EQUAL RIGHTS TRUST

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By Fax, Email and Post

17 September 2018

Dear Sir or Madam

Joint Third Party Intervention in the case *Liuda IACHIMOVSCHI and 5 Other Applicants v Republic of Moldova* (Application Nos. 21029/13, 40620/14, 23914/15, 26806/15, 32617/16 and 49542/16)

Further to the Court's letter dated 2 August 2018, we are pleased to enclose a copy of the Equal Rights Trust and ILGA-Europe's written submissions in the above proceedings in accordance with Rule 44 § 3 of the Rules of Court.

Yours faithfully

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IN EUROPEAN COURT OF HUMAN RIGHTS

App Nos: 21029/13, 40620/14, 23914/15, 26806/15, 32617/16, 49542/16

LIUDA IACHIMOVSCHI

Applicant

-and-

THE REPUBLIC OF MOLDOVA

Respondent

WRITTEN SUBMISSIONS OF THE EQUAL RIGHTS TRUST AND ILGA-EUROPE

Introduction

1. These written submissions are made on behalf of the Equal Rights Trust (**"the Trust"**) and the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (**"ILGA-Europe"**) (together **"the Interveners"**). Leave to intervene in these proceedings was granted by the President of the Court on 2 August 2018.

2. The Trust is an independent international organisation working to eliminate discrimination and advance equality worldwide. It has extensive legal expertise on the rights to non-discrimination and equality and their relationship to all other human rights. In recent years, the Trust has conducted substantial legal research on the phenomenon of discriminatory torture and inhuman and degrading treatment. The Trust has provided written submissions on this issue in cases including *Makuc* v *Slovenia* (App No. 26828/06), *Mudric v Moldova* (App No. 74839/10), and *Eremia v Moldova* (App No. 3564/11).

3. ILGA-Europe is an international non-governmental umbrella organisation which brings together over 500 organisations from Council of Europe countries and Central Asia. ILGA-Europe seeks to defend the human rights of those who face discrimination on the grounds of sexual orientation, gender identity or expression, or sex characteristics; it has consultative status with the Council of Europe and the UN Economic and Social Council, and has frequently intervened in proceedings before this Court and domestic courts.

4. The joined applications in these proceedings concern alleged failures by the State Party to protect the applicants against acts of violence by third parties. Two cases - App. Nos. 23914/15 and 21029/13 - raise distinct issues concerning the relationship between Articles 3 and 14 of the Convention. It is in respect of these issues that the Interveners hope to assist the Court.

5. In brief, the Interveners submit that:

5.1. It is critical that, even where a violation of Article 3 is found, the potential application of Article 14 be given separate consideration wherever there is a *prima facie* case that violence is gender-based (including cases of domestic violence) or is motivated by bias against LGBT+ persons. This is because ***discriminatory*** violence is qualitatively distinct from other forms of violence, and acknowledging this is essential to a proper understanding of its causes, consequences, and potential solutions.

5.2. In these circumstances, it will be particularly important for the Court to consider the State Party's positive obligations under Article 14, which encompass duties of prevention, protection, investigation and prosecution. Under Article 14, these obligations take on a distinctive character.

5.3. Finally, it will also be important for the Court to consider the relationship between the discriminatory nature of the violence in question and the reparations the State Party may be required to provide, both in the individual case and more broadly.

6. The Court has consistently indicated that, in interpreting the Convention and the scope of States Parties' obligations under it, it will "look for any consensus and common values emerging from the practices of European States and specialised international instruments": see e.g. *Opuz v Turkey* (App No. 33401/02, 9 September 2009), [164].

7. Accordingly, and where relevant, the Interveners have drawn on decisions by and guidance from a range of specialist organisations including the UN Committee for the Convention on the Elimination of All Forms of Discrimination Against Women (**"the CEDAW Committee"**);[1] the Committee Against Torture (**"CAT"**);[2] the UN Special Rapporteurs on Violence against Women and on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the UN Independent Expert on Protection Against Violence and Discrimination based on Sexual Orientation and Gender Identity; the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (**"the Istanbul Convention"**)[3] and its Explanatory Report; and the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (**"the Yogyakarta Principles"**).[4]

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[1] The Convention has 189 States Parties, including Moldova.

