

BEIZARAS and LEVICKAS v. LITHUANIA

Application no. 41288/15

WRITTEN SUBMISSIONS ON BEHALF OF

THE AIRE CENTRE (ADVICE ON INDIVIDUAL RIGHTS IN EUROPE),

**ILGA-EUROPE (THE EUROPEAN REGION OF THE INTERNATIONAL
LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION),**

THE INTERNATIONAL COMMISSION OF JURISTS (ICJ) AND

THE HUMAN RIGHTS MONITORING INSTITUTE (HRMI)

INTERVENERS

pursuant to the Section Registrar's notification of October 2017

24 October 2017

INTRODUCTION

- 1) These written submissions are presented on behalf of the Advice on Individual Rights in Europe Centre (“AIRE Centre”), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (“ILGA-Europe”), the International Commission of Jurists (“ICJ”) and the Human Rights Monitoring Institute (HRMI), hereinafter “the interveners”.
- 2) The present case provides the Court with an important opportunity to identify the scope of the Contracting Parties’ positive obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms (‘the Convention’ or ECHR) arising in connection with extreme forms of hate speech or other types of expression (hereafter “hate speech” for short), including hate speech that is of a homophobic or transphobic nature.
- 3) The interveners’ written submissions below focus on the following:
 - i. The international, European and comparative law addressing the Member States’ positive obligation to ensure the effective protection of individuals, including the obligation to prevent, investigate, prosecute, punish and remedy crimes, in particular, in connection with some extreme forms of homophobic or transphobic hate speech that constitutes incitement to commit violent crimes;
 - ii. Relevant domestic practices of Council of Europe Member States other than the Respondent Government in responding to these crimes; and
 - iii. Evidence regarding the domestic context in Lithuania indicative of the attitude and practices of the State in responding to homophobic or transphobic speech or other forms of expression.

A. RELEVANT INTERNATIONAL LEGAL PRINCIPLES AND STANDARDS

- 4) Under globally applicable international treaty law, three treaties are primarily relevant to addressing hate speech amounting to incitement to commit violent crimes: the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Prevention and Punishment of the Crime of Genocide.¹
- 5) Article 19 of the ICCPR² sets out everyone’s “right to freedom of expression.” However, this is not an absolute right. Article 19(3) provides for permissible restrictions on expression, including speech, in the following terms: *The exercise of the [right to freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.*

¹ There are also relevant provisions on freedom of expression in the Universal Declaration of Human Rights (UDHR). Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N.GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR], see Article 19. Furthermore, Article 7 UDHR is also relevant in this context as it provides that all people “are entitled to equal protection against any discrimination in violation of [the] Declaration and against any incitement to such discrimination”; Article 29 UDHR also imposes limitations on everyone’s exercise of their “rights and freedoms”, including, therefore, freedom of expression, but only to the extent necessary to secure “due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”.

² International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, arts. 19, 20, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S.171, 178 (entered into force Mar. 23, 1976).

- 6) The ICCPR also places obligations on States Parties to prohibit hate speech in certain circumstances. Article 20(2) provides that: *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*³
- 7) The Human Rights Committee has elucidated in its General Comment No 34 on Article 19 of the ICCPR that the right to freedom of expression “includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20.”⁴

“51. What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as lex specialis with regard to article 19.

52. It is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions. In every case in which the State restricts freedom of expression it is necessary to justify the prohibitions and their provisions in strict conformity with article 19.”

- 8) The U.N. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has also clarified that “while States are required to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence under article 20 (2) of the Covenant, there is no requirement to criminalize such expression. The Special Rapporteur underscores that only serious and extreme instances of incitement to hatred, which would cross the seven-part threshold, should be criminalized.”⁵
- 9) In regard to the Council of Europe, the equivalent of Article 19 of the ICCPR is Article 10 of the ECHR. Article 10 states “Freedom of expression
 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

³ Although Article 20(2) of the ICCPR expressly prescribes only the prohibition in law of advocacy of “national, racial or religious hatred”, when such advocacy constitutes incitement to discrimination, hostility or violence, when read in light of the non-discrimination provisions in Articles 2(1) and 26 of the ICCPR, Article 20(2) also requires the prohibition in law of other forms of advocacy of hatred constituting incitement to discrimination, hostility or violence towards a person or group on other prohibited grounds of discrimination, including, for example, one’s gender or one’s real or perceived sexual orientation or gender identity.

