

**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**Armine Oganezova *against* Armenia**

(Application nos. 71367/12 and 72961/12)

WRITTEN COMMENTS

Submitted jointly by

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

AIRE Centre

International Commission of Jurists

Human Rights Watch

15 October 2019

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), Advice on Individual Rights in Europe (AIRE Centre), the International Commission of Jurists (ICJ) and Human Rights Watch (HRW) (collectively, “Interveners”), with the leave of the Court under Rule 44 § 3 of the Rules of Court, granted on 24 September 2019. The Interveners submit the following:
  - (a) Under European and international jurisprudence, the victim’s identity as an LGBT person is relevant to the assessment of whether the threshold for torture and other ill-treatment under Article 3 of the European Convention of Human Rights (“ECHR”) has been met. Specifically, the discrimination directed towards LGBT persons indicates a particular motive and intent that may meet the threshold of Article 3 ECHR.
  - (b) The Contracting States have a positive obligation to protect persons in their jurisdiction from violence and harassment based on their real or imputed sexual orientation and/or gender identity or expression, including the obligation to prevent, investigate, prosecute, punish and remedy such acts. In particular, Contracting States have the additional procedural obligation to take all reasonable steps to establish whether any hatred or prejudice connected to a protected characteristic may have played a role in the violent attack, where acts of violence are motivated in whole or in part by prejudice against an individual’s real or imputed sexual orientation and/or gender identity or expression.
  - (c) That the attitudes and practices in responding to violence and harassment against LGBT people in Armenia provide important contextual information in analysing the present case.
2. This intervention draws upon the Court’s case-law, and other authoritative sources of international law, jurisprudence and guidance.

### I. The identity of victim of violence as an LGBT person should be taken into account in the assessment of Article 3 violations

#### A. The Court’s case-law

3. The following paragraphs highlight the Court’s assessment of torture and ill-treatment in circumstances where discrimination or prejudice underpins the violence against LGBT persons. In the context of discrimination based on one’s real or imputed sexual orientation or gender identity or expression, acts that in isolation would not have reached the minimum level of severity for an ECHR Article 3 violation may qualify as torture and ill-treatment.
4. The Court has acknowledged that the threshold for an Article 3 violation is relative;<sup>1</sup> it depends on all the circumstances of the case, including the personal circumstances of the victim (such as sex, age and state of health) and whether the victim was in a vulnerable situation.<sup>2</sup> The severity of ill-treatment also depends on the nature and context of the treatment or punishment, such as an atmosphere of heightened tension and emotions,<sup>3</sup> the manner and method of its execution,<sup>4</sup> its purpose and the *underlying intention or motivation*.<sup>5</sup> Each of these factors is capable of carrying significant weight.<sup>6</sup> Further, ill treatment is not limited to physical acts; rather, it includes treatment that subjects victims to “feelings of fear, anguish and inferiority capable of humiliating and debasing them”.<sup>7</sup>
5. In light of the above, personal circumstances, which may heighten the risk of being exposed to discrimination, violence and abuse can, in turn, cause the treatment of the victim to attain a minimum level of severity. For example, in *Milanović v. Serbia*, the Court took into account the fact that the applicant was a “member of a vulnerable religious minority”, and was being systematically targeted, in finding that a violation of ECHR Article 3, in conjunction with ECHR Article 14.<sup>8</sup> In *Zontul v. Greece*, the Court found that the rape of a prisoner by a State agent must be considered as a particularly serious

<sup>1</sup> *Ireland v. United Kingdom*, no. 5310/71, 18 January 1978, Series A no. 25.

<sup>2</sup> *Khlaifia and Others v. Italy*, no. 16483/12, §160, with further references.

<sup>3</sup> *Soering v. the United Kingdom*, no. 14038/88, § 100.

<sup>4</sup> *Soering v. the United Kingdom*, no. 14038/88, § 100.

<sup>5</sup> *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 117, *Abdu v. Bulgaria*, no. 26827/08, § 36.

<sup>6</sup> *Nicolae Virgiliu Tănase v. Romania* [GC], § 121. It may well sufficient for a finding of an Article 3 violation that the victim is humiliated in his or her own eyes, even if not in the eyes of others. *Nicolae Virgiliu Tănase v. Romania* [GC], §§ 116-118.

<sup>7</sup> *Identoba and Others v. Georgia*, no. 73235/12, § 65, further citing *Gäfgen v. Germany* [GC], no. 22978/05, § 103, and *Eremia v. the Republic of Moldova*, no 3564/11. § 54. See also *Zontul v. Greece*, no 12294/07, § 88 and 89.

<sup>8</sup> *Milanović v. Serbia*, no. 44614/07 § 89. Similarly, in *Okkali v. Turkey*, the Court regretted that the authorities and the Respondent State had not referred to the particular seriousness of the impugned act on account of the victim’s age and noted that the authorities “could have been expected to regard the applicant’s vulnerability as an aggravating factor.” *Okkali v. Turkey*, no. 52067/99, § 70.

and heinous form of ill-treatment, “given the ease with which the aggressor can abuse the vulnerability and the fragility of his victim.”<sup>9</sup>

