

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No: 12060/12

B E T W E E N:

M.C. and A.C.

Applicants

-v-

ROMANIA

Respondent

WRITTEN SUBMISSIONS ON BEHALF OF ILGA-EUROPE, FIDH AND THE AIRE CENTRE

Introduction

1. This case concerns an issue of great public importance and present concern: violent crime perpetrated against victims because of their sexual orientation or gender identity – be that lesbian, gay, bisexual, transgendered or intersex (LGBTI) – and the response, or lack of it, by state authorities.
2. These are the submissions of ILGA-Europe, FIDH and the AIRE Centre, made pursuant to leave granted by the President of the Chamber on 6 May 2013 in accordance with Rule 44(3) of the Rules of Court. The interest and expertise of ILGA-Europe, FIDH and the AIRE Centre are set out in their application for leave to make written submissions dated 17 April 2013, and are not repeated here.
3. The purpose of these submissions is:
 - 3.1. To set the events giving rise to this application against the back drop of widespread and frequent hate crimes against LGBTI individuals across Europe;
 - 3.2. To emphasise that these events have a particular significance as they arise in the context of the exercise of the rights of free expression and assembly;
 - 3.3. To remind the Court of the positive obligations on Member States to protect victims of homophobic hate crimes including the requirements for appropriate criminal legislation, for effective investigations into attacks of this kind, and for proper training within the justice system; all of which are necessary to ensure that efforts to combat violence against LGBTI individuals are practical and effective, not merely theoretical and illusory.

Hate Crime against LGBTI people within the Council of Europe

4. This application arises as a result of the applicants' treatment by the Romanian authorities after being the victims of a serious assault as they travelled home from an annual gay pride march in Bucharest on 3 June 2006. Despite presenting the police with clear evidence that they had been assaulted, and despite being able to identify two of their attackers (whose names and addresses were known to the police), the crime was not recorded until 27 April 2007. What investigation did take place was terminated on 4 October 2011 with no result.
5. The applicants' account amounts to prima facie evidence that they were attacked as a result of their perceived sexuality following their attendance at a gay rights event. There was thus prima facie evidence that this was a 'hate crime' motivated by the sexual orientation of the victims¹.

¹ "Hate crimes are crimes committed on grounds of the victim's actual or assumed membership of a certain group, most commonly defined by race, religion, sexual orientation, gender identity, nationality, ethnicity, disability etc." – Explanatory Memorandum to Council of Europe Recommendation CM/Rec(2010)5

6. This one incident of violence against the Applicants must be seen against a background of hate crimes motivated by intolerance of sexual orientation or gender identity taking place throughout the territory of the Council of Europe², as recognised in the Council of Europe's publication "Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe": *"There is a growing amount of evidence demonstrating that a significant number of LGBT persons in Council of Europe member states experience physical violence, harassment or assault because of their real or perceived sexual orientation and gender identity. Such violence may take different forms but is often driven by deep hatred, intolerance, disapproval or rejection of the sexual orientation or gender identity of the person. A commonly used term in this regard is "hate crime" or "hate-motivated violence"..."Hate-motivated violence and hate crimes against LGBT persons take place in all Council of Europe member states."*³
7. The pervasive nature of hostility towards LGBTI people is evident from surveys carried out across Europe:
- Georgia: 32% of respondents to a 2012 survey had experienced physical violence at least once in the previous 2 years, and 45.8% of those incidents took place in public places such as parks or streets⁴.
 - Russia: 90% of respondents in a survey had experienced discrimination based on their sexual orientation. 27% experienced physical violence⁵.
 - Sweden: A third of the transgender respondents to a large-scale study into the health situation of LGBT people reported experiencing violence or abuse at some point in their lives, while one third of this group reported these experiences within the last year⁶.
 - Turkey: A study by the Justice Ministry in 2003 found that 37% of lesbians and gays interviewed had undergone physical violence and 28% reported sexual violence. Among transvestites and transsexuals, 89% reported physical violence and 52% sexual violence⁷.
 - United Kingdom: a survey in 2008 found that one in five respondents had been a victim of homophobic hate crimes or incidents in the last three years. One in six had experienced a physical assault⁸. 73% of participants in a survey of transgender persons reported negative comments, verbal, physical or sexual abuse or threatening behaviour⁹.
8. A survey into hate crimes and discrimination experienced by LGBTI people in the (then) 27 EU member states and Croatia¹⁰, published in 2013 by the EU Fundamental Rights Agency