⁴ Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, para. 50-52

⁵ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 7 September 2012, A/67/357, para. 47. See also, para. 45 of the same report, which sets out the seven-part threshold test: “45. The threshold of the types of expression that would fall under the provisions of article 20 (2) should be high and solid. An important contribution in determining the appropriate threshold has been made by ARTICLE 19, a non-governmental organization, which has proposed a seven-part test using the following elements: (a) Severity of hatred, which should amount to “the most severe and deeply felt form of opprobrium”, including an assessment of the severity of what is said, the harm advocated, magnitude and intensity in terms of frequency, choice of media, reach and extent; (b) Intent of the speaker to incite discrimination, hostility or violence; (c) Content or form of the speech, including form, style, nature of the arguments deployed in the speech, magnitude or intensity of the speech, background of the inciter and the degree to which the speech is provocative or direct. Artistic expression should be considered with reference to its artistic value and context, given that individuals may use art to provoke strong feelings but without the intention of inciting violence, discrimination or hostility; (d) Extent of the speech, in terms of its reach and the size of the audience; (e) Likelihood or probability of harm occurring. While incitement by definition is an inchoate crime and the action advocated through incitement does not have to be committed for the speech to amount to a crime, a high degree of risk of resulting harm must be identified; (f) Imminence of the acts called for by the speech; (g) Context, including consideration of the speaker or author, audience, intended harm, existence of barriers in establishing media outlets, broad and unclear restrictions on content of what may be published or broadcast; absence of criticism of Government or wide-ranging policy debates in the media and other forms of communication; and the absence of broad social condemnation of hateful statements on specific grounds when they are disseminated.”

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”
- 10) Under Article 10 of the ECHR the list of what may constitute legitimate grounds permitting the imposition of restrictions or penalties on the exercise of the right to freedom of expression is longer than the corresponding list in Article 19(3) of the ICCPR.
 - 11) This Court has repeatedly held that “freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual’s self-fulfillment.”⁶ The Court has also held on numerous occasions that freedom of expression must be protected. It has explicitly stated that freedom of expression protects not only the “‘information’ or ‘ideas’ that are favorably received or regarded as inoffensive or as a matter of indifference, but also [protects] those that offend, shock or disturb Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’”⁷ While freedom of expression may be restricted when the conditions of Article 10(2) are satisfied, the exceptions, “however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established”⁸
 - 12) However there is no express equivalent in the ECHR to the Article 20 provisions in the ICCPR on advocacy of hatred constituting incitement to discrimination, hostility or violence.
 - 13) Under the Convention, Article 17 stipulates that the rights guaranteed by the ECHR may not be interpreted as granting the right to engage in any activity aimed at the destruction of any of the rights it proclaims, or limiting them further than is provided for in the ECHR. When dealing with cases concerning incitement to hatred and freedom of expression, the European Court of Human Rights uses two approaches that are provided for by the European Convention on Human Rights:
 - 1) the approach of exclusion from the protection of the Convention, provided for by Article 17 (prohibition of abuse of rights), where the comments in question amount to hate speech and negate the fundamental values of the Convention; and
 - 2) the approach of setting restrictions on protection, provided for by Article 10, paragraph 2, of the Convention (this approach is adopted where the speech in question, although it is hate speech, is not apt to destroy the fundamental values of the Convention).”
 - 14) In a number of cases before this Court, the statements in question were found to constitute incitement to commit acts of violence against others. In these types of cases a criminal law response has been considered appropriate.
 - 15) For example in *Belkacem v. Belgium*,⁹ the applicant was convicted of incitement to discriminate, hatred and violence after he made a series of *YouTube* videos. The applicant argued that he had

⁶ See *Dichand v. Austria*, App. No. 29271/95 ¶ 37 (Eur. Ct. H.R. Feb. 26, 2002),

⁷ *Goodwin v. United Kingdom*, 1996-II Eur. Ct. H.R. 483, 500; *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) at 23 (1994); *Thorgeir Thorgeirson v. Iceland*, 239 Eur. Ct. H.R. (ser. A) at 27 (1992); *Oberschlick v. Austria*, 204 Eur. Ct. H.R. (ser. A) at 25 (1991); *Lingens*, 103 Eur. Ct. H.R. at 26; *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 40 (1979).

⁸ *Observer & Guardian v. United Kingdom*, 216 Eur. Ct. H.R. (ser. A) (1991), at para. 59.

⁹ *Belkacem v Belgium* [2017] ECHR No 34367/14 the Court noted in particular that in his remarks the applicant had called on viewers to overpower non-Muslims, teach them a lesson and fight them. The Court considered that the remarks in question had a markedly hateful content and that he applicant, through his recordings, had sought to stir up hatred, discrimination and violence towards all non- Muslims. In the Court’s view, such a general and vehement attack was incompatible with the values of tolerance, social peace and non-discrimination underlying the European Convention on Human Rights

never intended to “incite” hatred, violence or discrimination but merely to disseminate his ideas and opinions and therefore his conviction was a breach of Article 10. The Court considered that the applicant had attempted to deflect Article 10 (freedom of expression) of the Convention from its real purpose by using his right to freedom of expression for ends that were manifestly contrary to the spirit of the Convention. Accordingly, the Court held that, in accordance with Article 17 (prohibition of abuse of rights) of the Convention, the applicant could not claim the protection of Article 10.