6. In the case of *Selmouni v. France*, the Court recalled that certain acts which were classified in the past as “inhuman and degrading treatment”, as opposed to “torture”, could be classified differently in the future.<sup>10</sup> This is because “the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.”<sup>11</sup>
7. Thus, in later cases the Court found that the threshold for a finding of an ECHR Article 3 violation in cases of ill-treatment with racist or discriminatory undertones against ethnic<sup>12</sup> or other minorities was met. In the *East African Asians* case, the former European Commission on Human Rights accepted that discrimination based on race could, in certain circumstances, of itself amount to “degrading treatment” within the meaning of ECHR Article 3,<sup>13</sup> emphasizing that special importance should be attached to such discrimination as an affront to human dignity.<sup>14</sup> Similarly, in *Cyprus v. Turkey* the Court concluded that the discriminatory treatment of the Kapras Greek Cypriot community, which could only be explained by their ethnic origin, race and religion, was degrading treatment, which attained the level of severity for an Article 3 violation.<sup>15</sup> In a more recent case, the Court found an ECHR Article 3 violation, in particular because “the infringement of human dignity [was] constituted by the presumed racial motive for the violence.”<sup>16</sup> Discriminatory remarks and racist insults must be considered, at the very least, as an aggravating factor when considering a given instance of ill-treatment in the light of ECHR Article 3.<sup>17</sup>
8. The Intervenor invite the Court to consider these principles when assessing prejudicial ill-treatment perpetrated against LGBT persons, given that gender identity and sexual orientation are one of the most basic components of self-determination and a fundamental facet of an individual’s identity and awareness.<sup>18</sup> The Court has acknowledged that LGBT persons may constitute vulnerable groups<sup>19</sup> and has not excluded the possibility that treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority could, in principle, fall within the scope of ECHR Article 3.<sup>20</sup> In *X v Turkey*, the Court found that the applicant had suffered discrimination on the basis of sexual orientation, which had been the main reason for keeping him in solitary confinement.<sup>21</sup> Further, in *O.M. v. Hungary*, the Court found a violation of ECHR Article 5(1) because the authorities ordered detention without considering the extent to which the applicant, a member of a vulnerable group by virtue of belonging to a sexual minority in Iran, was safe or unsafe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such minorities.<sup>22</sup> In *Identoba and Others v. Georgia*, the Court reiterated that discriminatory treatment as such can in principle amount to degrading treatment within the meaning of Article 3 where it attains a level of severity such as to constitute an affront to human dignity.<sup>23</sup>

<sup>9</sup> *Zontul v. Greece*, no 12294/07, § 88

<sup>10</sup> *Selmouni v. France* [GC], no. 25803/94, § 101.

<sup>11</sup> *Idem*.

<sup>12</sup> In *Moldovan v. Romania*, the failure of the Respondent State to provide adequate living conditions to members of the Roma community whose houses had been destroyed, along with the discriminatory way in which the victims had been treated, amounted to degrading treatment. The Court took into account the “general attitude of the authorities” which it found to have caused the applicants considerable mental suffering, thus diminishing their human dignity and arousing in them such feelings as to cause humiliation and debasement. See *Moldovan v. Romania*, nos. 41138/98 and 64320/01, at §§ 110 – 114.

<sup>13</sup> *East African Asians v United Kingdom*, nos. 4403/70 and others, Commission Report, 14 December 1973, DR 78, p. 5, at p. 62. See also *Moldovan and Others v. Romania*, as cited above, § 111.

<sup>14</sup> *East African Asians v. United Kingdom*, as cited above, §§ 196 and 207.

<sup>15</sup> *Cyprus v. Turkey*, no. 25781/94, §§ 309-310, ECHR 2001-IV.

<sup>16</sup> *Abdu v. Bulgaria* [Extracts], as cited above, § 39, *B.S. v. Spain*, no. 47159/08, § 41.

<sup>17</sup> *Identoba and others v. Georgia*, no.73235/12, § 65, *Moldovan and Others v. Romania* (no. 2), nos. 41138/98 and 64320/01, § 111, ECHR 2005-VII (extracts), and *B.S. v. Spain*, as cited above, *Abdu v. Bulgaria*, as cited above, § 37-38.

<sup>18</sup> *Y.Y. v Turkey*, no. 14793/08, §102.

<sup>19</sup> *Kiyutin v. Russia*, no. 2700/10, § 63 (citing *Schalk and Kopf v. Austria*, (no. 30141/04), § 97; *Smith and Grady v. the United Kingdom*, (nos. 33985/96 and 33986/96), § 90. See also Judge Salò’s partly dissenting opinion in *Abdi Mahamud v. Malta*, no. 56796/13: “Undeniably, the Court does take into consideration “in some instances” the applicant’s personal situation (circumstances and needs), that is to say his or her sex, age and state of health (see *Arutyunyan v. Russia*, no. 48977/07 § 68, 10 January 2012, and the case-law cited therein), when it has to determine whether ill-treatment attains a minimum level of severity. These are the personal considerations which may lead to particular vulnerability that can transform otherwise acceptable treatment into treatment attaining a minimum level of severity. I do not consider this list exhaustive, as, for example, sexual orientation can be another relevant personal circumstance.” (emphasis added)

<sup>20</sup> *Identoba and others v. Georgia*, no.73235/12, § 65, citing *Smith and Grady v. United Kingdom*, nos. 33985/96 and 33986/96, paragraph 121, ECHR 1999-VI.

<sup>21</sup> *X v Turkey*, no, 24626/09, 27 May 2013, § 57.

<sup>22</sup> *O.M. v. Hungary*, no. 9912/15, 5 July 2016, § 53.

<sup>23</sup> *Identoba and others v. Georgia*, no.73235/12, § 65, citing *East African Asians v. the United Kingdom*, nos. 4403/70 et al., Commission’s report of 14 December 1973, § 208, *Smith and Grady v. the UK*, nos. 33985/9633986/96, § 121 and *Moldovan and Others v. Romania* (no. 2), nos. 41138/98 and 64320/01, § 111.