² And in other regions – see "Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity" - Report of the United Nations High Commissioner for Human Rights. – 17 November 2011:

"In all regions, people experience violence and discrimination because of their sexual orientation or gender identity. In many cases, even the perception of homosexuality or transgender identity puts people at risk. Violations include – but are not limited to – killings, rape and physical attacks, torture, arbitrary detention, the denial of rights to assembly, expression and information, and discrimination in employment, health and education."

³ "Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe", Commissioner for Human Rights, Council of Europe, Strasbourg, June 2011, p. 51-52.

⁴ "Violations of the Rights of Lesbian, Gay, Bisexual, and Transgender People In Georgia" - Submission to the United Nations Human Rights Committee by Identoba – September 2013

⁵ Survey by Internet portal Qguys (sample 3800) quoted in "Situation of Lesbians, Gays, Bisexuals and Transgender People in the Russian Federation – 2008", Moscow Helsinki Group and the Russian LGBT Network, 2009

⁶ Statens Folkhälsoinstitut (2005) "Homosexuellas, bisexuellas och transpersoners hälsosituation, Återrapportering av regeringsuppdrag att undersöka och analysera hälsosituationen bland hbt-personer", Östersund: FHI

⁷ " 'We Need a Law for Liberation' -- Gender, Sexuality and Human Rights in a Changing Turkey" -- Human Rights Watch -- May 2008

⁸ "Homophobic Hate Crime -- The Gay British Crime Survey 2008" -- Stonewall

⁹ Whittle, S, Turner, L, Al-Alami M (2007) "Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination", Wetherby: The Equalities Review,

¹⁰ Violence and hostility against LGBTI people is not just a European problem, as has been recognised by the United Nations. 84 nations delivered a statement to the Human Rights Council on March 22, 2011

and based on some 93,000 responses to an on-line questionnaire¹¹, found that 47% of all respondents reported that they had been discriminated against or harassed in the previous 12 months on the grounds of their sexual orientation. In Romania, where the events giving rise to this application took place, that figure was 54% - with only four countries having a higher figure. This experience of discrimination affected the behaviour of LGBTI individuals significantly. For example:

- 50% avoided certain places or locations for fear of being assaulted, threatened or harassed (Romania 61%)
- 53% avoided holding hands with their partner for fear of being assaulted, threatened or harassed (Romania 78%)

9. Concern over violations of the rights of LGBTI people within the Council of Europe has given rise to a number of initiatives, including the 2010 adoption by the Committee of Ministers of a Recommendation on combating discrimination on the grounds of sexual orientation or gender identity (“the Committee of Ministers Recommendation”)¹², the inclusion of sexual orientation and gender identity in the non-discrimination article of the Convention on preventing and combating violence against women and domestic violence¹³, the publication in 2011 by the Commissioner for Human Rights of a report, “Discrimination on grounds of sexual orientation and gender identity in Europe”¹⁴, and resolutions by the Parliamentary Assembly in 2010 and 2013¹⁵. In the latter, the Assembly expressed regret that: *“prejudice, hostility and discrimination on the grounds of sexual orientation and gender identity remain a serious problem, affecting the lives of tens of millions of Europeans. They manifest themselves in hate speech, bullying and violence.... Violence against LGBTs is a problem everywhere in Europe. With the effects of the economic crisis in full sway, and the ensuing radicalisation and strengthening of extremist groups, there has been an increase in acts of verbal or physical abuse against minorities, including LGBT people, in many Council of Europe member States.”*¹⁶

10. The Committee of Ministers Recommendation recognises the fundamental attack on the very basis of democratic society represented by hate crimes against people with minority sexual orientations and gender identities: *“[Hate crimes and hate motivated incidents] threaten the very basis of democratic societies and the rule of law, in that they constitute an attack on the fundamental principle of equality in dignity and rights of all human beings, as inscribed in Article 1 of the Universal Declaration of Human Rights of the United Nations.”*¹⁷

calling on all states “to take steps to end acts of violence, criminal sanctions and related human rights violations committed against individuals because of their sexual orientation or gender identity”. On 17 June 2011 a Resolution was passed “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” - Resolution A/HRC/17/L.9/Rev.1, submitted by South Africa requesting a study on discrimination and sexual orientation

¹¹ “EU LGBT survey” - http://fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance_en.pdf.

