*the advocacy, promotion or incitement of a person or group of persons, as well as any harassment, insult negative stereotyping, stigmatization or threat in respect of such a person or group of persons*” based on their personal characteristics or status. Gender identity and sexual orientation were specifically included in the list of such characteristics.

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<sup>1</sup> *Vejdeland and Others v. Sweden*, no. 1813/07, 9 February 2012, § 55, citing *Féret v. Belgium*, no. 15615/07, 16 July 2009, § 73.

<sup>2</sup> Council of Europe, CRI (2016)15, 8 December 2015.

- (b) The European Parliament has noted “a proliferation of hate speech targeting the lesbian, gay, bisexual and transgender (LGBT) community in a number of European countries” and highlighted the use by public figures of “inflammatory or threatening language or hate speech.”<sup>3</sup> Similarly, the United Nations High Commissioner for Human Rights has drawn attention to concern within the United Nations system about “rhetoric used to incite homophobic and transphobic hatred and related violence. Such language is used by some political and community leaders to promote negative stereotypes, stir up prejudice and harass particular individuals”.<sup>4</sup>
- (c) The Committee of Ministers of the Council of Europe has stated that measures should be taken “to combat all forms of expression, including in the media and on the Internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons.”<sup>5</sup>

**B. Homophobic and transphobic speech may violate the rights protected by the Convention due of its humiliating and stigmatising effect**

- 7. The Court has recognised that sexual orientation and gender identity are covered both by (i) Article 8 of the Convention,<sup>6</sup> taking into account that the concept of private life under this Article includes a person’s psychological integrity,<sup>7</sup> and (ii) Article 14 of the Convention (taken in conjunction with Article 8), which prohibits discriminatory treatment.<sup>8</sup>
- 8. The Court has noted that statements that portray homosexuals “as a generally undesirable sector of the population, whether as children, same-sex couples or parents” accompanied by the use of specific gestures to imitate homosexuals, may be regarded as “ridicule promoting negative stereotypes.”<sup>9</sup> Thus, the Court has acknowledged that homophobic and transphobic hate speech may have a stigmatising and humiliating effect.
- 9. Further, the Court has recognised that the use of hate speech relating to a group of persons in general can result in an individual member of that group feeling offended,<sup>10</sup> and thus to be a victim of a violation of its rights under Articles 8 and 14 of the Convention. Indeed, the Court has established that: “any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group’s sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group.”<sup>11</sup> This impact is not, therefore, restricted to situations where such statements make a specific reference to one or more individuals.
- 10. Homophobic and transphobic statements targeted against LGBT people can have extremely serious implications on the enjoyment of their rights and freedoms. As was noted in the Explanatory Memorandum to GPR No. 15, “[t]he use of hate speech can lead to those targeted by it feeling not only afraid and insecure but also – without any justification - guilty or ashamed and humiliated, leading to a loss of self-confidence and self-esteem. Moreover, these feelings can also result in [...] mental and physical health problems of a more serious nature. As a result, such feelings can have consequences for every aspect of the life of those concerned, whether at work, school, or home, but their impact on family relations and the willingness to participate in society is especially serious.”<sup>12</sup> Similar statements were included in the UN International Criminal Tribunal for Rwanda, which affirmed that “[h]ate speech is a discriminatory form of aggression that

<sup>3</sup> European Parliament resolution of 26 April 2007 on homophobia in Europe.

<sup>4</sup> *Discrimination and violence against individuals based on their sexual orientation and gender identity*, A/HRC/29/23, 4 May 2015, § 33 (footnotes omitted).

<sup>5</sup> Appendix to Recommendation CM/Rec(2010)5 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, § 6.

<sup>6</sup> See, *inter alia*, *Lustig-Prean and Beckett v. United Kingdom*, nos. 31417/96 and 32377/96, 27 September 1999, §§ 84-87; and *Smith and Grady v. United Kingdom*, nos. 33985/96 and 33986/96, 27 September 1999. In both cases, the Court found that the applicants’ dismissal from the naval services, together with the intrusive nature of the investigations conducted into their homosexuality, violated their right to private life under Article 8.

<sup>7</sup> See, e.g., *Đorđević v. Croatia*, no. 41526/10, 24 July 2012, §§ 151-152.

<sup>8</sup> See, for example, *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, 21 December 1999; *Shefeld and Horsham v. United Kingdom*, nos. 31-32/1997/815-816/1018-1019, 30 July 1998; *Karner v. Austria*, no. 40016/98, 24 July 2003; *Bączkowski and Others v. Poland*, no. 1543/06, 3 May 2007; and *E.B. v France*, no. 43546/02, 22 January 2008.

<sup>9</sup> *Mladina d.d. Ljubljana v. Slovenia*, no. 20981/10, 17 April 2014, § 44.

<sup>10</sup> *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, 15 March 2012, § 53.