- 16) In contrast in *Otegi Mondragon v. Spain* the Court decided that an elected representative’s criminal conviction under Article 490 §3 of the Criminal Code, resulting in one year’s imprisonment, for causing serious insult to the King of Spain was a violation of Article 10 of the Convention.¹⁰ During an official visit by the King to the province of Biscay, the applicant, a spokesperson for his parliamentary group, Sozialista Abertzaleak, said the visit of the King was a “genuine political disgrace” and that as “supreme head of the Guardia Civil (police) and of the Spanish armed forces” the King was the person in command of those who had tortured journalists as part of a recent police operation against a local newspaper, the applicant called the King “he who protects torture and imposes his monarchical regime on our people through torture and violence”.
- 17) In *Delfi v Estonia*,¹¹ the Court was asked to examine for the first time a complaint about liability, for user generated comments on an internet news portal. The Grand Chamber concluded that the Estonian courts’ finding of liability against Delfi had been a justified and proportionate restriction on the news portal’s freedom of expression, in particular because the comments in question, including threats directed against an individual known as L, had been extreme and had been posted in reaction to an article published by Delfi on its professionally managed news portal run on a commercial basis. The Grand Chamber, in general terms stated that: “*where third-party user comments are in the form of hate speech and direct threats to the physical integrity of individuals, as understood in the Court’s case-law (...), the Court considers (...) that the rights and interests of others and of society as a whole may entitle Contracting States to impose liability on Internet news portals, without contravening Article 10 of the Convention, if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties*” (§ 159)
- 18) As a restriction on freedom of expression, any incitement-related restriction should conform to the three-part test provided under Article 19 (3) of the ICCPR and Article 10 of ECHR, namely, that such restrictions be provided by law, that they be necessary, and that they be for one of the legitimate grounds identified in either of those provision. Any law seeking to implement the

¹⁰ *Otegi Mondragon v Spain*, judgment of 15 March 2011, Application No 2034/07 The Court acknowledged that the language could be considered provocative, but reiterated that it was permitted, in the context of a public debate of general interest, to have recourse to a degree of exaggeration, or even provocation. The comments in issue had been made in a public and political context that was outside the “essential core of individual dignity” of the King. The European Court further emphasised the particular severity of the sentence. While the determination of sentences was in principle a matter for the national courts, a prison sentence imposed for an offence committed in the area of political discussion was compatible with freedom of expression only in extreme cases, such as hate speech or incitement to violence. Nothing in this case justified such a sentence, which inevitably had a dissuasive effect.

¹¹ *Delfi AS v. Estonia* (2015) ECtHR 64669/09 Regardless of a technical system filtering vulgarity and obscene wordings, regardless of a functioning notice-and-take-down facility, and, most importantly, regardless of an effective and immediate removal of the offensive comments at issue after being notified by the victim about their grossly insulting character, the Grand Chamber was of the opinion that Delfi was liable for having made accessible for some time the grossly insulting comments on its website. The Grand Chamber agreed with the domestic courts that Delfi was to be considered a publisher and deemed liable for the publication of the clearly unlawful comments. In the Grand Chamber’s opinion, Delfi exercised a substantial degree of control over the comments published on its portal and because it was involved in making public the comments on its news articles on its news portal, Delfi “went beyond that of a passive, purely technical service provider” (§ 146). The Grand Chamber furthermore referred to the “duties and responsibilities” of internet news portals, under Article 10 § 2 of the Convention, when they provide for economic purposes a platform for user-generated comments on previously published content and some users – whether identified or anonymous – engage in clearly unlawful speech, which infringes the personality rights of others and amounts to hate speech and incitement to violence against them

provisions of Article 20(2) ICCPR must not overstep the limits on restrictions to freedom of expression set out in Article 19(3). Indeed as the Human Rights Committee has clarified in its General Comment 34 “[t]he acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.”¹²

- 19) This Court’s case law pertaining to the relationship between Article 10 and Article 17 of the Convention is analogous to – and indeed consistent with – the Human Rights Committee’s approach, described above, to the relationship between Article 19 and Article 20 of the ICCPR, as seen in this Court’s judgment in the case of *Lehideux and Isorni v. France*.¹³ There, this Court noted that the Commission had held that Article 17 of the Convention could not prevent the applicants from relying on Article 10. The Court implicitly agreed, analyzing the case through the filter of Article 10, albeit interpreted in accordance with Article 17.¹⁴
- 20) The implication is that for an incitement-related restriction to be legitimate, it must meet each of the requirements of the three-part test in Article 10. First, the interference must be “prescribed by law”. This requirement is fulfilled only when the law is accessible: “the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”¹⁵ Therefore, this Court may be called upon to assess the “quality” of a law, with a view to ascertaining whether the law has the requisite precision in defining the conditions and forms of any limitations on basic safeguards. The precision and foreseeability requirement is necessary in order to avoid both arbitrariness and an unfettered discretion by the authorities to act as they wish.¹⁶
- 21) Second, the interference must pursue a legitimate aim. The aims expressly provided for in both the ECHR and the ICCPR are listed exhaustively in the sense that no other aims are to be regarded as legitimate grounds for restricting freedom of expression. Restrictions on rights guaranteed by the ECHR must be narrowly construed and must be necessary in a democratic society in the interests of, for example, for the prevention of disorder or crime. This Court has recognized that, “*it is in the first place for the national authorities to assess whether there is a ‘pressing social need’ for the restriction and, in making their assessment; they enjoy a certain margin of appreciation.*”¹⁷ However their margin of appreciation is not unlimited.¹⁸
- 22) Third, the restriction must be necessary in a democratic society or meet a pressing social need. The word “necessary” means that there must be a “pressing social need” for the restriction. The reasons given by the State to justify the restriction must be “relevant and sufficient” and the restriction must be proportionate to the aim pursued.¹⁹ The Grand Chamber of this Court summarized its approach to ascertaining whether a pressing social need has been met in its judgment in the case of *Zana v. Turkey*, where it held “the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against

¹² Human Rights Committee, General Comment 34, para. 50.