¹² 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

¹³ Article 4.3.

¹⁴ Chapter 5 of the Background Document concerns ‘Hate-motivated crime and speech’

¹⁵ Resolutions 1728 (2010) and 1948 (2013).

¹⁶ *Id*, ¶¶ 2 & 7.

¹⁷ Equality is a fundamental right recognised not only in the UDHR and the ECHR but also in the Treaty on European Union (Article 2) and the EU Charter on Fundamental Rights, Article 21 of which explicitly prohibits discrimination on the grounds of sexual orientation. See also the International Covenant on Civil and Political Rights, Article 2(1): “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Since the case of *Toonen v Australia* (communication no. 488/1992) the Human Rights Committee has recognised that this protection extends to those discriminated against on the basis of their sexual orientation.

11. The Court is reminded to take into account the international legal background concerning violence against LGBTI people when considering the scope and applicability of Convention protections in this case¹⁸.

Violence associated with participation in marches, demonstrations and other gay pride events

12. The events giving rise to this application are of particular concern because they give rise not merely to allegations of hate crimes, but to allegations of hate crimes following exercise of the applicants' rights to gather with others to express and defend their sexual identities. In such circumstances the attack is "particularly destructive of fundamental rights" (*Šečić v Croatia* (2007) § 63) in two respects: representing not merely hostility towards the victims' sexuality but also an attempt to intimidate those victims into keeping silent about their sexual identity.

13. Once again, this attack on those exercising their rights to express their pride in their sexuality freely and publicly cannot be seen as an isolated event. Research by ILGA-Europe published in 2008 documented 28 occasions in 13 member states when attempts by LGBT people to exercise the right to freedom of assembly had met with violence¹⁹. This phenomenon has also been recognised by the UN²⁰.

14. The following are further, more recent, examples of incidents of violence against LGBTI people connected with marches, demonstrations and other gay pride events. One is taken from a submission by ILGA-Europe, "Violence against lesbian, gay, bisexual, transgender and intersex people in the OSCE region" for the OSCE's 2012 annual hate crimes report, which documents a wide range of sexual orientation and gender identity related hate crimes and incidents in 32 Council of Europe member states²¹.

14.1. **Bosnia and Herzegovina:** On 24 September 2008, after weeks of public hate speech, the opening event of the Queer Sarajevo Festival was attacked, resulting in eight casualties and the Festival's cancellation. In a 2010 country visit report, the Council of Europe Commissioner for Human Rights expressed particular concern at statements by parliamentarians and religious leaders supporting the attackers and noted that investigations had not resulted in any prosecutions²².

14.2. **Serbia:** The September 2010 Belgrade Pride march took place under tight police protection. Some 6000 members of right-wing organisations and football hooligan groups simultaneously attacked the police and official buildings and vandalised cars

¹⁸ See, for example, *Opuz v Turkey* (2010) 50 EHRR 28 at 184-185: "The Court notes at the outset that when it considers the object and purpose of the Convention provisions, it also takes into account the international-law background to the legal question before it..."

¹⁹ See: "Lesbian, gay, bisexual and transgender rights -- Freedom of Assembly -- Diary of events by country -- August 2008" at http://www.ilga-europe.org/europe/campaigns_projects/freedom_of_assembly_and_expression; the countries were: Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Moldova, Poland, Romania, Russia, Serbia, Turkey, Ukraine.

²⁰ See "Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity" - Report of the United Nations High Commissioner for Human Rights. - 17 November 2011: "64. LGBT defenders and supporters of related rights have been subjected to violence and harassment when convening meetings or cultural events, or participating in LGBT "equality marches". In some States, such events are denied police protection or permits, sometimes under guise of threats to public morals or safety, which privileges the antagonists rather than those claiming rights. In the absence of effective police protection, advocates and marchers have sometimes been physically attacked and harassed by State and non-State actors, including "skinhead" and fundamentalist groups..."