<sup>11</sup> *Ibid.*, § 58.

<sup>12</sup> Council of Europe, CRI (2016)15, 8 December 2015, § 105, p. 40. In similar vein, see also a report by the European Union Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States Part II – The Social Situation*, (2009), p. 8.

destroys the dignity of those in the group under attack,” “creates a lesser status” and “can be an irreversible harm”.<sup>13</sup> While these statements were made about hate speech relating to racial characteristics, they apply equally to hate speech about other protected characteristics under Article 14, including perceived sexual orientation or gender identity. This recognition matches the findings of the Court that hate speech violates individuals’ rights under the Convention.<sup>14</sup>

11. Furthermore, throughout Europe and the international human rights community, it has been recognised that many instances of hate crimes committed against LGBT people have been linked to the prior use of “degrading words” or occur in a context of “heightened dehumanisation and discrimination”.<sup>15</sup> Such action motivated by homophobic and transphobic attitudes has been found to lead to violations of the right to life, the right to liberty and security of the person and the prohibition against ill-treatment.<sup>16</sup>

## II. Contracting States have a positive obligation under the Convention to protect against hate speech on the basis of sexual orientation or gender identity

### The Court’s practice

12. The Court’s case-law to-date supports the Interveners’ position that Contracting States are under a positive obligation to protect individuals against homophobic and transphobic statements that amount to hate speech. Affording such protection:
  - (a) has been recognised by the Court in cases involving hate speech under Articles 8 in conjunction with Article 14;
  - (b) is consistent with the narrow margin of appreciation the Court has recognised, on a multiple of occasions, in relation to Article 8 on the grounds of sexual orientation or gender identity; and
  - (c) does not unduly restrict the freedom of speech under Article 10 of the Convention, given that hate speech may be subject to restrictions under Article 10(2).

### A. Positive obligation under the Convention

13. Article 1 of the Convention imposes on the Contracting States positive obligations to ensure that the rights of individuals defined in the Convention are protected within their jurisdiction.<sup>17</sup> This obligation has, of course, been recognised by the Court in a number of cases. In *M.C. and A.C. v. Romania*, the Court stated that “positive obligations on the part of a State are inherent in the right to effective respect for private life under Article 8”.<sup>18</sup>
14. In relation to hate speech specifically, the Court has acknowledged that Contracting States have positive obligations to protect and investigate hate speech, and more generally protect against attitudes and violent acts with discriminatory motives. Such an obligation might arise in cases where “a person makes credible

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<sup>13</sup> UN, International Criminal Tribunal for Rwanda, *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-T

<sup>14</sup> Report of the Council of Europe Conference: “The hate factor in political speech – Where do responsibilities lie?”, § 16, available at: <https://rm.coe.int/16800c170e>.

<sup>15</sup> Joint report by the IACHR Office of the Rapporteur on the Rights of Lesbian, Gay, Bisexual, Trans and Intersex Persons and the IACHR Office of the Special Rapporteur for Freedom of Expression. Chapter IV, para 1. Available at: [http://www.oas.org/en/iachr/expression/docs/reports/hate/hate\\_speech\\_incitement\\_violence\\_against\\_lgbti.pdf](http://www.oas.org/en/iachr/expression/docs/reports/hate/hate_speech_incitement_violence_against_lgbti.pdf).

<sup>16</sup> See, e.g., report of the Office of United Nations High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, A/HRC/29/23, 4 May 2015, § 21, and the report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on the implementation of General Assembly resolution 69/160, A/HRC/29/47, 13 April 2015, § 13.

<sup>17</sup> In the context of Article 3 violation (taken in conjunction with Article 1), see *Identoba v. Georgia*, no. 73235/12, 12 May 2015, § 66; and *A. v. the United Kingdom*, 23 September 1998, § 22, Reports of Judgments and Decisions 1998-VI.

<sup>18</sup> See, e.g. *M.C. and A.C. v. Romania*, no. 12060/12, 12 April 2016, § 114 (in that case, only an infringement of Article 3 in conjunction with Article 14 was found); *Söderman v. Sweden* [GC], no. 5786/08, § 81, ECHR 2013; *C.A.S. and C.S. v. Romania*, no. 26692/05, 20 March 2012, § 71; *M.C. v. Bulgaria*, no. 39272/98, § 150; and *mutatis mutandis*, *Identoba v Georgia*, §§ 72-73 and 94. In the same sense, see also *Aksu v. Turkey* [GC], cited above, § 59; and *Tavli v. Turkey*, no. 11449/02, 9 November 2006, § 28.

assertions that he or she has been subjected to harassment motivated by racism, including verbal assaults and physical threats”<sup>19</sup>