¹³ *Lehideux and Isorni v. France* [GC], Judgment 23 September 1998, Application No. 24662/94.

¹⁴ “In its decision on the admissibility of the application (see paragraph 30 above), the Commission expressed the opinion that Article 17 could not prevent the applicants from relying on Article 10”, para. 37; and “The Court will rule on the application of Article 17 in the light of all the circumstances of the case. It will accordingly begin by considering the question of compliance with Article 10, whose requirements it will however assess in the light of Article 17 ...”, *Lehideux and Isorni v. France*, para. 38.

¹⁵ *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49

¹⁶ *Olsson*, 130 Eur. Ct. H.R. (ser. A) at 30; see also *Hentrich v. France*, 296 Eur. Ct. H.R. 3, 19 (1994).

¹⁷ *Thoma v. Luxembourg*, 2001-III Eur. Ct. H.R. at para. 48.

¹⁸ *Zana v. Turkey* 1997-VII Eur. Ct. H.R. 2533, paras 2540, 2547

¹⁹ *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40.

*the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was “proportionate to the legitimate aims pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient.... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts”.*²⁰

- 23) In its jurisprudence on extreme forms of expression, this Court has employed a case-by-case approach. Whenever the Court entertains any doubts as to the hatred-related aspects of the impugned speech, it applies the test strictly and thoroughly examines the type of speech in issue as well as the context in which it delivered. For example, in *Şener v. Turkey*, where the government had charged the owner and editor of a weekly review under the Turkish Prevention of Terrorism Act (1991) “with having disseminated propaganda against the indivisibility of the State by publishing” an article containing sharp criticism of the Turkish Government’s policies and actions of their secured forces with regard to the population of Kurdish origin,²¹ this Court found that *although certain phrases seem aggressive in tone . . . the article taken as a whole does not glorify violence. Nor does it incite people to hatred, revenge, recrimination or armed resistance. On the contrary, the article is an intellectual analysis of the Kurdish problem which calls for an end to the armed conflict.*²² The Court held that the government had “failed to give sufficient weight to the public’s right to be informed of a different perspective on the situation . . . irrespective of how unpalatable that perspective may be for them.”²³ It concluded that the editor’s “conviction was disproportionate to the aims pursued and, accordingly, not necessary in a democratic society.”²⁴ As such, the ECHR held “there [had] therefore been a violation of Article 10 of the Convention.”²⁵
- 24) In respect of intent the Human Rights Committee has held that an intent to incite discrimination, hostility or violence should be required if speech is to be criminalized under international standards.²⁶ In some cases this Court has required specific intent to incite violence in order for speech to be criminalized; in other cases the Court has found that an intent to incite lesser harms would suffice.²⁷ The interveners submit that intent to commit acts of violence against other individuals, such as *direct threats to the physical integrity of individuals* may be dispositive of whether the hate speech may be criminalized.²⁸
- 25) The interveners also consider that the elements of likelihood, foreseeability and imminence must also be considered before determining whether and when instances of hate speech constitute incitement to commit violent acts and should, therefore, be criminalized. It seems clear from the case law of both the Human Right Committee and this Court that there is no need to show that the harm that was incited e.g. the harm against other individuals’ physical integrity — actually occurred. However, the case law of this Court appears to suggest that likely imminent harm may be necessary,²⁹ that the speaker intends to incite violence, and that violence might objectively

²⁰ *Zana*, 1997-VII Eur. Ct. H.R. at 2548, para. 51.

²¹ App. No. 26680/95 ¶¶ 6–8, 44 (Eur. Ct. H.R. July 18, 2000).

²² *Id.* ¶ 45

²³ *Id.*

²⁴ *Id.* ¶ 47

²⁵ *Id.*

²⁶ See for instance *Faurisson v. France*, where the concurring committee members, agreed that the author’s freedom of expression was validly restricted by prohibiting his denial of the Holocaust, noting that the law itself under which the author was convicted imposed restrictions that “do not meet the proportionality test. They do not link liability to the intent of the author, nor to the tendency of the publication to incite to anti-Semitism”. *Faurisson v. France*, Commc’n No. 550/1993, ¶ 9 (Hum. Rts. Comm. Nov. 8, 1996);

²⁷ Compare *Gündüz v. Turkey*, App. No. 35071/97, ¶¶ 48, 51 (Eur. Ct.H.R. Dec. 4, 2003) with *Féret v. Belgium*, App. No. 15615/07, ¶ 73 (Eur. Ct. H.R. July 16, 2009), (“La Cour estime que l’incitation à la haine ne requiert pas nécessairement l’appel à tel ou tel acte de violence ou à un autre acte délictueux”).