²¹ The ILGA-Europe submission lists 18 other freedom of assembly related incidents of varying severity taking place in Albania, Armenia, Bulgaria, Finland, Georgia, Hungary, Latvia, Montenegro, Russia, Slovakia and Ukraine.

²² "Queer Sarajevo Festival - Narrative Report" - Organization Q, Sarajevo, BiH; and Report by Thomas Hammarberg, Commissioner for Human Rights, following his visit to Bosnia and Herzegovina on 27 - 30 November 2010 - ¶¶ 44 - 47.

and shops in the city centre²³. 140 persons were reported injured, including 124 policemen.

14.3. **Ukraine:** In Kiev, on 20 November 2010, 10 men wearing masks attempted to enter a building where a candlelight vigil, film exhibition and discussion were being held to promote the Transgender Day of Remembrance for those killed because of their transgender status in Ukraine. The organiser of the event prevented their entrance, but he was attacked, beaten and sprayed with teargas. He was subsequently hospitalised and diagnosed with internal injuries and chemical burns to his face. The attack was characterised by the police only as “hooliganism”²⁴.

14.4. **Russia:** On 20 January 2013 in Voronezh 6 activists protesting against the federal “propaganda of homosexuality to minors” bill were attacked by a mob. A few days earlier they had begun receiving death threats, after announcing their demonstration on social media. They called on the police to protect them. About 200 counter-protesters, some of them masked, blocked the protest. Several of the activists were attacked and injured. Police at the scene did not intervene to stop the assaults²⁵.

14.5. **Romania:** On 6 November 2012 in Bucharest 7 young women and men were assaulted by a group of 10 people wearing hoods after attending an academic debate about the history of homosexuality. During the assault the attackers claimed they were opposing the “organisation of gay events”²⁶.

14.6. **Georgia:** On 17 May 2013 in Tbilisi a crowd of thousands led by priests broke through police cordons and attacked a group of 50 LGBTI rights demonstrators. Police evacuated them in buses, which then came under attack. Approximately 20 people were injured²⁷.

15. Where attacks occur during or following public events of this kind, they threaten not merely the right not to be subjected to inhuman and degrading treatment under Article 3 of the Convention, the right to physical and psychological integrity under Article 8 and freedom of sexual orientation, an “intimate and vulnerable sphere of an individual's private life” also protected by Article 8, but also the connected rights of free expression and free assembly guaranteed by Articles 10 and 11. Such attacks create an environment in which expressing one's own sexuality, and defending the rights of others to do the same, becomes a dangerous and frightening endeavour.

16. This Court has recognised the unique importance of freedom of association to those who speak out for the rights of minorities or hold unpopular views: *“The Court recognises that freedom of association is particularly important for persons belonging to minorities... Indeed, forming an association in order to express and promote [minority] identity may be instrumental in helping a minority to preserve and uphold its rights.”*²⁸

²³ “The honouring of obligations and commitments by Serbia” – Report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) - Doc. 12813 – 9 January 2012.

²⁴ “Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya” - Addendum - Summary of cases transmitted to Governments and replies received - A/HRC/16/44/Add.1 - ¶¶ 2325 to 2331.

²⁵ Human Rights Watch – 27 January 2013 – *“Russia: Reject Homophobic Bill – Investigate Threats, Attacks, on peaceful protests”*

<http://www.hrw.org/news/2013/01/26/russia-reject-homophobic-bill>

²⁶ “Violence against lesbian, gay, bisexual, transgender and intersex people in the OSCE region” - Romania – Case 1 – ILGA-Europe

²⁷ “Gay-rights rally is attacked in Georgia” – New York Times – 18 May 2013. Four days later, an NGO reported to ILGA-Europe: “they are still “hunting” our activists..... Several people were beaten up on the street, one had his hair set on fire, and a girl was even bitten... As for the girls, three of them have brain concussion; one has an injury on her head. I'm not saying anything about the psychological distress. Our psychologist is working non-stop...” (E-mail to ILGA-Europe from the Women's Initiative Support Group, 21 May 2013).

²⁸ Case of *Gorzelik and Others v. Poland*, Application No. 44158/98, 17 Feb 2004, Para. 92.