## B. International law and practice

9. UN independent human rights institutions, bodies (such as the Treaty Bodies), and experts, including the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (“UN Special Rapporteur”), have acknowledged the need to take into account discriminatory elements and vulnerabilities when assessing whether the minimum thresholds under international law of torture or other cruel, inhuman and degrading treatment or punishment have been met. Indeed, the UN Committee Against Torture (“Committee Against Torture”) has emphasized that the discriminatory use of mental or physical violence or abuse is an important factor in determining whether an act constitutes torture.<sup>24</sup> Furthermore, The UN Human Rights Council adopted a resolution on “Human rights, sexual orientation and gender identity” for the first time in 2011 and subsequently in 2014 and 2016, expressing grave concern at “acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity”.<sup>25</sup>
10. According to the UN Special Rapporteur, “States should interpret the torture protection framework against the background of other human rights norms, such as those developed to eliminate racial discrimination and discrimination and violence against women, and those designed to protect the rights of children and persons with disabilities.”<sup>26</sup> Accordingly, States have a heightened obligation to protect from torture and other forms of abuse certain minorities or marginalized individuals or populations who are especially at risk of such abuses.<sup>27</sup>
11. International and regional human rights bodies, institutions and independent human rights experts have highlighted the precarious position of LGBT persons and the greater risks (as compared with the rest of the population) they face of becoming victims of discriminatory violence perpetrated by State agents and private actors. That enhanced risk, resulting in part from the perceived failure of the individuals concerned to conform to socially constructed gender expectations, is particularly pronounced in States in which persons are criminalized, stigmatized, persecuted or harassed for their actual or perceived sex, gender identity or expression, sexual orientation or non-adherence to dominant social norms regarding gender and sexuality.<sup>28</sup>
12. In assessing the level of pain and suffering experienced by victims of gender-based violence, States must examine the *totality of the circumstances*, “including the victim’s social status; extant discriminatory legal, normative and institutional frameworks that reinforce gender stereotypes and exacerbate harm; and the long-term impact on victims’ physical and psychological well-being, enjoyment of other human rights and their ability to pursue life goals.”<sup>29</sup>
13. In light of the above, UN independent human rights institutions, bodies and experts have considered that violence against LGBT persons may constitute torture or other cruel, inhuman or degrading treatment or punishment in light of the pain and suffering caused and the *implicit discriminatory purpose and intent*.<sup>30</sup> According to the UN Special Rapporteur:<sup>31</sup> “*Full integration of a gender perspective into any analysis of torture and ill-treatment is critical to ensuring that violations rooted in discriminatory social norms around gender and sexuality are fully recognized, addressed and remedied. [...] The purpose and intent elements of the definition of torture are always fulfilled if an act is gender-specific or perpetrated against persons on the basis of their sex, gender identity, real or perceived sexual orientation or non-adherence to social norms around gender and sexuality.*”

---

<sup>24</sup> Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entry into force 26 June 1987, in accordance with article 27), defines torture, inter alia, as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for [...] *any reason based on discrimination of any kind.*” See, also, the International Criminal Tribunal for Rwanda explicitly adopted the Convention’s definition of torture in *Prosecutor v Akayesu*, see *Prosecutor v Akayesu* (1998), §§593–594, Case No. ICTR-96-4-T, ICTR Trial Chamber I, judgment of 2 September 1998.

<sup>25</sup> UN Human Rights Council, Resolution on Human rights, sexual orientation and gender identity (A/HRC/RES/27/32), 26 September 2014; UN Human Rights Council, Resolution on Protection against violence and discrimination based on sexual orientation and gender identity (A/HRC/RES/32/2, 30 June 2016.

<sup>26</sup> Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/73/207), 20 July 2018, § 64.

<sup>27</sup> UN Committee Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2, available at: <https://www.refworld.org/docid/47ac78ce2.html> [accessed 28 June 2019].

<sup>28</sup> A/73/207, as cited above, § 70; see also Report of the United Nations High Commissioner for Human Rights, “Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity”, 17 November 2011, A/HRC/19/41.

<sup>29</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/31/57), 5 January 2016, § 68.

<sup>30</sup> Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (A/HRC/38/43), 11 May 2018, §§ 26 and 28.

<sup>31</sup> A/HRC/31/57, as cited above, §§ 6 and 8.

14. Discrimination on grounds of sexual orientation or gender identity may contribute to the dehumanization of the victim, which usually creates the conditions for torture and other ill-treatment to take place.<sup>32</sup> The intentional infliction of severe pain and suffering “for any reason based on discrimination of any kind” may constitute torture under Article 1 of the Convention against Torture.<sup>33</sup> Similar observations have been made at the regional level. In Europe, the Committee of Ministers of the Council of Europe has emphasized that sexual orientation and gender identity are factors which, in combination with one or more others, such as race or sex, will increase the risk of human rights abuses faced by the persons concerned.<sup>34</sup>
  15. The Inter-American Commission on Human Rights (“IACHR”) approaches violence committed against LGBT persons through the lens of prejudice, a concept which contextualizes violence ‘as a social phenomenon, as opposed to violence being understood as taking place in isolation.’<sup>35</sup> In two cases concerning attacks against individuals based on their sexual orientation and gender identity before the IACHR, the IACHR emphasized the link between discrimination and violence against LGBT persons and explained that sexual violence against LGBT people can acquire a particular meaning, since it can be used to punish and degrade victims for being who they are.<sup>36</sup> The IACHR’s report in *Azul Rojas Marin v. Peru* classified as torture the detention and rape by police staff of the victim (who at the time identified as a gay man), given that the violence was purely based on “subjective appreciations” and was caused by prejudice. Further, in *Vicky Hernández and Family v. Honduras*, which concerned an alleged extrajudicial killing of a transgender woman,<sup>37</sup> the IACHR framed its findings against the backdrop of heightened violence and discrimination against the LGBTI community in Honduras. It concluded that the murder of Vicky Hernandez was based on prejudice against her gender identity and expression. It further noted that such violence, “constitutes an affront to the right of all persons to self-determination and to freely choose the options and circumstances that give meaning to his or her existence, in accordance with his or her own choices and convictions.”<sup>38</sup>
- II. Contracting States have a positive obligation under Articles 3 and 8 of the ECHR to protect from and investigate allegations of violence with discriminatory elements**
- A. The Court’s case-law concerning Articles 3 and 8 of the ECHR**
16. The Court’s case-law under Article 3 and 8 of the ECHR has emphasized the Contracting States’ positive obligation to (i) *protect* individuals against violence based on their actual or perceived sexual orientation and/or gender identity, as well as (ii) *investigate and prosecute* allegation of such violence.
  17. With regard to the positive obligation to protect against torture and other ill-treatment, this Court’s jurisprudence has made clear that Article 3, read in conjunction with Articles 1 and 13, requires the implementation of effective criminal law mechanisms to deter the commission of offences against personal integrity, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.<sup>39</sup> This is because “effective measures of deterrence against grave acts ... can only be achieved by the existence of effective criminal-law provisions backed up by law enforcement machinery.”<sup>40</sup> The positive obligation on Member States to bring to justice perpetrators of acts of ill-treatment thus serves “to ensure that acts of ill-treatment do not remain ignored by the relevant authorities and do provide effective protection against acts of ill-treatment.”<sup>41</sup>
  18. In *Identoba and Others v. Georgia*, the Court emphasized that the State had a heightened burden of protection of the individuals because of its prior knowledge of public hostility towards the LGBT community.<sup>42</sup> In that case, the applicants were attending an LGBT march in Georgia and faced violence from counter-demonstrators. The Court held that the failure of the police to protect the demonstrators

<sup>32</sup> UN General Assembly, Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment (A/56/156), 3 July 2001, § 19. See also A/HRC/19/41, as cited above, § 34.