15. As regards violence with homophobic or transphobic overtones in particular, in *Identoba v. Georgia* and *M.C. and A.C. v. Romania*, the Court found that failure of the domestic authorities to take all reasonable steps necessary to unmask the role of possible homophobic motives for the violent events in question contravened Article 3 (protection against torture) in combination with Article 14 of the Convention, in light of the “clearly homophobic hate speech uttered by the assailants during the incident” (emphasis added).<sup>20</sup>
16. The same high standard of protection applies in situations of pure hate speech, where no act of physical violence is involved. In *Aksu v. Turkey*, the Court found a violation of the applicant’s right to private life under Article 8, on account of the State’s failure to prevent and investigate racial insults contained in publications that expressed anti-Roma sentiment. The Interveners maintain that an equally high level of protection should be afforded against pure hate speech motivated by discrimination on the basis of one’s sexual orientation or gender identity.
17. As the Court has repeatedly acknowledged, the need for effective deterrence against serious acts that threaten the protection of fundamental values and essential aspects of the protection of private life may require not only an effective criminal investigation,<sup>21</sup> but may also involve the adoption of measures designed to secure respect for private life for individuals between themselves.<sup>22</sup> To that end, the Court has noted that States may be obliged to maintain and apply an adequate legal framework affording protection against acts of violence by private individuals.<sup>23</sup> Even though “*the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State’s margin of appreciation*”, the Court found that “[c]hildren and other vulnerable individuals, in particular, are entitled to effective protection.”<sup>24</sup> The Court has recognised that members of LGBT community may be such a vulnerable individual.<sup>25</sup>
18. It is therefore necessary for States to protect individuals against the harmful effects of hate speech directed at their perceived sexual orientation or gender identity. In the Interveners’ view, legislative measures that allow victims of homophobic hate speech to bring civil discrimination claims to the courts are important steps to achieve such effective protection. Indeed, the Convention also provides in Article 13 a right to an effective remedy, in this case a possibility of bringing a civil action for damages for a violation of Articles 8 and 14.

#### **B. Sexual orientation and gender identity warrant a heightened level of protection and a narrow margin of appreciation for the Contracting State**

19. A high standard of protection should be afforded against hate speech motivated by discrimination against one’s actual or perceived sexual orientation or gender identity.
20. First, the Court has stressed that “*discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour*”.<sup>26</sup> On that basis, sexual orientation or gender identity should be treated in the same way as categories such as race, ethnicity and religion that are commonly covered by hate-speech and hate-crime laws and jurisprudence.
21. Second, the Court has observed that, in determining whether a positive obligation exists under Article 8, regard must be had to the fair balance which has to be struck between the general interest and the interests of the individual; in both contexts the State enjoys a certain margin of appreciation.<sup>27</sup> However, the margin

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<sup>19</sup> *R.B. v. Hungary*, no. 64602/12, 12 April 2016, § 84.

<sup>20</sup> *Identoba v. Georgia*, as cited above, § 77; similar facts in *M.C. and A.C. v. Romania*, as cited above, § 124.

<sup>21</sup> *Alković v. Montenegro*, no. 66895/10, 5 December 2017, § 65; *M.C. and A.C. v. Romania*, cited above, § 115: “The Court reiterates that it has not excluded the possibility that the State’s positive obligation under Article 8 to safeguard an individual’s physical integrity may extend to questions relating to the effectiveness of a criminal investigation”.

<sup>22</sup> *M.C. and A.C. v. Romania*, cited above, § 114; *Aksu v. Turkey*, [GC], as cited above, § 59, with further references to *Tavlı v. Turkey*, no. 11449/02, 9 November 2006, § 28 and *Ciubotaru v. Moldova*, no. 27138/04, 27 April 2010, § 50.

<sup>23</sup> *Alković v. Montenegro*, cited above, § 65; *Isaković Vidović v. Serbia*, no. 41694/07, 1 July 2014, § 59.

<sup>24</sup> See, e.g. *M.C. and A.C. v. Romania*, cited above, § 114; *Söderman v. Sweden* [GC], no. 5786/08, § 81, ECHR 2013; *C.A.S. and C.S. v. Romania*, no. 26692/05, 20 March 2012, § 71; *M.C. v. Bulgaria*, cited above, § 150; and *mutatis mutandis*, *Identoba v Georgia*, §§ 72-73 and 94.

<sup>25</sup> *O.M. v. Hungary*, no. 9912/15, 5 July 2016, § 53 (the case concerned an Article 5 violation).

<sup>26</sup> *Vejdeland and Others v. Sweden*, cited above, § 55, citing *Smith and Grady v. the United Kingdom*, cited above, § 97.