17. A failure to protect LGBTI people from violent attacks of this kind, or a related failure to properly investigate an allegation of hate crime and bring the perpetrators to justice, threaten not only the rights of the victims but the rights of LGBTI people generally in societies where they fear being victims of violent homophobic crime (see, *mutatis mutandis*, *Modinos v Cyprus* (1993), § 23).

Responsibilities of the authorities

18. In this case, and in most other incidents of hate crimes, the alleged perpetrators are not agents of the state. Yet this does not mean that a Member State bears no responsibility towards the victims for what has taken place. The Convention places positive obligations on Member States to provide protection²⁹ – see *Storck v Germany* (2006) 43 EHRR 6 at [101]: ‘...the Court has expressly found that Art 2, Art 3 and Art 8 of the Convention enjoin the State not only to refrain from an active infringement by its representatives of the rights in question, but also to take appropriate steps to provide protection against an interference with those rights either by state agents or private parties.’

19. Member States of the Council of Europe have not given homophobic violence the same attention that they have given to other forms of hate crime. The following represent minimum requirements for Member States to meet their obligations to protect against violence motivated by intolerance of sexual orientation and/or gender identity.

Appropriate criminal legislation

20. As recognised by the Committee of Ministers Recommendation, introducing criminal laws condemning discriminatory motives is “vital” and will “send out a signal to offenders that a just and humane society will not tolerate such behaviour.” Such laws will also provide assurance to LGBTI people and allow for statistical data to be gathered³⁰.

21. The Court itself has recognised that introducing criminal laws to protect individuals from treatment in breach of Article 3 & 8 ECHR is a fundamental aspect of the positive obligation those Articles entail: “150 Positive obligations on the State are inherent, in the right to effective respect for private life under Art.8...effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions.”³¹

22. The Court has further recognised that a failure to take into account racist motivation for a crime may amount to a violation of Article 14³². For the protection provided to minorities by the Convention to have any consistency, the same principle must apply to a failure to take into account evidence that a crime was motivated by prejudice against the sexual orientation or gender identity of the victims.

²⁹ As do other international human rights treaties, such as the American Convention on Human Rights, adopted 7 January 1970, OAS Official records, OEA/serK./XVI/1.1, Doc 65 rev 1, corr 1 (1970), reprinted in 9 ILM 673 (1970) and the African Charter on Human and Peoples’ Rights, adopted June 27, 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982) – see, for example, Inter-American Commission Report *Velasquez-Rodriguez v Honduras* July 29, 1988 Inter-Am. Ct. H.R. (ser.C) No.4 at [172] and African Commission decision 245/02 : *Zimbabwe Human Rights NGO Forum v Zimbabwe* (15 May 2006)

³⁰ Explanatory memorandum to Recommendation CM/Rec(2010)5

³¹ *MC v Bulgaria* (2005) 40 E.H.R.R. 20

³² *Angelova and Iliev v. Bulgaria*, No. 55523/00, judgment of 26 July 2007, para. 115: “[W]hen investigating violent incidents State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention.”

23. It is noted that while Romania has since introduced legislation rendering motivation derived from the victim's sexual orientation an aggravating factor, at the time of the events giving rise to this application no such measure was in place. It is of concern to the interveners that there remains no specific reference to 'gender identity' in the criminal law. A failure to recognise in domestic law the gravity of hate crime against LGBTI people breaches the Convention. See, *mutatis mutandis*, *C.N. v United Kingdom* (2012), § 80 ("the Court considers that due to the absence of a specific offence of domestic servitude, the domestic authorities were unable to give due weight to these factors"); see also *Siliadin v France* (2005), § 148.

Effective investigation and prosecution

24. Merely passing a law prohibiting discriminatory offences, or increasing the punishment for them, is not sufficient to protect LGBTI people from attack (as is evident from the many documented hate crimes that take place in countries where they are specifically prohibited). Nor is it sufficient to meet the requirements of the Convention. Member States have an obligation to ensure that Convention rights are "practical and effective" not "theoretical and illusory" (*Airey v Ireland* (1979-80) 2 EHRR 305)³³. This extends to the application of laws that protect Article 3 and Article 8 rights: "153 ...the Court considers that states have a positive obligation inherent in Arts 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape **and to apply them in practice through effective investigation and prosecution**"³⁴.