<sup>33</sup> A/73/207, as cited above, § 74; UN Convention against Torture, Article 1.

<sup>34</sup> Explanatory memorandum 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.

<sup>35</sup> IACHR, Report on Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, 12 November 2015, OAS/Ser.L/V/II. Doc 36/15 Rev 1, § 44.

<sup>36</sup> IACHR, Report No. 24/18 Case 12.982, Report on Merits *Azul Rojas Marín and Others v. Perú*, 24 February 2018, paras 95 and 99 (courtesy translation from Spanish).

<sup>37</sup> IACHR Report No. 157/18, Case 13.051 Report on Merits *Vicky Hernández and Family v. Honduras*, 7 December 2018, §§ 56 et seq.

<sup>38</sup> IACHR Report No. 157/18, Case 13.051 Report on Merits *Vicky Hernández and Family v. Honduras*, 7 December 2018, § 62 and 66, further citing IACtHR, Case of *Atala Riffo and Girls. v. Chile*, Merits, Reparations and Costs, Judgment of February 24, 2012, Series C. No. 239, § 136.

<sup>39</sup> *Beganović v. Croatia*, no. 46423/06, § 71. See also *A v. the UK* (100/1997/884/1096) (23 September 1998) §22; *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, §96; *Šečić*, § 53.

<sup>40</sup> *O’Keeffe* §148. See also *X and Y v the Netherlands*, no. 8978/80, §27; *Beganović* §71; *M.C. v Bulgaria*, no. 39272/98, §149.

<sup>41</sup> *Beganović* §79.

<sup>42</sup> *Identoba and Others v. Georgia*, no. 73235/12, § 72.

was in violation of Article 3 ECHR (in conjunction with Article 14) as various reports observed that prejudice against LGBT persons was deeply entrenched in the Georgian community, and the State should have known of these tensions during the march, but failed to provide adequate protection.<sup>43</sup>

19. This heightened standard applies to the procedural obligation to effectively investigate and prosecute violence with homophobic or transphobic undertones. The duty to effectively investigate is a central element of the obligation on Member States to ensure that the rights guaranteed under the Convention are practical and effective,<sup>44</sup> and applies irrespective of whether treatment contrary to Article 3 has been perpetrated by a State agent or a private individual.<sup>45</sup>
20. The Court has identified the following minimum standards which make an investigation “effective”: first, the investigation must be independent, impartial and subject to public scrutiny, and the competent authorities must act with diligence and promptness.<sup>46</sup> Second, the investigation must be thorough. This means that the authorities must always make a serious attempt to find out what happened and must not rely on hasty or ill-founded conclusions.<sup>47</sup> In order to be thorough, the investigation must address all aspects of the human rights violations concerned. The investigation must therefore be sufficiently broad and must not be conducted within an excessively narrow investigative framework.<sup>48</sup> Third, the authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, a detailed statement concerning the allegations from the alleged victim, eyewitness testimony, forensic evidence and, where appropriate, medical reports.<sup>49</sup> Fourth, the investigation must be capable of leading to the identification and punishment of those responsible for the alleged events and of establishing the truth.<sup>50</sup> Fifth, the authorities must also take all reasonable steps to establish whether any hatred or prejudice connected to a protected characteristic may have played a role in the attack.<sup>51</sup>
21. The fifth requirement identified above is particularly important in the context of the present case. In *Identoba and Others v. Georgia* and *M.C. and A.C. v. Romania*, the Court emphasized the obligation of authorities to take all reasonable steps necessary to unmask the role of possible homophobic motives for the violent events in question.<sup>52</sup> This is an obligation to use best endeavours: the authorities must do what 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.<sup>53</sup> Failure to do so was found to contravene Article 3 in combination with Article 14 ECHR, in light of the “clearly homophobic hate speech uttered by the assailants during the incident”.<sup>54</sup> According to the Court, without such a rigorous approach from the law-enforcement authorities, “prejudice-motivated crimes would unavoidably be treated on an equal footing with ordinary cases without such overtones, and the resultant indifference would be tantamount to official acquiescence to or even connivance with hate crimes.”<sup>55</sup>
22. Although often assessed in the context of Article 14, in cases involving racist violence the Court has made clear that this also forms part of the positive obligation to effectively investigate under Article 3, in conjunction with Articles 1 and 13.<sup>56</sup> This is because such motivations are “*particularly destructive to*

<sup>43</sup> *Identoba and Others v. Georgia*, no. 73235/12, § 65.

<sup>44</sup> See case law discussed below. See also, Committee of Ministers, Guidelines adopted by the Committee of Ministers on 30 March 2011 at the 1110<sup>th</sup> meeting of the Ministers’ Deputies, Article VIII (“**CM Guidelines, Art VIII**”).

<sup>45</sup> *Bureš v The Czech Republic*, no. 37679/08, § 122; *Denis Vasilyev v Russia*, no. 32704/04, § 100.

<sup>46</sup> *Beganović*, as cited above, §75; *Çelik and İmret v Turkey*, no. 44093/98, § 55.

<sup>47</sup> *Mikheyev v Russia*, no. 77617/01, §§ 107-108; *El-Masri v The Former Yugoslav Republic of Macedonia*, no. 39630/09, §182; *Bureš*, as cited above, §123.

<sup>48</sup> *Nachova* §115.