²⁸ *Jersild v. Denmark*, App. No. 15890/89

²⁹ See the *Camden Principles, on Freedom of Expression and Equality*, ARTICLE 19 (Apr. 2009),

<https://www.article19.org/data/files/pdfs/standards/the-camdenprinciples-on-freedom-of-expression-and-equality.pdf>,

ensue in order for the speech to lose the protection of Article 10 of the ECHR. For instance, in *Gündüz*, the Court suggested that merely calling for sharia law, without calling for violence to introduce it, could not be criminalized in Turkey without violating the ECHR's free speech protections.³⁰

- 26) Where hate speech constituting incitement to commit violent acts against individuals does occur, then this Court has clearly established that failure to investigate, prosecute and punish such hate speech amounts to a breach of the positive obligations under the Convention. Contracting parties should not only refrain from interfering with human rights; they also have positive obligations to secure their protection and fulfillment, including by ensuring the effective protection of individuals against incitement to commit acts of violence against them, as well as obligations to prevent, investigate, punish and offer effective redress against such acts when they occur.

B. RELEVANT DOMESTIC PRACTICES IN OTHER COUNCIL OF EUROPE MEMBER STATES

- 27) In many European countries' jurisdictions, the term "hatred" generally covers racial, national and religious hatred as well as hatred on the grounds of sex, sexual orientation.³¹ Spain's parliament adopted legislation amending the penal code to introduce "sexual identity" among the protected grounds, alongside sexual orientation. The law criminalises several acts, including the promotion, encouragement, exaltation or justification of violence, hostility, hatred or discrimination by any means of public expression, including in the media. Furthermore, it punishes offending the dignity of people through humiliation, contempt or disrespect against members of a protected group
- 28) Article 283 (1) of the Austrian Criminal Code (*Strafgesetzbuch*, StGB) – in effect since 1 January 2012 – criminalises public incitement to acts of violence against a group or a member of a group based on certain personal characteristics, including their sexual orientation. The incitement must take place *explicitly* because the individual or group of individuals belongs to that group, and be carried out in a manner suitable to disturbing the public order or noticeable for the wider public. Article 283 (2) also prohibits public agitation against a group specified in Article 283 (1) and further prohibits insults violating the human dignity of such a group, provided that the insult aims to disparage the group and is made to the wider public. These provisions also apply to transgender or gender reassignment issues.
- 29) In Croatia, the Criminal Code (*Kazneni zakon*) provides that any public incitement to violence or hate against an individual or group of citizens due to their sexual orientation or gender identity is punishable (Article 325). Although the police may be determined to take legal steps against individuals who engage in hate speech, these need to be followed up by the Office of the State Attorney General. If the State Attorney General does not do so, the police can use its independent powers of prosecution to proceed against the hate speech in misdemeanor courts, but only after (re)classifying the hate speech as a misdemeanor against public order. As a result, possible hate speech ends up not being treated as such.
- 30) In Finland, hate speech can constitute incitement to hatred against a population group under section 10 of Chapter 11 of the penal code. It punishes anyone who makes available to the public or otherwise spreads among the public or keeps available for public information an expression of

principle 12.1 (stating that the term "incitement" refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups).

³⁰ *Gündüz v. Turkey*, App. No. 35071/97, ¶ 51 (Eur. Ct. H.R. Dec. 4, 2003); see also *Temel v. Turkey*, App. No. 16853/05, ¶ 62 (Eur. Ct. H.R. Feb. 1, 2011) (noting that the relevant statement did not incite violence).

³¹ The Spanish Criminal Code of 1996, for instance, defines the grounds for "incitement" in its Article 510 as being: "Those who provoke discrimination, hatred or violence against groups or associations for racist, anti-Semitic or other reasons regarding ideology, religion or beliefs, family status, ethnic, race or national origin, gender, sexual orientation, illness or physical, will be punished with one to three years in prison and a fine equivalent to six to twelve months'.

opinion or other message in which a certain group is threatened, defamed or insulted on the basis of its characteristic. The provision was amended in 2011 to explicitly cover sexual orientation.