<sup>27</sup> See, e.g., *B. v. France*, no. 13343/87, 25 March 1992, § 44; *Hämäläinen v. Finland* [GC], no. 37359/09, § 67, ECHR 2014.

allowed to the State will be restricted “when a particularly important facet of an individual’s existence or identity is at stake.”<sup>28</sup>

22. The Court has stressed on multiple occasions that sexual orientation and gender identity are important facets of an individual’s private life, and clearly fall under the personal sphere protected by Article 8 of the Convention.<sup>29</sup> Indeed, gender identity belongs to “one of the most intimate areas of a person’s private life”, is a free-standing right, a “fundamental aspect of the right to respect for private life”,<sup>30</sup> and is “one of the most basic essentials of self-determination.”<sup>31</sup> They are, moreover, used as a marker of group identity.<sup>32</sup> Accordingly, the margin of appreciation allowed to the State under Article 8, in particular when implementing their obligations to protect individuals from hate speech relating to sexual orientation and gender identity, may be restricted.<sup>33</sup>

### C. Acknowledging a heightened level of protection does not contravene Article 10

23. The Interveners recognise that ensuring protection against defamatory or discriminatory speech under Article 8 may be in tension with the freedom of speech enshrined in Article 10 of the Convention. This is a balance that needs to be struck by the States.
24. The Court has acknowledged that, where both Articles 8 and 10 are at stake, the States enjoy a margin of appreciation both (i) in the choice of the means to secure compliance with Article 8 in the sphere of the relations between individuals, and (ii) in assessing whether and to what extent an interference with the right to freedom of expression is necessary under Article 10. If the balance is struck in accordance with the Court’s case-law, the Court will generally refrain from substituting its view for that of the State.<sup>34</sup> However, “if the balance struck by the national authorities was unsatisfactory, in particular because the importance or scope of one of the rights at stake was not duly considered, the margin of appreciation would be a narrow one”<sup>35</sup> (emphasis added).
25. Further, the outcome of the balancing exercise should not vary depending on whether the application is brought under Article 8 by the person who is the subject of the statement, or under Article 10 by the person who made it, because in principle the rights under these Articles deserve equal respect.
26. It must be noted that Article 10(2) accepts that limitations imposed on freedom of speech will not infringe the Convention if they are prescribed by law, serve a legitimate aim, namely the protection of the reputation and rights of others, and are necessary in a democratic society in order to achieve those aims. As the Court has recognised, the fundamental principles underpinning protection against hate speech are “tolerance and respect for the equal dignity of all human beings” which “constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance [...], provided that any ‘formalities’, ‘conditions’, ‘restrictions’ or ‘penalties’ imposed are proportionate to the legitimate aim pursued.”<sup>36</sup> It was precisely in that context that the Court upheld the need for restrictions on homophobic speech in *Vejdeland* (see above, Section I-A).
27. In reviewing the decisions taken by the State under Article 10 pursuant to their margin of appreciation, the Court in *Vejdeland and Others v. Sweden* took into account, for example, the content of the views held against the applicants and the context in which they made the comments, whether the State interference at

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<sup>28</sup> *Schlumpf v. Switzerland*, no. 29002/06, 8 January 2009, § 104.

<sup>29</sup> See *Dudgeon v. the United Kingdom*, no. 7525/76, 22 October 1981, § 41, Series A no. 45; *B. v. France*, cited above, § 63, Series A no. 232-C; *Burghartz v. Switzerland*, no. 16213/90, 22 February 1994, § 24, Series A no. 280-B; *Laskey, Jaggard and Brown v. the United Kingdom*, nos. 21627/93, 21826/93, and 21974/93, 19 February 1997, § 36, Reports of Judgments and Decisions 1997-I; and *Smith and Grady v. the United Kingdom*, cited above, § 71. In addition, the Court has also recognised this in relation to a number of issues, for example, spanning the legal recognition of gender re-assignment procedures (*Christine Goodwin v. The United Kingdom*), regulation of gender-reassignment surgery (*L. v. Lithuania*, no. 27527/03), the possibility of same sex couples to get married or enter into any other types of civil union (*Oliari and Others v. Italy*, no. no. 18766/11 and 36030/11), legal protection or recognition for same-sex couples married abroad (*Orlandi and Others v. Italy*, no. 26431/12).

<sup>30</sup> *Van Kück v. Germany*, no. 35968/97, 12 June 2006, §§ 56 and 75.

<sup>31</sup> *Y.Y. v Turkey*, no. 14793/08, 10 March 2015, § 102 (extracts).

<sup>32</sup> Interights’ intervention in *Vejdeland and Others v. Sweden*, cited above, § 45.

<sup>33</sup> *Schlumpf v. Switzerland*, no. 29002/06, 8 January 2009, § 104.

<sup>34</sup> *Perinçek v. Switzerland* [GC], no. 27510/08, 15 October 2015, §§ 198-199.

<sup>35</sup> *Aksu v. Turkey*, as cited above, § 67.