<sup>49</sup> *Beganović* §75; *Bati and Others v Turkey*, nos. 33097/96 and 57834/00, §134; *C.A.S and C.S v Romania*, no. 26692/05, §70; *Mikheyev*, as cited above, §108.

<sup>50</sup> *El-Masri* §182.

<sup>51</sup> *Beganović* §§93-94; *B.S. v Spain*, no. 47159/08, (“*B.S. v Spain*”) §§58-59; see also *Nachova*, as cited above, §§160-161; *Šečić*, as cited above, §§ 66-70; *Milanović v Serbia*, no. 44614/07, §§ 96-97; *Fedorchenko and Lozenko v Ukraine*, no. 387/0, § 65; *Virabyan v Armenia*, no. 40094/05, § 218; *Bekos and Koutropoulos v Greece*, no. 15250/02, § 69.

<sup>52</sup> *Identoba v. Georgia*, as cited above, § 77; similar facts in *M.C. and A.C. v. Romania*, as cited above, § 124.

<sup>53</sup> *M.C. and A.C. v. Romania*, No. 12060/12, §113, citing *inter alia Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, §160, *Mudric v. the Republic of Moldova*, no. 74839/10, §§60-64 and *Identoba and Others v. Georgia*, as cited above, § 67.

<sup>54</sup> *Identoba v. Georgia*, as cited above, § 77; similar facts in *M.C. and A.C. v. Romania*, as cited above, § 124.

<sup>55</sup> *M.C. and A.C. v. Romania*, No. 12060/12, § 124.

<sup>56</sup> *B.S. v Spain* § 59: “[T]he authorities’ duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 3 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 of the Convention to secure respect without discrimination for the fundamental value enshrined in Article 3. Owing to the interplay of the two provisions, issues such as those in the present case may fall to be examined under one of the two provisions only, with no separate issue arising under the other, or may require examination under both Articles. This is a question to be decided in each case on its facts and depending on the nature of the allegations made ...”

*fundamental rights*,<sup>57</sup> and have far-reaching implications not just for an individual victim but also, as noted above, at a wider societal level. The Interveners submit that the same conclusion should apply *mutatis mutandis* to violence based on one's actual or perceived sexual orientation and gender identity.

23. The requirement to effectively investigate is the precursor to a State's duty to effectively prosecute hate crimes motivated by sexual orientation and/or gender identity. In the absence of a duty to effectively prosecute, "*the general legal prohibition of torture and inhuman or degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.*"<sup>58</sup> By analogy, the Interveners contend that the criminal law proscribing violent crimes requires that investigations be followed by appropriate prosecutions when the evidence warrants them.
24. In determining whether a positive obligation exists under Article 8, the Court has considered 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>59</sup> However, the margin allowed to the State will be restricted "when a particularly important facet of an individual's existence or identity is at stake."<sup>60</sup> The Court has emphasised on multiple occasions that sexual orientation and gender identity are important elements of the personal sphere protected by Article 8<sup>61</sup> and important facets of an individual's private life;<sup>62</sup> 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>63</sup> and is "one of the most basic essentials of self-determination."<sup>64</sup>
25. Further, while the choice of the means to protect against acts of individuals is, in principle, within the State's margin of appreciation, effective deterrence against grave acts, where fundamental values and essential aspects of private life are at stake, requires efficient criminal law provisions. Children "and other vulnerable individuals", in particular, are entitled to such effective protection.<sup>65</sup> The Court has recognised that members of LGBT community may be such a vulnerable individual.<sup>66</sup> In addition, States may be obliged to maintain and apply an adequate legal framework affording protection against acts of violence by private individuals.<sup>67</sup> Last, the Court has not excluded the possibility that the State's positive obligation under Article 8 to safeguard an individual's physical integrity may also extend to questions relating to the effectiveness of a criminal investigation.<sup>68</sup>

## B. International law and practice

26. The case-law of this Court, as summarized above, finds support in the jurisprudence of the UN Human Rights Committee,<sup>69</sup> the UN Committee against Torture,<sup>70</sup> the Inter-American Commission on Human Rights<sup>71</sup> and the African Commission on Human and People's Rights.<sup>72</sup> Similarly, the Inter-American Convention to Prevent and Punish Torture holds a State responsible for acts that it fails to prevent.<sup>73</sup> As regards the protection of private life, Article 12 of the Universal Declaration of Human Rights affords individuals the right to be free from interference with their privacy, family, home or correspondence.<sup>74</sup>

<sup>57</sup> *Šečić v. Croatia*, no. 4116/02, § 67.

<sup>58</sup> *El-Masri* §182. See, more generally, OHCHR, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc E/CN.4/2005/102/Add.1 (2005), Principle 19.

<sup>59</sup> See, e.g., *B. v. France*, no. 13343/87, 25 March 1992, § 44; *Hämäläinen v. Finland* [GC], no. 37359/09, § 67, ECHR 2014.

<sup>60</sup> *Schlumpf v. Switzerland*, no. 29002/06, 8 January 2009, § 104.

<sup>61</sup> See Council of Europe, Guide to Article 8, 2016 (updated August 2019), para. 128, with further citations to the Court's case law.

<sup>62</sup> See *Dudgeon v. the United Kingdom*, no. 7525/76, § 41, Series A no. 45; *B. v. France*, cited above, § 63, Series A no. 232-C; *Burghartz v. Switzerland*, no. 16213/90, § 24, Series A no. 280-B; *Laskey, Jaggard and Brown v. the United Kingdom*, nos. 21627/93, 21826/93, and 21974/93, § 36, and *Smith and Grady v. the United Kingdom*, cited above, § 71.

<sup>63</sup> *Van Kück v. Germany*, no. 35968/97, §§ 56 and 75.

<sup>64</sup> *Y.Y. v Turkey*, no. 14793/08, § 102 (extracts).

<sup>65</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, *X and Y v. the Netherlands*, *August v. the United Kingdom*; *M.C. v. Bulgaria*.

<sup>66</sup> See references in para. 8 above.