- 31) In Greece, recent legislation punishes incitement to actions or deeds that may cause discrimination, hatred or violence against persons or groups of persons defined on the basis of, among others, sexual orientation or gender identity. The sanctions introduced range from 3 months to 3 years of imprisonment and fines from €5,000 to 20,000. These sanctions are increased if the incitement results in actual crimes. Sanctions of more than 1 year of imprisonment also lead to the deprivation of political rights. Moreover, sanctions are increased when the perpetrator is a public servant or employee and acts during the exercise of their function.
- 32) Since July 2013, Hungarian criminal law explicitly protects against both hate speech and hate crimes based on sexual orientation and gender identity. However, incitement against a community can only be established if “stirring up hatred” carries a direct and immediate risk of violent action. General racist, homophobic or transphobic comments that do not reach this severity level are not punished.
- 33) In Malta, Section 82 A of the Criminal Code as amended in 2012 was extended to cover incitement to hatred based on sexual orientation and gender identity.
- 34) In Portugal, Law 19/2013 of 21 February amended the penal code by adding “gender identity” in 2013... In the United Kingdom, “transgender identity” is now protected by law; until 2010, it was only considered to be a circumstance leading to an “aggravated offence”.
- 35) In addition to criminalising certain forms of homophobic or transphobic expression as ‘hate speech’, a number of Member States have also chosen to treat the existence of a homophobic or transphobic motivation as an aggravating circumstance or as a factor triggering stronger penalties for other, common criminal offences (which are therefore treated as ‘hate crimes’).³²
- 36) Most states recognise intent or intention as one of the defining elements of the offence of incitement.³³ In a minority of European states, a threshold lower than intent, such as recklessness, is considered as sufficient to demonstrate incitement.³⁴
- 37) For the majority of the Council of Europe’s member states, incitement to hatred, to be found, must have occurred in public.³⁵

C. EVIDENCE REGARDING THE DOMESTIC CONTEXT IN LITHUANIA INDICATIVE OF THE ATTITUDE AND PRACTICES OF THE STATE IN RESPONDING TO HOMOPHOBIC OR TRANSPHOBIC SPEECH

³² Belgium, Croatia, Denmark, Finland, France, Greece, Hungary, Lithuania, Malta, Portugal, Romania, Spain, Slovakia, Sweden and the United Kingdom all consider homophobic intent an aggravating circumstance or an element to be taken into account when determining penalties, either for all common crimes or for a closed set of criminal offences. In Austria and in the Netherlands, the courts apply higher penalties to crimes committed with a homophobic intent even if such motivations are not specifically addressed in legislation.

³³ In the UK with regard to hate speech specifically, Part 3A of the Public Order Act 1986, as amended by the 2008 Criminal Justice Act, criminalises the use of “threatening words or behaviour, or [display of] any written material which is threatening” if the person carrying out the act thereby intends to “stir up hatred” on the grounds of sexual orientation. In the Netherlands, Articles 137(c) and 137(d) of the Criminal Code operate to prohibit public intentional insults or engaging in verbal, written or illustrated incitement to hatred on account of a person’s race, religion, sexual orientation or personal convictions. See also Section 47.2 of the Criminal Code (Cyprus); Section 2 of the Prohibition of Incitement Act 1989 (Ireland); Paragraph 82A.1 Criminal Code (Malta); Article 240 of the Criminal Code/Law Number 65/98 (Portugal). Austria, Criminal Code (*Strafgesetzbuch*, StGB), Art. 283, 13 November 1998, as amended

³⁴ For example, in Norway, under Paragraph 135(a) of the Criminal Code. the offence of incitement to hatred under may be committed willingly or through gross negligence

³⁵ Exceptions to this include Albania, Estonia, Malta, Moldova, Montenegro, the Netherlands, Poland, Serbia, Slovenia and Ukraine, and the United Kingdom with the exception of one’s private dwelling).

- 38) LGBT people are perceived as one of the most vulnerable social groups in Lithuania, as confirmed by the results of the representative surveys conducted on the national level.³⁶ EU Barometer (2015) results demonstrate widespread negative attitudes towards LGBT persons in Lithuanian society: 44% of the respondents would feel “uncomfortable” having a gay, lesbian or a bisexual person as a colleague (EU average - 13%), while 50% of the respondents *do not* think that gay, lesbian and bisexual people should have the same rights as heterosexual people (EU average - 23%)³⁷. While public opinion polls in Lithuania show the social distance between the “majority” of the community and the LGBT* community: 46% would not like to have a homosexual person as neighbor, 50% would not want to rent an apartment to a homosexual person.³⁸
- 39) According to FRA survey (2013), 61% of the LGBT respondents in Lithuania, the highest number in the EU, felt discriminated against or harassed in the last 12 months on the grounds of sexual orientation (EU average - 47%).³⁹
- 40) The on-line survey by the national LGBT association “LGL” (2016) has identified that 50% of the respondents became victims of hate speech⁴⁰ or hate crimes⁴¹ in the last 12 months on the grounds of sexual orientation. However, only 14% of these respondents reported those incidents to the law enforcement authorities.⁴²
- 41) Consequently, the official figures for police reported offences do not speak to the real scale of anti-LGBT hate speech in Lithuania. According to the official data, in the period of 2014-2016 only 97 cases of hate speech (incitement to hatred, Article 170 of the Criminal Code of the Republic of Lithuania) on the grounds of sexual orientation were registered with the police.⁴³ In general, over 90% of all hate speech cases in Lithuania are accounted to the online environment.⁴⁴

³⁶ Human Rights Monitoring Institute (HRMI), “Public Opinion Poll (2016)”, https://hrmi.lt/wp-content/uploads/2016/12/Apklausa-2016_santrauka.pdf, p. 12, tab. 12