<sup>36</sup> *Erbakan v. Turkey*, no. 59405/00, 6 July 2006, § 56

issue was “proportionate” to the legitimate aim pursued, and whether the reasons adduced by the State to justify the interference were “relevant and sufficient.”<sup>37</sup>

28. An important factor is whether the statements, when fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance. The Court has already emphasized the importance of restricting speech where the aim of the speech is to incite hatred towards a racial or ethnic group.<sup>38</sup> More generally, the Court has been particularly sensitive to “sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups”<sup>39</sup> (emphasis added), and has paid attention to the medium and manner in which the statements were made, as well as their capacity – direct or indirect – to lead to harmful consequences.<sup>40</sup> In particular, the Court has paid close attention to statements made by politicians. It has noted that, “*given that the fight against all forms of intolerance is an integral part of the protection of human rights, it is of crucial importance that politicians, in their public speeches, avoid disseminating words likely to nourish intolerance.*”<sup>41</sup> Even though political speech requires a high degree of protection, politicians “*should pay particular attention to the defense of democracy and its principles*”, whereas “*political discourse that incites hatred based on religious, ethnic or cultural prejudices poses a threat to social peace and political stability in democratic states.*”<sup>42</sup>
29. The same sensitivities should be exercised in the case of speech directed against sexual orientation and gender identity, given that, as the Court emphasized in *Vejdeland*, “*discrimination based on sexual orientation is as serious as discrimination based on “race, origin or colour”.*”<sup>43</sup> Indeed, the Court has consistently declined to endorse policies and decisions which embody a predisposed bias on the part of a heterosexual majority against a homosexual minority and has held that “*these negative attitudes, references to traditions or general assumptions in a particular country cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment, any more than similar negative attitudes towards those of a different race, origin or colour.*”<sup>44</sup>
30. The Interveners respectfully submit that due consideration should be given to all the above factors when assessing whether the State properly discharged its obligations to protect the Applicants’ private life under Article 8.

#### **D. International law and practice**

31. A positive obligation of Contracting States to protect against homophobic and transphobic speech is entirely consistent with, and widely recognised by, current international and European standards.
32. There have been calls to take steps to increase public awareness of the importance of respecting pluralism and of the dangers posed by the use of hate speech, to demonstrate the falsity of the foundations on which such speech is based and to provide support for self-regulation of expression by public and private institutions.<sup>45</sup> Ensuring effective protection is even more important, given that “[i]n today’s cyber world and social media, incitement to hatred and violence driven by hate speech relating to sexual orientation and gender identity has an exponential reach, spinning the web of violations in real time and into the future.”<sup>46</sup>
33. In addition, there is a need, in certain circumstances, for action to be taken against particular hate speech – and its dissemination – through the application of administrative, civil and criminal law, while respecting the

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<sup>37</sup> *Vejdeland and Others v. Sweden*, cited above, § 52.

<sup>38</sup> E.g. see *Garaudy v. France*, no. 65831/01, *Norwood v. the United Kingdom*, no.23131/03, *Pavel Ivanov v. Russia*, no. 35222/04.

<sup>39</sup> *Perinçek v. Switzerland* [GC], as cited above, § 206. See particularly, *Vejdeland and Others v. Sweden*, which concerned allegations that homosexuals were attempting to play down paedophilia and were responsible for the spread of HIV and AIDS).

<sup>40</sup> *Perinçek v. Switzerland* [GC], cited above, § 207. See also *Féret v. Belgium*, as cited above, § 76, where the statements had been made on electoral leaflets, which had enhanced the effect of the discriminatory and hateful message that they were conveying; and *Vejdeland and Others* (cited above, § 56), where the statements had been made on leaflets left in the lockers of secondary school students.

<sup>41</sup> *Erbakan v. Turkey*, as cited above, § 64.

<sup>42</sup> *Féret v. Belgium*, as cited above, §§ 73-76. The Court found that the State had legitimately restricted a parliamentarian’s freedom of speech because his comments, conveyed in an electoral context, had carried heightened resonance and clearly amounted to incitement to racial hatred.

<sup>43</sup> Op. cit., fn 27. As noted by the third-party intervener in *Vejdeland and Others v. Sweden*, hate speech laws should protect those characteristics that are essential to a person’s identity and that are used as evidence of belonging to a particular group. See *Vejdeland and Others*, as cited above, quoting Interights’ argument at § 46.

<sup>44</sup> *Bayev and Others v. Russia*, § 68, citing other cases.

<sup>45</sup> See, e.g., GPR No. 15, recommendations 4 and 6.

<sup>46</sup> Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/35/36, 19 April 2017, § 39.

right to freedom of expression. This can be seen in a wide range of measures and instruments, including the requirements in Article 20(2) of the International Covenant on Civil and Political Rights, requiring that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law,<sup>47</sup> and in Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination that States Parties criminalise, *inter alia*, all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination and incitement to such acts against any race or group of persons of another colour or ethnic origin. Further, the existence of an obligation to provide effective steps for the implementation of such measures has also been recognised, for example, by the Committee on the Elimination of Racial Discrimination,<sup>48</sup> in order to provide meaningful protection for the individuals.