<sup>67</sup> *Alković v. Montenegro*, cited above, § 65; *Isaković Vidović v. Serbia*, no. 41694/07, 1 July 2014, § 59.

<sup>68</sup> *M.C. and A.C. v. Romania*, cited above, § 115, citing *C.A.S. and C.S. v. Romania*, no. 26692/05 (the case concerned child abuse).

<sup>69</sup> See, e.g., Human Rights Committee General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) ("General Comment 31"), §§8, 15, 18. See also, e.g., Human Rights Committee Concluding Observations ("HRC CO"), CCPR/C/POL/CO/6 (15 November 2010), §§5, 8; HRC CO, CCPR/C/RUS/CO/6 (29 October 2009) §27.

<sup>70</sup> See, e.g., HRC CO, CAT/MNG/CO/1 (20 January 2011) §25; HRC CO, CAT/C/KWT/CO/2 (28 June 2011) §25; HRC CO, CAT/C/BGR/CO/4-5 (14 December 2011) §28; HRC CO, CAT/C/NOR/CO/6-7 (13 December 2012) §21; HRC CO, CAT/C/RUS/CO/5 (11 December 2012) §15.

<sup>71</sup> See, e.g., Inter-American Commission on Human Rights, Case 11.137, *Juan Carlos Abella, Argentina* (18 November 1997) (OEA/Ser.L/V/11.98), §392.

<sup>72</sup> See, e.g., African Commission decision 245/02, *Zimbabwe Human Rights NGO Forum v Zimbabwe* (15 May 2006).

<sup>73</sup> Inter-American Convention to Prevent and Punish Torture, (1987), Article 6.

<sup>74</sup> UN General Assembly, United Nations Declaration of Human Rights, (1948), Article 12.

This duty is a positive one, as it requires a State to ensure that there are laws prohibiting interference or attacks.<sup>75</sup>

27. Human rights institutions, including Courts, have emphasized a States' special responsibility to investigate and protect against discriminatory violence directed against vulnerable groups, irrespective of whether such violence is perpetrated directly by the State or by non-State actors. For example, in *Rosendo Cantú et al. v. Mexico*, which concerned the rape and torture of an indigenous Mexican girl, the IACtHR noted that, "from the moment that the State became aware that a rape had been committed against an individual who is a member of a particularly vulnerable group, given her status as an indigenous person and a minor, it had the obligation to conduct a serious and effective investigation to confirm the truth of the matter and to determine who was responsible."<sup>76</sup>
28. In the area of LGBT rights, the States' positive obligation to duly investigate allegations of ill-treatment and torture with discriminatory elements against the LGTBI community is widely recognized by current international and regional standards. On 29 September 2015, 12 UN entities released a joint statement calling for an end to violence and discrimination against LGBT people. The statement calls on the States to do more to "protect LGBTI persons from violence, torture and ill-treatment, including by: (i) investigating, prosecuting and providing remedy for acts of violence, torture and ill-treatment against LGBT adults, adolescents and children, and those who defend their human rights [...]"<sup>77</sup> Reported concerns include ineffective police action, failure to register cases, loss of documents, inappropriate classification of acts, including physical assault as a minor offence, and investigations guided by stereotypes and prejudices.<sup>78</sup>
29. Under international and regional human rights standards, States must:
  - (a) Make special efforts to investigate any homophobic or transphobic connotations in an act of violence and take all necessary steps to ensure that law enforcement structures, including the judiciary, have the necessary knowledge and skills to identify such crimes and incidents.<sup>79</sup> As discriminatory motives "are tricky to prove", the "quality of investigations are all the more important".<sup>80</sup>
  - (b) Prosecute the alleged perpetrators and, if found guilty, convict and sanction them with penalties commensurate with the gravity of the offence.<sup>81</sup> States must ensure that when determining sanctions, a biased motive related to sexual orientation or gender identity be taken into account as an aggravating circumstance.<sup>82</sup>
  - (c) Establish judicial procedures responsive to the needs of victims.<sup>83</sup> Offer appropriate remedies, including redress and reparation and, where appropriate, medical and psychological support.<sup>84</sup>
  - (d) Make special efforts to eradicate deeply rooted practices of mistreatment and disrespect by police agents with regard to LGBT persons who are victims or witnesses of crime.<sup>85</sup> In this regard, the Interveners also emphasize the critical importance of training law enforcement officials to avoid derogatory language related to sexual orientation, gender identity, or gender expression, and refrain from making biased assumptions in their receipt, processing, and investigation of complaints.<sup>86</sup> If police, prosecutors and the courts are not sensitive to the rights of victims of hate crimes motivated by prejudice on the basis of sexual orientation or gender identity, there remains a real risk that the criminal law will be ineffective and that perpetrators will continue to act with impunity. As the UN High Commissioner for Human Rights has recognized: "[e]ven where systems exist, incidents may go unreported or misreported because victims distrust the police [...] or because those responsible for registering the incidents fail to recognize

---

<sup>75</sup> *Idem*.

<sup>76</sup> IACtHR, *Rosendo Cantú et al. v. Mexico*, 31 August 2010, § 103.

<sup>77</sup> Available at: <https://www.ohchr.org/EN/Issues/Discrimination/Pages/JointLGBTIstatement.aspx>.

<sup>78</sup> A/HRC/29/23, as cited above, §24.

<sup>79</sup> Recommendation CM/Rec(2010)5, Section I.A.3.

<sup>80</sup> Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, Section I.A.1 and Explanatory Memorandum to Recommendation CM/Rec(2010)5 of the Council of Europe Committee of Ministers to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity, p. 23.

<sup>81</sup> See, e.g., HRC CO, CAT/C/NOR/CO/6-7 (13 December 2012) §21

<sup>82</sup> Recommendation CM/Rec(2010)5, Section I.A.2.

<sup>83</sup> African Commission on Human and Peoples' Rights, Resolution 275: Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity.

<sup>84</sup> Yogyakarta Principles of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2007), Principle 3.

<sup>85</sup> IACHR, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, as cited above, §§ 464-465.