[2] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has 163 States Parties, including Moldova.

[3] The Court has relied on the provisions of the Istanbul Convention in a number of cases including *Bălşan v Romania* (App No. 49645/09) and *Talpis v Italy* (App. No. 41237/14). Moldova signed the Istanbul Convention in 2017.

[4] The Yogyakarta Principles were adopted by a group of eminent human rights experts in 2006 as reflecting the existing state of international human rights law in relation to sexual orientation and gender identity: see Introduction, p 7. They have been endorsed by both the Council of Europe and the European Parliament: see Council of Europe standards, *Combating Discrimination on grounds of sexual orientation or gender identity* (2011), [44]; European Parliament, *Report on the Annual Report on Human Rights in the World 2007 and the European Union's policy on the matter*, A6-0153/2008, [141].

Importance of consideration under Article 14

8. The Court has held that "[w]here a substantive Article of the Convention has been invoked both on its own and together with Article 14 and a separate breach has been found of the substantive Article, it is not generally necessary for the Court to consider the case under Article 14." However, the Court will consider Article 14 where inequality of treatment in the enjoyment of the relevant right(s) is "a fundamental aspect of the case": *Chassagnou v France* (App Nos. 25088/94, 28331/95 and 28443/95, 29 April 1999), [89]; *Aziz v Cyprus* (App. No. 69949/01, 22 June 2004), [35].

9. The Interveners submit that these conditions will be met in cases of alleged domestic violence, and in any other case where the facts disclose a *prima facie* case that the violence in question is motivated by bias against a minority group.[5] In such cases, inequality of treatment is likely to be a key consideration for a number of reasons.

   9.1. First, the violence in question may well ***constitute discrimination***. For example, the Court has recognised domestic or gender-based violence as a form of discrimination against women: *Opuz v Turkey,* [200]; *Bălşan v Romania* (App. No. 49645/09, 23 August 2017), [79] and [88].

   9.2. Secondly, the violence is likely to have been ***caused or influenced by*** broader forms of discrimination and inequality. For example, it is widely recognised that structural inequalities and socially constructed notions of gender contribute to the disproportionate susceptibility to ill-treatment of women and LGBT+ persons.[6]

   9.3. Thirdly, bias-motivated violence also ***impacts disproportionately and differently*** on women and members of minority groups, including LGBT+ persons. The Court has long recognised this connection as it relates to the intensity of suffering, in considering whether the Article 3 threshold has been met: see e.g. *Identoba v Georgia* (App No. 73235/12, 12 August 2015), [64]-[70]. However, it is equally important to recognise the differential nature of the harm that may be caused: for example, ill-treatment of LGBT+ persons may lead individuals to conceal or suppress their identity[7] and may contribute to the dehumanisation of victims, which is "often a necessary condition for torture and ill-treatment to take place".[8]

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[5] Relevant factors may include whether the victim is a member of a stigmatised minority; where and when the violence took place; and whether the victim raised the possibility of bias motivation with domestic authorities: see e.g. *Identoba v Georgia* (above), [64], and *M.C. and A.C. v Romania* (App. No. 12060/12, 12 July 2017), [106].

[6] See e.g. UN General Assembly, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (2001), UN Doc. A/56/156, [19]; CAT, *General Comment No. 2* (2008), UN Doc. CAT/C/GC/2, [22]; Yogyakarta Principles, Introduction, p 6.

[7] Yogyakarta Principles, Preamble, para 2; Council of Europe, *Resolution 1728 (2010) of the Parliamentary Assembly – Discrimination on the basis of sexual orientation and gender identity*, adopted 29 April 2010, [3]; *Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe to member States on measures to combat discrimination on grounds of sexual orientation or gender identity*, adopted 31 March 2010, Comments.

[8] *Interim report of the Special Rapporteur on torture* (2001), [19].