34. The Council of Europe Committee of Ministers Recommendation on Hate Speech calls for the establishment of “a sound legal framework consisting of civil, criminal and administrative law provisions on hate speech which enable administrative and judicial authorities to reconcile in each case respect for freedom of expression with respect for human dignity and the protection of the reputation or the rights of others”.<sup>49</sup> It points out that such a framework should allow the victims a right of reply or order a retraction.<sup>50</sup>
35. The need for measures to be taken against hate speech based a person’s sexual orientation or gender identity in particular was recognised in ECRI’s GPR No. 15.<sup>51</sup> This recommended that standing be provided for those targeted by hate speech – as well as equality bodies, national human rights institutions and interested non-governmental organisations - to bring administrative or civil proceedings in respect of hate speech.<sup>52</sup>
36. Many Contracting States have already taken positive steps to criminalise and/or grant the right to bring civil proceedings against homophobic speech. As regards criminal liability, a large number of Contracting States expressly make it a criminal offence to incite hatred, violence or discrimination on the grounds of sexual orientation and, in some instances, also gender identity. These include Austria,<sup>53</sup> Belgium,<sup>54</sup> Estonia,<sup>55</sup> France,<sup>56</sup> Ireland,<sup>57</sup> Greece,<sup>58</sup> England and Wales,<sup>59</sup> Spain,<sup>60</sup> as well as Croatia, Denmark, Finland, Malta, Iceland and the Netherlands.<sup>61</sup> Although the precise delineation of the relevant offences is not uniform, the common denominator is that the punishable acts fall short of *action* amounting to violence. In some States like the Czech Republic, Germany, Italy and Poland, where hate speech against LGBT persons is not explicitly defined as a criminal offence, generally worded offences have sometimes been used to protect from homophobic or transphobic expressions.<sup>62</sup>
37. A number of countries have also expressly established civil law remedies for hate speech for reasons of sexual orientation. For example:
  - (a) In the Czech Republic, the Anti-Discrimination Act victims of discrimination and incitement to discrimination on grounds of sexual orientation have an explicit right to seek civil law redress before the courts, including a cease and desist order, compensation, remedies against the consequences of

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<sup>47</sup> Such prohibition may, according to the United Nations Human Rights Committee, take the form of civil and administrative, as well as criminal penalties - see in *Rabbae, A.B.S. and N.A. v. Netherlands*, Communication No. 2124/2011, Views of 14 July 2016, § 10.4.

<sup>48</sup> See, e.g., *Adan v. Denmark*, Communication No. 43/2008, Opinion of 13 August 2010 and *TBB-Turkish Union in Berlin/Brandenburg v. Germany*, Communication No. 48/2010, Opinion adopted on 26 February 2013. See also its *General Recommendation No. 35 Combating racist hate speech*, CERD/C/GC/35, 26 September 2013, § 17.

<sup>49</sup> Council of Europe Committee of Ministers Recommendation No. R (97) 20 on Hate Speech, adopted on 30 October 1997, principle 2.  
<sup>50</sup> *Ibid.*

<sup>51</sup> Recommendation, 5b.

<sup>52</sup> Namely to seek to delete it, to require an acknowledgement that it was published or to enjoin its dissemination and to compel the disclosure of the identity of those using it; see Recommendation 8e.

<sup>53</sup> Sections 283(1) and 283(2) of the Criminal Code, as amended.

<sup>54</sup> Article 22 in conjunction with Article 5 of the Belgian Anti-Discrimination Act (2007).

<sup>55</sup> Section 151 of the Penal Code.

<sup>56</sup> Articles 225-1 and 225-2 of the Penal Code, as amended by Law no. 2001-1066 (discrimination) and Article 20 of the Law no. 1881-07-29 of 29 July 1881, as amended (provocation to hatred or violence).

<sup>57</sup> Section 2 of the Prohibition of Incitement to Hatred Act (1989).

<sup>58</sup> Article 1 of the Law no. 927/1979 on punishing acts or activities aiming at racial discrimination; Article 81A of the Criminal Code.

<sup>59</sup> See Section 29AB, 29B and 29C of the Public Order Act 1986, as amended.

<sup>60</sup> Articles 510(1) and (2) of the Criminal Code (1996).

<sup>61</sup> See FRA, Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU, Comparative legal analysis, Update 2015, pages 59-62; and Responding to Hate Speech against LGBTI people, Policy Brief, October 2013, pages 31 et seq.

<sup>62</sup> See FRA, as cited above, page 69 (Table 4).



discrimination and monetary compensation for non-pecuniary damage.<sup>63</sup> Similar civil law remedies are available under the Bulgarian Prevention Against Discrimination Act.<sup>64</sup> In Hungary, victims of hate speech can seek civil law redress under the Equal Treatment Act.<sup>65</sup> In England and Wales, civil causes of action are established under several laws, including the Protection from Harassment Act and the Equality Act.