<sup>86</sup> IACHR, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, as cited above, §§ 464-465.

motives of perpetrators”<sup>87</sup> The Interveners submit that the failure to provide such training should, in certain circumstances, itself constitute a violation of the positive obligations inherent in Article 3, 8 and 13.<sup>88</sup>

- (e) Last, emphasis is given to data collection,<sup>89</sup> as the recording and monitoring of hate crimes on the basis of sexual orientation and/or gender identity remains very limited throughout many Member States. The Interveners consider that the collection, analysis and publication of data is critical to ensure effective compliance with the positive obligations inherent in Articles 3, 8 and 13. That data should include, at a minimum, statistics setting out the number and nature of incidents reported by the public to authorities, and details of charges and conviction rates.<sup>90</sup>

30. Overall, States must exercise due diligence in investigating violence that is based on prejudice, since impunity for human rights violations leads to repetition.<sup>91</sup> Deficiencies in the investigation and prosecution include (i) prejudice in the conduct of investigations, (ii) lack of a differentiated approach which often leads to the crime in question (i.e., violence against LGBT persons) not being “categorized as often as they should be as hate crimes or crimes motivated by prejudice”, as well as (iii) the “acquittal or mitigated sentencing’ of perpetrators due to the sexual orientation or gender identity of the victim”.<sup>92</sup>

### III. Contextual information about discriminatory attitudes in Armenia

31. While Armenia is party to key international and regional human rights treaties, Armenian legislation does not afford protection against explicitly homophobic or transphobic violence or threats or other incitement to such violence. In practice, LGBT persons and affiliates in Armenia continuously struggle to enjoy equality, both at personal and organizational levels, and there is no guarantee that their rights will be upheld either in court or at police stations.

#### A. Absence of legal protection

32. There is no legislation in Armenia that explicitly prohibits discrimination on the grounds of sexual orientation or gender identity or protects against violence motivated by homophobia and/or transphobia. Article 77 of the Armenian 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”. Sexual orientation or gender identity are not mentioned as protected characteristics. The Armenian Criminal Code does not include sexual orientation and/or gender identity among the grounds for which a specific offence can be classified as a bias-motivated crime or incitement to discrimination, hostility or violence.<sup>93</sup> The Criminal Code considers only ethnic, racial or religious hatred, or religious fanaticism as aggravating circumstances in case of murder, infliction of wilful damage to health or torture.<sup>94</sup> In 2017, the government proposed amendments to the Criminal Code (currently only planned for adoption in 2020), but the draft does not explicitly include sexual orientation and gender identity as prohibited grounds.<sup>95</sup>
33. The general non-discrimination clause of the Armenian Constitution, Article 29, 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>96</sup> Whilst the clause ostensibly entails an open-ended list of protected characteristics, according to the European Commission against Racism Intolerance (“ECRI”), to date general anti-discrimination standards have not been applied to LGBT persons in court proceedings, and there is no relevant case law in that respect.<sup>97</sup> There is no specific anti-discrimination

<sup>87</sup> OHCHR, Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity (17 November 2011), §23.

<sup>88</sup> The significance of training in this context has been recognized, for example, by the Committee of Ministers, Committee of Ministers, Recommendation CM/Rec(2010)5 (emphasis added); see also CM Guidelines, Art VIII; and the UN Commissioner on Human Rights, OHCHR, Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity (17 November 2011), §64. See, more generally, the EU Directive on Victims’ Rights (2012/29/EU), and ILGA Europe, *Guidelines for transposition, The EU Directive on Victims’ Rights (2012/29/EU) and homophobic and transphobic crime victims* (December 2013).

<sup>89</sup> Recommendation CM/Rec(2010)5, Section I.A.5.

<sup>90</sup> See, e.g., HRC CO, CAT/C/MDA/CO/2 (29 March 2010) §27; HRC CO, CAT/C/RUS/CO/5 (11 December 2012) §15.

<sup>91</sup> IACHR, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, as cited above, § 438.

<sup>92</sup> *Ibid.*, § 490 et seq.

<sup>93</sup> The European Commission against Racism and Intolerance notes that in the period 2011-2016, just three cases of “public incitement to hatred” (Article 226 of the Criminal Code) were dealt with by the courts, and none of these were cases involving homophobia or transphobia, ECRI report on Armenia 2016, as cited above, para. 91.

<sup>94</sup> Articles 104(2), 112(2), 113(2) and 119(2), RA Criminal Code, available at: <http://www.parliament.am/legislation.php?sel=show&ID=1349&lang=eng>

<sup>95</sup> ECRI Conclusions On The Implementation Of The Recommendations In Respect Of Armenia subject To Interim Follow-Up, 18 June 2019, <https://rm.coe.int/conclusions-5th-cycle-on-armenia/1680972faa>

<sup>96</sup> <http://www.president.am/en/constitution-2015/>, Article 29.

<sup>97</sup> The European Commission against Racism and Intolerance (ECRI) report on Armenia 2016, available at <https://rm.coe.int/fourth-report-on-armenia/16808b5539>, para. 91.

legislation, and as a result the Armenian legal system lacks a legal definition of discrimination, forms of discrimination, legal remedy or means of protection for victims of 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>98</sup>

34. 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>99</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 racist acts.<sup>100</sup> A draft anti-discrimination law was proposed for consultation in March 2018. Although the draft law mirrored the (ostensibly) open-ended list of prohibited grounds of discrimination provided in Article 29 of the Constitution, it missed 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, as 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>101</sup>
35. In addition to the legislative gap identified above, various reports of leading international human rights organizations and civil society groups have reported that the LGBT community in Armenia faces widespread hostile social attitudes and routine discrimination.<sup>102</sup> LGBT persons in Armenia continue to face intimidation, threats, harassment, physical and psychological abuse in different spheres of life, including the family, healthcare, law enforcement, armed forces and closed institutions. Studies show that homophobia and transphobia are widespread and deeply ingrained in Armenian society. Not surprisingly, visibility of the LGBT community is limited. Armenia is witnessing an unprecedented level of hate speech and violence related to people's sexual orientation or gender identity. The organization Right Side recorded 100 cases of hate crime or other hate motivated violence against transgender people in 2016 - 2017 and 123 cases in 2018.<sup>103</sup> In 2018, 15 cases of alleged human rights violations against LGBTI persons were documented, but only four victims sought help from the ombudsperson's office and none from law enforcement bodies. Only three cases were sent to court.<sup>104</sup>
36. The political environment has immensely contributed to the development of homophobic and transphobic narrative in the country. The country has experienced a surge in hate crimes after the "Velvet Revolution" in 2018. Former state officials have held various debates, press conferences, as well as interviews with the participation of famed or less famed public and state actors, blaming the new government in being "anti-national", complicit in supporting organizations "destroying the traditional Armenian family".<sup>105</sup> In the fall of 2018, members of the Republican and Prosperous Armenia fractions of the Parliament proposed amendments to the Law on Children's Rights in order to outlaw the dissemination of information that favours "non-traditional sexual relations". The draft law defines "traditional" sexual relations as those taking place between an adult man and adult woman.<sup>106</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".<sup>107</sup>
37. 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