9.4. Finally, violence against women and minority groups is also liable to ***result in*** other forms of discrimination. For example, broader discriminatory attitudes against women and LGBT+ persons mean they often face obstacles in seeking and obtaining legal accountability[9] - since they are at risk of further victimisation, breach of confidentiality, and harassment[10] - and in accessing medical treatment in public hospitals, where they are at risk of receiving inadequate treatment or even being victims of assault.[11]

10. For all these reasons, the Interveners submit that ***discriminatory*** ill-treatment - and indeed discriminatory violence more broadly - is qualitatively distinct from other types of ill-treatment and violence. If this phenomenon is to be effectively tackled, it demands a response which recognises its discriminatory causes and consequences. This is clear from the number of authoritative sources which emphasise the importance, in the context of both prevention and reparations, of addressing the structural causes of the violation[12] and of implementing measures such as training and awareness-raising.[13]

11. Furthermore, it is well established that States Parties will only effectively "secure" the enjoyment of Convention rights for the purposes of Article 1 if they institute effective, comprehensive and coordinated measures of prevention, protection, investigation, and reparation for victims of Convention violations. Failing to recognise and address the discriminatory aspects of the forms of violence identified above is bound to hinder this objective. In the Court's own words, it amounts to "turn[ing] a blind eye to the specific nature of acts that are particularly destructive of fundamental rights": *Nachova v Bulgaria* (App. Nos. 43577/98 and 43579/98, 6 July 2005), [160]; *Identoba v Georgia*, [67].

Positive obligations under Articles 14 and 3

12. The Court has long recognised that States Parties have positive obligations to take measures "to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals": *M.C. and A.C. v Romania* (App. No. 12060/12, 12 July 2017), [109]-[111]. As well as being enshrined in Article 3, these obligations form "part of the authorities' positive responsibilities under Article 14 of the Convention to secure the fundamental values protected by Articles 3 and 8 without discrimination": *Identoba v Georgia*, [63]; *M.C. and A.C. v Romania*, [105].

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[9] Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (2016), UN Doc. A/HRC/31/57, [9] and [65].

[10] See e.g. *Interim report of the Special Rapporteur on torture* (2001), [19]-[21]; Human Rights Council, High Commissioner for Human Rights report, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity* (2015), UN Doc. A/HRC/29/23, [25]; Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences* (2010), UN Doc. A/HRC/14/22, [85].

[11] See e.g. *Interim report of the Special Rapporteur on torture* (2001), [19] and [22].

[12] See e.g. CAT, *General Comment No. 3* (2012), UN Doc. CAT/C/GC/3, [8]; *Report of the Special Rapporteur on torture* (2016), [66] and [68]; CEDAW Committee, General Recommendation No. 35, [34].

[13] Yogyakarta Principles, Principle 28F.

13. Three distinct, but related, types of positive obligation can be drawn from the Court's jurisprudence: to ***prevent***, to ***protect***, and to ***investigate and prosecute***. These duties take on a specific character when viewed through the lens of Article 14 as well as Article 3.

(a) The duty to prevent

14. States have a specific duty to take steps to prevent the ill-treatment of women and minority groups by private individuals: *Identoba v Georgia*, [63]; *M.C. and A.C. v Romania*, [105]. Given the links between discrimination and this kind of ill-treatment, the Interveners submit that - consistent with the Court's own jurisprudence[14] and the general international consensus - this involves the enactment of an effective and comprehensive legislative framework that prohibits discrimination on the grounds of sex, gender, sexual orientation and gender identity in both the public and private sphere[15] (including laws sanctioning all forms of gender-based[16] and homophobic violence[17]), and the effective enforcement of such laws in a non-discriminatory manner.[18]

15. The domestic framework must also make provision for protective measures such as restraining or protection orders. In particular, it is essential that authorities have the power to issue protection orders for all forms of gender-based violence; that such orders are readily available, regardless of the existence of other legal proceedings, and are not dependent on the initiation of a criminal case; that emergency orders are available *ex parte* in case of immediate danger; that other actors, such as family members, have standing to apply; and that breaches of protection orders are criminalised.[19]

16. Finally, States Parties must also adopt non-legislative measures aimed at eliminating discriminatory violence. Importantly, these should include:

    16.1. *Training and capacity-building*: States Parties should provide mandatory and recurrent training for all professionals who deal with victims and perpetrators of gender-based or bias-motivated violence, including the judiciary, legislators, law enforcement officers, lawyers, social workers, forensic medical personnel, and

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[14] See e.g. *Eremia v Moldova* (App. No. 3564/11), [32]; *Mudric v Moldova* (App. No. 74839/10), [47]; *T.M. and C.M. v Moldova* (App. No. 26608/11), [43]; and *Rumor v Italy* (App. No. 72964/10), [63].