³⁷ QC13 and QC16 respectively,

http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/68081_

³⁸ The Institute for Ethnic Studies, “Public attitudes survey (2015)”, <http://www.ces.lt/wp-content/uploads/2010/02/Visuomen%C4%97s-nuostatos-2015.pdf>, p. 2, 4, tab. 6

³⁹ FRA – European Union Agency for Fundamental Rights, EU LGBT survey – European Union Lesbian, Gay, Bisexual and Transgender Survey, Main Results, October 2014, http://fra.europa.eu/sites/default/files/fra-eu-lgbt-survey-main-results_tk3113640enc_1.pdf

⁴⁰ The liability for hate speech is provided for in Articles 170 Article 170 concerning incitement against any national, racial, ethnic, religious or other group of person and

170(2) “Public approval of international crimes, the crimes of the USSR or Nazi Germany against the Republic of Lithuania and its people, and denial or gross denigration of those crimes“ (of the Chapter “Crimes and misdemeanors against a person’s equal rights and freedom of conscience”) of the Criminal Code, <https://www.e-tar.lt/portal/lt/legalAct/TAR.2B866DFF7D43/vVrMmyDxLS>

⁴¹ All offensive actions against individuals, society, property, if they are committed in order to express hatred towards a group of persons or a person belonging thereto on grounds of age, sex, sexual orientation, disability, race, nationality, language, descent, social status, religion, convictions or views, are known as hate crime (Article 60 part 1 p. 12, Article 129 part 2 p. 13, Article 135 part 2 p. 13, Article 138 part 2 p. 13 of the Criminal Code), <https://www.e-tar.lt/portal/lt/legalAct/TAR.2B866DFF7D43/vVrMmyDxLS>

⁴² 102 Appeal to the Ministry of the Interior of the Republic of Lithuania “On effective response of the state Institutions to the unwanted phenomenon of hate crimes in the Republic of Lithuania“, 10 April 2017, No. LGL-20170410/1. The quantitative survey “Hate No More. Quantitative study report” conducted by the Paulina Górska, Mikolaj Winiewski, Michal Bilewicz showed that only 20% of respondents from Lithuania report hate motivated violence or harassment to law enforcement authorities, p. 57 (unpublished).

⁴³ In total, 287 cases of incitement to hatred on different grounds were registered during the period of 2014-2016. According to the information that Information Technology and Communications Department under the Ministry of Interior provide, <http://old.ird.lt/statistines-ataskaitos/?lang=lt&rt=1>

⁴⁴ Human Rights Monitoring Institute (HRMI), “Hate Speech in Lithuania. Frequently Asked Questions”, 2013, <https://hrmi.lt/wp-content/uploads/2016/08/Neapykantos-kurstymas-Lietuvoje-DUK.pdf>

- 42) Prejudicial attitudes of the law enforcement and judicial authorities, their failure to acknowledge a biased nature of the crime or refusal to register and/or investigate the reported incidents altogether are among the main reasons invoked by the victims of homophobic hate speech to explain their decision not to report hate speech cases.
- 43) Several court-set precedents demonstrate the prejudicial nature of the law enforcement attitudes towards the LGBT* community. In a case decided by the Lithuanian Supreme Court, the accused had posted a homophobic comment reacting to an article describing a peaceful protest “*Kisses against homophobia*” organized by the LGBT supporters. Instead of analysing the impugned statement, the court focused on the actions of the protest participants. Specifically, the Court found the assembly to be “provocative”. According to the Court, “*the eccentric behavior of the participants did not add to the mutual understanding between [them and] people holding different views and did not promote tolerance*”. The Court also found that the participants of the assembly failed to respect other people’s rights and failed to take account of the fact that the vast majority of Lithuanians held “traditional family values”, where a “family is a union of a man and a woman”. The Court determined that in this light, the accused’s reaction was normal and he was acquitted.⁴⁵
- 44) In a more recent case, the Lithuanian Supreme Court acquitted another person accused of inciting hatred on the grounds of sexual orientation. In the Court’s opinion, “*the general social context and the context of the particular case under discussion are not so tense that in itself would justify stricter restrictions on the exercise of the freedom of expression associated with it and the ultimate punishment of criminal liability as ultima ratio application*”.⁴⁶ The Court’s position with regard to the “general social context” is highly disputable in light of the surveys quoted above.
- 45) In its report, the European Commission against Racism and Intolerance (ECRI) condemned such practice and urged Lithuania to take steps towards preventing the notion of “*protecting public morals*” from being used to justify or condone incitement of hatred against LGBT persons.⁴⁷ The ECRI called on the Lithuanian authorities to “*take steps to ensure that the widespread phenomenon of homo-/ and transphobic hate speech is effectively tackled*”.⁴⁸
- 46) A failure to acknowledge a biased nature of the anti-LGBT crimes, including hate speech, and/or to investigate reported incidence was also recognized as one of the pressing issues during the second cycle of Lithuania’s Universal Periodic Review before the United Nations Human Rights Council. 28 recommendations issued by the member states were exclusively related to the need for active steps in the prevention of hate crimes and hate speech and its proper investigation.⁴⁹
- 47) Official statistics indicate that a significant part of investigations into hate speech cases is terminated or suspended, e.g.⁵⁰ in 2016 out of 86 open investigations, 42 were sent to the court for trial hearings, 34 were terminated, and 10 were suspended.⁵¹ The decisions to terminate the investigations are usually adopted when (i) no “elements of a crime or a criminal offense” are

⁴⁵ Decision of the Supreme Court of Lithuania of 18 December 2012, in the criminal case No 2K-677/2012.