<sup>98</sup> ECRI report on Armenia 2016, as cited above, para. 91.

<sup>99</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, ECRI report on Armenia 2016, as cited above, para. 91.

<sup>100</sup> ECRI report on Armenia, as cited above, para 91 and 26.

<sup>101</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>102</sup> HRW World Report 2019, available at: <https://www.hrw.org/world-report/2019/country-chapters/armenia>, US Department of State Country Report on Human Rights Practices for 2018, section 6, available at <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/armenia/>. See also 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> and ECRI report on Armenia 2016, as cited above, pp. 29-31.

<sup>103</sup> The organization Right Side studies are available at <http://rightsidengo.com/publication/>.

<sup>104</sup> US Department of State Country Report on Human Rights Practices for 2018, section 6, available at <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/armenia/>.

<sup>105</sup> ILGA-Europe, Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans, and Intersex People in Armenia covering the period of January to December 2018, <https://www.ilga-europe.org/sites/default/files/armenia.pdf>

<sup>106</sup> Report of the Commissioner For Human Rights of The Council Of Europe Dunja Mijatović following Her visit To Armenia from 16 to 20 September 2018, para. 103.

<sup>107</sup> ECRI report on Armenia, as cited above, para. 52.

illustrate that any attempts to apply the existing general non-discrimination clauses to LGBT people have failed. While civil society and international organizations reported many discrimination-related crimes committed against LGBT people, there is no data in the official statistics of the Armenian Police on hate-motivated crimes against LGBT people.<sup>108</sup>

38. Authorities typically fail to respond to discrimination and violence perpetrated on the basis of sexual orientation or gender identity, and even sometimes condone such attacks. Few victims of such crimes report them to the police, for fear of public exposure or disclosure of their LGBT identity to their families, lack of trust in the police and fear of further victimization at the hands of the police. Indeed, there have been cases of police officers perpetrating hate crimes themselves, including physical violence, but due to the lack of legislation, they have not been officially recorded or investigated.<sup>109</sup> An example that encapsulates the dire situation described above is the attack of nine young people, including LGBT activists in the village of Shurnukh in August 2018. The assailants, supported by the entire village, surrounded the house where the victims were at the time, hit them with stones and shouted threats towards them because of their appearance and assumed sexual orientation. The victims called the police, who arrived with a 1.5 hour delay, despite the death threats towards the victims. The authorities opened a criminal file on grounds of beating with no account of the motives of the offenders, and ultimately closed the case relying on a general pardon declared on the occasion of Yerevan's 2800th anniversary.<sup>110</sup> The violent act was followed by a huge wave of victim-blaming both in mass and social media. In one Facebook post, Prosperous Armenia parliamentarian Gevorg Petrosyan wrote, "all gays, sectarians, and their defenders should be eradicated from our holy land."<sup>111</sup>
39. This combination of social, cultural, political and other underlying factors and legislative gaps contribute to a further deterioration of the situation for LGBT people living in Armenia, and deprive them of their fundamental human rights, preventing them from enjoying proper access to justice or living in a safe environment. Recently, the European Union and the United Nations in Armenia expressed grave concerns over the rise in hate speech and threats of violence against human rights and LGBT activists,<sup>112</sup> and called upon the Armenian authorities to investigate and prosecute incidents of harassment and abuse against members of the LGBT community in accordance with the law, to ensure physical safety of those targeted, and to promote an environment of human dignity free from hate speech.<sup>113</sup>

#### IV. Conclusion

40. Despite a number of recent jurisprudential and legal advances, violence against the LGBT people is still a real problem in many parts of Europe. The Court has the opportunity to reaffirm that the European Convention is practical and effective in protecting persons from violence based on their actual or perceived sexual orientation or gender identity and expression, and reflects the latest international standards.
41. In particular it is important that:
- (a) Contracting States effectively fulfil their positive obligations under Articles 3 and 8 of ECHR in protecting persons from violence, and put in place necessary legislative, policy and other measures for unmasking any discriminatory motive or intent present in the acts of violence; and ensure adequate investigation, especially when dealing with victims of discriminatory torture and ill-treatment.
  - (b) Ensure that a comprehensive anti-discrimination legislation is in place, and sexual orientation and gender identity are explicitly recognised as protected grounds for discrimination.

<sup>108</sup> ECRI report on Armenia, as cited above, para. 89,

<sup>109</sup> US Department of State Country Report on Human Rights Practices for 2018, section 6, available at <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/armenia/>.

<sup>110</sup> US Department of State Country Report on Human Rights Practices for 2018, section 6, available at <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/armenia/>.

<sup>111</sup> US Department of State, 2018 Country Reports on Human Rights Practices, Armenia, Section 6, see <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/armenia/>

<sup>112</sup> [https://eeas.europa.eu/delegations/armenia/60790/statement-behalf-delegation-european-union-and-eu-member-states-embassies-resident-armenia\\_en](https://eeas.europa.eu/delegations/armenia/60790/statement-behalf-delegation-european-union-and-eu-member-states-embassies-resident-armenia_en)

<sup>113</sup> <https://www.un.am/en/news/845>