[15] See e.g. Yogyakarta Principles, Principle 2C; *Report of the Special Rapporteur on torture* (2016), [73](d); Human Rights Council, *Discriminatory laws and practices* (2015), [79](c); Istanbul Convention, Art 4.

[16] See e.g. CEDAW Committee General Recommendation No. 35, [26](a) and [29](a); *Committee of Ministers Recommendation Rec(2002)5 of 30 April 2002 on the protection of women against violence.*

[17] See e.g. *Report of the Special Rapporteur on torture* (2016), [73](d); see also UN Office of the High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* (2012), p 19.

[18] See e.g. *Report of the Special Rapporteur on torture* (2016), [73](d); CAT, *General Comment No. 2* (2008), [21]; Istanbul Convention, Art 4.

[19] See e.g. *T.M. and C.M. v Moldova*, [60]; Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences* (2017), UN Doc. A/HRC/35/30, [84]-[89], [112]; Istanbul Convention, Articles 52, 53 and 56; Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (1994), Article 7(d); *Lenahan (Gonzales) v. United States of America* (Inter-American Commission on Human Rights, Case No. 12/626, 21 July 2011), [163], [215](4).

health-care professionals.[20] In particular, training should be mainstreamed into the training of police officers in order to eliminate police mistreatment of and bias against victims who are women and/or members of minority groups.[21]

16.2. *Education and awareness-raising*: States Parties should integrate equality into educational curricula, teaching materials and other awareness-raising programmes regarding different manifestations of bias-motivated violence, in order to address and eradicate stereotypes and prejudices which condone or promote it.[22]

17. Violations of Article 14 taken with Article 3 may be found where, in the absence of such measures, particular judicial or prosecutorial practices have a disproportionate impact on individuals who share a relevant status. Thus, for example, in *Opuz v Turkey* the Court held that "the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors... indicated that there was insufficient commitment to take appropriate action to address domestic violence": [199]-[202]; see also *Bălşan v Romania*, [86] (holding that "the general and discriminatory passivity of the authorities created a climate that was conductive to domestic violence").

(b) The duty to protect

18. State Parties also have an obligation to take reasonable steps to prevent ill-treatment "of which the authorities knew or ought to have known": *Identoba v Georgia*, [66]; *Eremia v Moldova* (App. No. 3564/11, 28 August 2013), [49]; *T.M. and C.M. v the Republic of Moldova* (App. No. 26608/11, 28 April 2014), [36]. The Court has consistently held that "failure by a State to protect women against domestic violence breaches their right to equal protection under the law", irrespective of whether the failure is intentional: *Bălşan v Romania*, [78]; *T.M. and C.M. v Moldova*, [57]; *M. G. v Turkey*, [115].

19. Three sets of factors are relevant in determining whether this obligation has been engaged: (i) the circumstances of the individual case; (ii) the characteristics of the type of violence in issue; and (iii) the broader socio-cultural context.

20. As to the ***first*** set of factors, the duty to protect will certainly be triggered where an individual or group has given specific notice of the risk, for example by explicitly requesting protection against foreseeable acts of discriminatory violence or ill-treatment:

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[20] See e.g. CEDAW Committee General Recommendation No. 35, [38]; Yogyakarta Principles, Principles 2F, 7C, 8C, 10C, 17I, 28C, 28F; *O.G. v Russian Federation* (Communication No. 91/2015, 20 November 2017), [9](b)(vi); Human Rights Council, *Report of the Special Rapporteur on violence against women* (2017), [106]; Istanbul Convention, Article 15; *Report of the Special Rapporteur on torture* (2016), [69]; Human Rights Council, *Discriminatory laws and practices* (2015), [78](e); *Committee of Ministers Recommendation Rec(2002)5* (2002), Appendix, [8]-[11]; Inter-American Convention, Art 8(c); Report of the UN Independent Expert on Protection Against Violence and Discrimination based on Sexual Orientation and Gender Identity (2018),UN Doc. A/HRC/38/43, [95].