(b) In countries like Germany, Italy and Poland, where hate speech against LGBT persons is not expressly defined as a criminal offence, civil liability can be established through various provisions.<sup>66</sup>

38. It is clear therefore that the judgments of the Court are in line with international legislation and policy that recognise it is necessary for States to protect individual from hate speech.

### III. Contextual information concerning the attitudes and practices in responding to homophobic or transphobic speech in Armenia

39. While Armenia is party to key human international and regional human rights treaties, Armenian legislation does not afford any protection against homophobic or transphobic expressions. In practice, LGBT persons and affiliates in Armenia are prevented from seeking redress against hate/discriminatory speech, and continuously struggle to enjoy equality, both at personal and organizational levels,<sup>67</sup> not only because of the complete absence of an adequate legal framework (see Section III-A below), but also because of the hostile attitudes against the LGBT community (Section III-B).

#### A. Absence of legal protection

40. There is no legislation that explicitly prohibits discrimination on the grounds of sexual orientation or gender identity in Armenia.

(a) The general non-discrimination clause (Article 29) of the Armenian Constitution prohibits discrimination on the grounds of “sex, race, skin colour, ethnic or social origin, genetic features, language, religion, world view, political or other views, belonging to a national minority, property status, birth, disability, age, or other personal or social circumstances.”<sup>68</sup> Whilst the clause ostensibly entails an open-ended list of protected characteristics, according to ECRI, general anti-discrimination standards have not been applied so far to LGBT persons in court proceedings, and there is no relevant case law in that respect.<sup>69</sup> In addition, Article 77 of the Constitution prohibits the abuse of basic rights and freedoms in relation to “incitement of national, racial or religious hatred or propaganda of violence or war”<sup>70</sup>. Sexual orientation or gender identity are not mentioned as protected characteristics.

(b) Moreover, there is no specific anti-discrimination legislation, and as a result, no legal definition of discrimination, forms of discrimination, legal remedy or means of protection for victims of discrimination exist. There is also no legally accepted definition of hate speech or incitement to discrimination. Since the burden of proof lies with the victim, it remains difficult to prove discrimination cases on the grounds of sexual orientation or gender identity.<sup>71</sup>

(c) Traces of protection against hate speech can be found in the Armenian Criminal Code, however, the relevant prohibition is limited only to actions that incite national, racial or religious hatred, or that are aimed to display racial superiority or humiliate national dignity. Such acts are punishable by fine and

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<sup>63</sup> The Anti-Discrimination Act 198/2009 Coll. Act of 23 April 2008, Sections 2 and 10.

<sup>64</sup> Articles 4(1), 5, and 50 et seq. of the Prevention Against Discrimination Act, as amended. The perpetrators may also be subject to administrative fines.

<sup>65</sup> See Article 19, Responding to ‘hate speech’: Comparative overview of six EU countries, 2018, page 25.

<sup>66</sup> For Germany, see Article 19, as cited above, page 25; for Italy, see FRA, as cited above, page 62, citing Italy, Tribunal of Milan, First Civil Section (Tribunale di Milano – Prima sezione civile), No. 12187, 13 October 2011.

<sup>67</sup> PINK Armenia annual reports, available here: <http://www.pinkarmenia.org/en/publications/report/>; HRW World Reports, available at <https://www.hrw.org/world-report/2018/country-chapters/armenia>

<sup>68</sup> <http://www.president.am/en/constitution-2015/>, Article 29.

<sup>69</sup> The European Commission against Racism and Intolerance (ECRI) report on Armenia 2016, available at <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Armenia/ARM-CbC-V-2016-036-ENG.pdf>, para. 91.

<sup>70</sup> Article 77, RA Constitution <http://www.president.am/en/constitution-2015/>

<sup>71</sup> ECRI report on Armenia 2016, as cited above, para. 91.

deprivation of liberty.<sup>72</sup> No protection against hate speech is available on grounds other than those stated in the Criminal Code provision.

- (d) The same applies to bias-motivated criminal acts/hate crimes. The Criminal Code prohibits or considers as an aggravating circumstance only acts which are motivated by ethnic, racial or religious hatred, or committed on the grounds of religious fanaticism.<sup>73</sup> Again, hate crimes committed on the basis of a person's perceived sexual orientation and/or gender identity are not addressed.