⁴⁶ Decision of the Supreme Court of Lithuania of 1 March 2016 in the criminal case No. 2K-86-648/2016.

⁴⁷ European Commission against Racism and Intolerance, „ECRI report on Lithuania. Fifth monitoring cycle“, 18 March 2016, <http://www.coe.int/t/DGHL/MONITORING/ECRI/Country-by-country/Lithuania/LTU-CbC-V-2016-020-ENG.pdf>. *Ibid.*, para. 41.

⁴⁸ *Ibid.*

⁴⁹ UPR Info, https://www.upr-info.org/sites/default/files/document/lithuania/session_26_-_november_2016/recommendations_and_pledges_lithuania_2016.pdf

⁵⁰ On the basis of Articles 3 and 212 of the Code of Criminal Procedure which provide for circumstances in which criminal proceedings are not possible as well as instances of termination of pre-trial investigation. Code of Criminal Procedure of the Republic of Lithuania, 2002, No. 37-1341, Article 3 and Article 212, <https://www.e-tar.lt/portal/lt/legalAct/TAR.EC588C321777/eOTCCBWCJC>

⁵¹ In 2015, out of 159 open investigations, 43 were sent to the court, 64 were terminated, and 52 were suspended. Statistical data available from the National Courts Administration <http://www.teismai.lt/en/courts/statistics/654>

established, (ii) a perpetrator is not identified⁵², (iii) no intention to incite hatred observed, (iv) the expression does not *directly incite* other persons to discriminate against a group of people or a person belonging to it⁵³, (v) criminal law as *ultima ratio* measure cannot be applied due to the nature of hate offence⁵⁴, (vi) *mens rea* is not determined.⁵⁵

48) Ultimately, a vast majority of hate speech incidents against LGBT persons remain unreported and unprosecuted, and the phenomena itself continues to spread. It further fuels prejudicial attitudes and general societal animosity towards LGBT individuals thus obstructing them from fully participating in the public life and enjoying their fundamental rights, including a right to respect their private life.

CONCLUSIONS

49) Criminal law should be used sparingly in the field of freedom of expression. This approach is consistent with that of another Council of Europe human-rights mechanism, the European Commission against Racism and Intolerance (ECRI), the General Policy Recommendations and practice of which this Court often cites in relevant judgments.

50) The case law of the Convention recognizes a “right to insult, to offend shock or disturb”. Speech should only be criminalized if it is intended to incite the commission of violent criminal acts against individuals and is likely to produce such effect.⁵⁶ Where hate speech constituting incitement to commit violent acts against individuals does occur, then this Court has clearly established that failure to investigate, prosecute and punish such hate speech amounts to a breach of the positive obligations under the Convention.

51) The prosecution of cases under incitement to hatred legislations is only one element of State responsibility in this arena. States should also adopt a wide range of measures including the possibility of claiming damages from the authors of these statements.

52) This conclusion does not prevent the recourse, as appropriate, to other criminal law offences, notably public order offences. However as the Venice Commission highlight,⁵⁷ criminal sanctions, should be reserved and be applied in strictly justifiable situations, when no other means appears capable of achieving the desired protection of individual rights in the public interest.

⁵² Such incidents are typical of cases of incitement to hatred on the Internet.

⁵³ Human Rights Monitoring Institute (HRMI), “Hate crimes and hate speech in Lithuania: Country Report”, 2017 (not published).

⁵⁴ *Ibid*; Decision of the Supreme Court of Lithuania of 1 March 2016 in the criminal case No. 2K-86-648/2016.

⁵⁵ According to the case-law, a crime of hate speech should be committed intentionally, i.e. a person should understand that by a particular expression he/she “ridicules, expresses contempt of, urges hatred towards or encourages discrimination against a group of residents or against a specific person, on account of his or her sex, sexual orientation, race, nationality, language, ethnicity, social status, faith, religion or beliefs” and should want to act in that way. In other words, such crimes should be committed with a direct intent, e.g. Lithuania, Panevėžys District Court (Panevėžio apygardos teismas), No.1A-845-366/2011, 1 December 2011

⁵⁶ *Rabbae v. The Netherlands*, Comm’n No. 2124/2011, Individual Opinion of Sarah Cleveland and Mauro Politi (concurring), ¶¶ 6–7 (Hum. Rts. Comm. Nov. 18, 2016).

⁵⁷ Venice Commission, October 2008 [http://www.venice.coe.int/docs/2008/CDL-AD\(2008\)026-e.pdf](http://www.venice.coe.int/docs/2008/CDL-AD(2008)026-e.pdf)