[21] *Report of the Special Rapporteur on violence against women* (2017), [106].

[22] CEDAW Committee General Recommendation No. 35, [35](a)-(b); *Report of the Special Rapporteur on torture* (2016), [69]; Istanbul Convention, Articles 13(1) and 14; Yogyakarta Principles, Principles 1C, 2F, 5E, 8C, 10C, 12B, 15E, 16C-D, 20D, 28F; Human Rights Council, *Discriminatory laws and practices* (2015), [79](j); *Committee of Ministers Recommendation Rec(2002)5* (2002), Appendix, [14]-[15]; Istanbul Convention, Art 14; Inter-American Convention, Art 8(b).

see *Identoba v Georgia*, [72] and [80]. However, this is not required in every case: the Court has also had regard to factors such as whether the perpetrator had a record of violence; whether the authorities were aware that the victim had been subjected to violence on a number of occasions; and whether the victim made previous pleas for assistance: see e.g. *Opuz v Turkey*, [134]; *Eremia v Moldova*, [86]; *T.M. and C.M. v Moldova*, [58]; *Bălşan v Romania*, [62].

21. As to the ***second*** set of factors, and taking the specific example of domestic violence, it is well known that this does not always result in physical injury; tends to escalate over time; and is often characterised by repetitive violence.[23] This has direct implications when determining whether a State Party's duty to protect is triggered. The Court has emphasised that "special diligence" is required in dealing with domestic violence cases, taking into account the "specific nature of domestic violence as recognised in the Istanbul Convention": *Talpis v Italy* (App. No. 41237/14, 18 September 2017), [129]. The Istanbul Convention and its Explanatory Report (at [260]) highlight the need for "risk assessment and risk management [to] consider the probability of repeated violence, notably deadly violence, and adequately assess the seriousness of the situation."

22. Finally, as to the ***third*** set of factors, systemic or widespread discrimination against individuals sharing a relevant status is also relevant in assessing whether a State Party "knew or ought to have known" of a given risk. Thus, for example:

    22.1. The Court will take account of the prevalence of domestic violence and its discriminatory effect on women in considering the State's duty to protect. For example, the Court has twice held that the specific facts of a case, coupled with recent findings by the UN Special Rapporteur on Violence against Women, showed that domestic authorities in Moldova did "not fully appreciate the seriousness and extent of the problem of domestic violence in Moldova and its discriminatory effect on women": *T.M. and C.M. v Moldova*, [62]; *Eremia v Mooldova*, [89].

    22.2. The Court has also held that the existence of a "history of public hostility towards the LGBT community" and "reports of negative attitudes towards sexual minorities in some parts of the society" gave rise to "an obligation to provide heightened State protection", on the grounds that the authorities "knew or ought to have known of the risks associated with any public event concerning that vulnerable community": *Identoba v Georgia*, [72], [80].[24]

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[23] See e.g. *T.M. and C.M. v Moldova*, [59]; Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (2008), UN Doc. A/HRC/7/3, [45]; Meyersfeld, B., "Developments in International Law and Domestic Violence", *Interights Bulletin*, Summer 2011, p 108.

[24] The Court's approach to these issues is consistent with that of the Special Rapporteur on Torture, who has highlighted that States' "due diligence" obligations are engaged where they are "aware of a pattern of violence or targeting of specific groups by non-State actors" and that there is a "heightened obligation to protect vulnerable and marginalized individuals from torture": see e.g. *Report of the Special Rapporteur on torture* (2016), [11]-[12].

23. Where the duty to protect is triggered, a failure to take "reasonable measures which could have had a real prospect of altering the outcome or mitigating the harm" will engage the responsibility of the State Party: see e.g. *Opuz v Turkey*, [136].