41. The lack of comprehensive non-discrimination legislation has been raised on various occasions by international human rights bodies, recommending, *inter alia*, to include sexual orientation and gender identity as a protected characteristic and ensure effective protection of LGBT people in Armenia.<sup>74</sup> The same concerns are also echoed in ECRI's report on Armenia, which urges the Armenian authorities to include homo/transphobic motivation as an aggravating circumstance in respective provisions outlawing public incitement to hatred.<sup>75</sup>
42. A draft anti-discrimination law was proposed for consultation in March 2018. Although the draft law mirrors the (ostensibly) open-ended list of prohibited grounds of discrimination provided in Article 29 of the Constitution (see above, para. 40a), it fails to explicitly protect sexual orientation or gender identity. It thus misses the opportunity to affirm that "*other personal or social circumstances*" entail one's actual or perceived sexual orientation and gender identity. This is particularly important in light of the hostile societal, political and cultural attitudes towards the LGBT community, described in detail below. More generally, the draft law suffers various shortcomings, and is incompatible with international human rights law in the area of equality and non-discrimination.<sup>76</sup>

## B. Hostility against the LGBT community in Armenia

43. In addition to this legislative gap, various reports of leading international human rights organizations, states as well as civil society groups in Armenia repeatedly stress that the LGBT community represents one of the most marginalized, least visible and discriminated against groups in Armenia.<sup>77</sup> Studies show that homophobia and transphobia are widespread and deeply ingrained in Armenian society. According to the 2016 study by South Caucasus Regional Office of the Heinrich Boell Foundation 90% of Armenia's population is against LGBT people, agreeing that their rights should be restricted through legal means<sup>78</sup>. Visibility of the LGBT community is limited.
44. The political environment has immensely contributed to the development of homophobic and transphobic narrative in the country. PINK Armenia, one of the few LGBT rights groups in the country, has documented throughout the years the state-sponsored nature of homophobia, and the direct involvement of prominent state figures in supporting discrimination and other human rights violations against LGBT people.<sup>79</sup> In this regard, ECRI has expressed concerns about "*the overall lack of reaction to hate speech [in Armenia], which the general public could interpret as trivialising the stigmatisation of these vulnerable groups, and in particular the LGBT community*", and recommended "*that a code of conduct be introduced as soon as possible in Parliament sanctioning, inter alia, racist and homo/transphobic discourse*".
45. In light of such widespread societal and institutional discrimination and prejudice, access to adequate legal protection for LGBT people continues to be unavailable as a matter of practice. Reports also illustrate that any attempts to apply the existing general non-discrimination clauses to LGBT people have failed. For

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<sup>72</sup> Article 226, RA Criminal Code, available at: <http://www.parliament.am/legislation.php?sel=show&ID=1349&lang=eng>

<sup>73</sup> Article 63, RA Criminal Code, available at: <http://www.parliament.am/legislation.php?sel=show&ID=1349&lang=eng>

<sup>74</sup> See e.g. UN HRC Concluding Observations on the Second Periodic report of the RA on ICCPR, CCPR/C/ARM/CO/2, 31 August, 2012, para 10.

<sup>75</sup> ECRI report, para 25

<sup>76</sup> See Equal Rights Trust, Draft Law of the Republic of Armenia "On Ensuring Equality", Legislative Analysis, March 2018, available at <http://www.equalrightstrust.org/news/armenia%E2%80%99s-draft-law-ensuring-equality-work-progress>

<sup>77</sup> HRW World Report 2017, available at: <https://www.hrw.org/world-report/2017/country-chapters/armenia>, US Department of State Country Report on Human Rights Practices for 2017, section 6; US State department's annual [report](#) on human rights situation in 2016.

- Amnesty International, "Less equal: LGBTI human rights defenders in Armenia, Belarus, Kazakhstan, and Kyrgyzstan", part 4.1. page 19, available at: <https://www.amnesty.org/download/Documents/EUR0475742017ENGLISH.PDF>

- ECRI report on Armenia 2016, as cited above, pp. 29-31.

<http://www.pinkarmenia.org/en/2016/06/prejudice-tolerance/>

<sup>79</sup> PINK Armenia Annual Reports, available at <http://www.pinkarmenia.org/en/publications/report/>,

[https://www.hrw.org/sites/default/files/related\\_material/armenia\\_6.pdf](https://www.hrw.org/sites/default/files/related_material/armenia_6.pdf), p. 5, <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Armenia/ARM-CbC-V-2016-036-ENG.pdf>, paras 29-30

example, there is no data in the official statistics of the Armenian Police on hate-motivated crimes against LGBT people, while civil society and international organizations reported many discrimination related crimes committed against LGBT people for the same period.<sup>80</sup> While discrimination and other hate motivated incidents are widespread, LGBT people mostly choose to remain silent, in an attempt to minimise the chances of outing, further victimisation and labelling.

46. This combination of social, cultural, political and other underlying factors and legislative gaps contribute to a further deterioration of the situation of LGBT people living in Armenia,<sup>81</sup> and prevent them from enjoying proper access to justice or living in a safe environment.

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<sup>80</sup> <http://hatecrime.osce.org/armenia>, ECRI report, para.

<sup>81</sup> "Societal Attitudes Towards LGBTI People in Armenia", South Caucasus Regional Office of the Heinrich Boell Foundation Report, 2016, available: <http://www.pinkarmenia.org/wp-content/uploads/2016/06/From-Prejudice-to-Equality-English.pdf>