24. In the Interveners' submission, and based on the Court's own case-law and other authoritative sources, measures which may be required include conducting individual risk assessments;[25] issuing protection, restraining or emergency barring orders, which have been described as "essential tools" in the protective toolkit;[26] and making available other protective and support services, such as shelters, helplines, and legal and medical assistance.[27]

25. Importantly, a State Party's duty to take these measures does not rely upon the victim having made a formal request for protection: as the Court has noted in the context of domestic violence, victims' particular vulnerability means that the authorities are under a heightened obligation to verify whether a more robust approach is required, and to "investigate of their own motion the need for action": *T.M. and C.M. v Moldova*, [46], [60].

*(c) **The duty to investigate and prosecute***

26. It is well established that the authorities must conduct an "effective official investigation" into alleged ill-treatment, including where such ill-treatment is inflicted by private actors: see e.g. *Eremia v Moldova*, [51]. However, the principle of non-discrimination under Article 14 entails specific obligations in respect of the investigation of alleged ***discriminatory*** ill-treatment, including violence against women and violence motivated by bias against LGBT+ persons: see *Identoba v Georgia*, [67]; *M.C. and A.C. v Romania*, [105].

27. In deciding whether to investigate, the State Party must have due regard to the nature of the violence in question: for example, it is essential that the authorities do not apply "preconceived and stereotyped notions of what constitutes gender-based violence against women."[28] In *T.M. and C.M. v Moldova*, the Court noted that domestic violence takes many forms, not all of which result in physical injury, and held that the failure to initiate a prosecution because the injuries were not considered "severe enough" highlighted a failure to understand the specific nature of domestic violence: [83]. The Court has also held that, in underestimating the seriousness of domestic violence during an investigation, a State may have condoned the violence in violation of Articles 14 and 3.

28. The discriminatory nature of violence or ill-treatment also bears on what constitutes an "effective" investigation. Thus, as well as considering factors such as whether the

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[25] See e.g. Istanbul Convention, Art 51; Istanbul Convention Explanatory Report, [260]; CEDAW Committee General Recommendation No. 35, [40](b); *Report of the Special Rapporteur on violence against women* (2017), [103].

[26] *Report of the Special Rapporteur on violence against women* (2017), [20]; see also *Bălşan v Romania*, [82]; *T.M. and C.M. v Moldova*, [60].

[27] CEDAW Committee General Recommendation No. 35, [40](c); *Report of the Special Rapporteur on torture* (2016), [73](c); *Report of the Special Rapporteur on violence against women* (2017), [47]-[54], [100]; Istanbul Convention, Arts 22-24.

[28] CEDAW Committee General Recommendation No. 35, [26](c).

authorities reacted promptly to the complaints, whether due consideration was given to the opening of investigations, and the length of time taken (see e.g. *M.C. and A.C. v Romania*, [111]), the Court will consider whether the investigation explored the existence of a discriminatory motive: see e.g. *Nachova v Bulgaria*, [160]-[161]. The Court has indicated that a "meaningful inquiry" into the possibility of a discriminatory motive will be "indispensable" where the alleged ill-treatment occurred against the background of broader hostility toward the relevant group, or where discriminatory and/or hate speech is alleged: see e.g. *M.C. and A.C. v Romania*, [113], [124]; *Identoba v Georgia*, [77]. The authorities are obliged to "take all reasonable steps to unmask" any discriminatory motive (*Nachova v Bulgaria*, [160], [168]; *Identoba v Georgia*, [67]); in particular, they "must do whatever is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of violence induced by, for instance, racial or religious intolerance, or violence motivated by gender-based discrimination": *Identoba v Georgia*, [67]; see also *M.C. and A.C. v Romania*, [113].

29. In the Interveners' submission, regard should also be had to whether the investigation (and any subsequent prosecution) was non-discriminatory: for example, in the case of domestic violence it should be "unaffected by gender stereotypes", and should apply gender-sensitive procedures in order to avoid re-victimisation and stigmatisation.[29] This connects with the obligation, discussed above in the context of prevention, to ensure that police and prosecutors have received adequate training.

30. These aspects of the investigative process also bear on State Parties' obligations in respect of prosecution. In particular, it is critical that any charges brought be "assigned a legal classification that [allow] the proper administration of justice", including by recognising their discriminatory character: *M.C. and A.C. v Romania*, [124]. Thus, for example, the Court has held that where domestic authorities found that an incident of domestic violence was "not severe enough to require criminal sanctions", they had "acted in a way that was inconsistent with international standards on violence against women and domestic violence in particular": *Bălşan v Romania*, [81].

Effective remedies / Just satisfaction

31. Where a State Party has failed to comply with its obligations in respect of discriminatory ill-treatment or violence - and whether or not there has been a freestanding violation of Article 3 - its particular character also affects what may be required by way of reparations. This issue may arise in a number of contexts, including States Parties' obligation to provide an effective remedy (Article 13); their obligation to execute the Court's judgments, including by making reparation and avoiding repetition of violations;[30] or the

[29] See e.g. CEDAW Committee General Recommendation No. 35, [26](c); CAT, General Comment No. 3, [33].

[30] See e.g. *Papamichalopoulos v Greece* (Article 50), 31 October 1995, Series A no. 330-B, [34]ff; see also *Scordino v Italy* (App. No. 36813/97, 29 March 2006), [233] (referring to the obligation to select "the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects"). States also

consideration of claims for "just satisfaction" (Article 41). In any of these contexts, the Court may properly have regard to international consensus and best practice on the question of reparations.

32. Both the CAT and the CEDAW Committee have emphasised the importance of providing "full and effective" reparations to victims of ill-treatment[31] and of discriminatory violence of all kinds.[32] This may well go beyond the provision of financial compensation, and should respond to victims' specific needs.[33] Crucially, the State Party must consider and seek to address the "context of structural discrimination in which violations occurred."[34]

33. In addition, in determining the appropriate level of compensation, regard must be had to both pecuniary and non-pecuniary loss and damage, and to both physical and mental harm.[35] Any award should, of course, reflect the particular harm arising from the discriminatory aspect of the ill-treatment.

34. These principles are consistent with the Court's own jurisprudence: for example, it has held that the nature of the right at stake has implications for the type of remedy a State Party is required to provide (see e.g. *Budayeva v Russia* (App. No. 15339/02, 20 March 2008), [190]-[191]), and that assessing effectiveness under Article 13 requires consideration of the applicant's personal circumstances (see e.g. *Dordevic v Croatia* (App. No. 41526/10, 24 July 2012, [101]). In the Interveners' submission, the application of these principles has particular significance in cases involving discriminatory violence or ill-treatment.

Conclusion

35. For all the reasons given above, recognising the particular characteristics of discriminatory ill-treatment and violence is essential in understanding its causes, consequences, and potential solutions. If States Parties are to be encouraged to respond appropriately to this phenomenon, and hence to comply with their full range of positive obligations under the Convention, it is vital that the Court give careful and systematic consideration to Article 14 in all appropriate cases.

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have a general obligation to solve the problems underlying the Court's judgments: see e.g. Committee of Ministers' Recommendation Rec(2006)6 on the improvement of domestic remedies; Declaration adopted at the High-Level Conference on the Future of the Court, 19-20 April 2012, para 9(f)(ii).

[31] CAT, General Comment No. 3, [2], [5]; see also *Report of the Special Rapporteur on torture* (2016), [68].

[32] CEDAW Committee General Recommendation No. 35, [46]-[47].

[33] Ibid, [39]; Yogyakarta Principles, Principles 10B and 28; CAT, General Comment No. 3 (2012), [6] and [9].

[34] *Report of the Special Rapporteur on torture* (2016), [66] and [68]; see, to similar effect, CAT, General Comment No. 3, [8]; *Report of the Special Rapporteur on violence against women* (2010), [85]; Report of the UN Independent Expert, [92]. The need for transformative remedies addressing structural discrimination has been noted in relation to other protected characteristics: see e.g. *Gonzales et al v Mexico* (IACtHR Case No. 281/02, [451]) (gender discrimination); *European Roma Rights Centre v Bulgaria* (ECSR, Complaint No. 31/2005) (race discrimination).

[35] CAT, General Comment No. 3, [9]-[10].