25. A central element of the obligation on Member States to ensure that the rights guaranteed by the Convention are practical and effective is the duty to conduct an effective investigation into arguable claims of Article 3 treatment (and, where relevant, an effective prosecution). "If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would 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."³⁵

26. The vital importance of effective investigation in the protection of human rights is beyond doubt. It is recognised not only within Convention case law and under the EU Charter³⁶ but also within the jurisprudence of other international human rights jurisdictions, such as the

³³ This requirement that the guarantees of the Convention be practical and effective extends to the provision of an effective remedy (Article 13) – see *Assenov v Bulgaria* (1999) 28 EHRR 652 at 103 The EU Charter offers a similar guarantee of an effective remedy under Article 47.

³⁴ *MC v Bulgaria* (2005) 40 E.H.R.R. 20

³⁵ *Assenov v Bulgaria* (1999) 28 E.H.R.R. 652, para 102. The importance of the duty to investigate in avoiding impunity has been emphasised by the Council of Europe's Committee for the Prevention of Torture: "The credibility of the prohibition of torture and other forms of ill-treatment is undermined each time officials responsible for such offences are not held to account for their actions. If the emergence of information indicative of ill-treatment is not followed by a prompt and effective response, those minded to ill-treat persons deprived of their liberty will quickly come to believe – and with very good reason – that they can do so with impunity. All efforts to promote human rights principles through strict recruitment policies and professional training will be sabotaged. In failing to take effective action, the persons concerned – colleagues, senior managers, investigating authorities – will ultimately contribute to the corrosion of the values which constitute the very foundations of a democratic society." (14th General Report on the CPT's activities, CPT/Inf (2004) 28, para. 25)

³⁶ Charter of Fundamental Rights of the European Union, Articles 2 & 4, interpreted in line with Article 52(3)

UN Human Rights Committee³⁷, the Inter-American Commission on Human Rights³⁸ and the African Commission on Human and People's Rights³⁹. In addition, the UN's 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' recognises a duty to "investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law".⁴⁰

27. The Court has made plain what is required to render an investigation effective - see, by way of summary, *Premininy v Russia* (44973/04), 10 February 2011:

"For the investigation to be regarded as "effective", it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means. Authorities must take the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard, and a requirement of promptness and reasonable expedition is implicit in this context. In cases under Articles 2 and 3 of the Convention where the effectiveness of the official investigation has been at issue, the Court has often assessed whether the authorities reacted promptly to the complaints at the relevant time."

28. Furthermore, "...where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure" - *Aksoy v Turkey* (1997) 23 EHRR 553.

29. Significantly, the Court has also recognised that authorities "have an additional obligation to take all reasonable measures to identify whether there were [discriminatory] motives and to establish whether or not...hatred or prejudice may have played a role in the events...The authorities' duty to investigate the existence of a possible link between [homophobic and transphobic] 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

³⁷ See General Comment No. 31 "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant":

"8. ...the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities..."

15. ...Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy..."

18. Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant..."

³⁸ See, for example, Inter-American Commission Report No. 55/97, Case 11.137, Merits, Juan Carlos Abella, Argentina, November 18, 1997. Para. 392 African Commission decision 245/02 : *Zimbabwe Human Rights NGO Forum v Zimbabwe* (15 May 2006)

³⁹ See, for example, African Commission decision 245/02 : *Zimbabwe Human Rights NGO Forum v Zimbabwe* (15 May 2006)

⁴⁰ General Assembly Resolution 60/147 of 16 December 2005, Principle 3(b)

implicit in their responsibilities under Article 14 of the Convention to secure respect without discrimination for the fundamental value enshrined in Article 3” (B.S. v Spain, no. 47159/08, 24 July 2012, §58-59 read in the light of X v Turkey, no. 24626/09, 9 October 2012, §62).

30. As the UN High Commissioner for Human Rights has recommended, states must: *“Investigate promptly all reported killings and other serious incidents of violence perpetrated against individuals because of their actual or perceived sexual orientation or gender identity, whether carried out in public or in private by State or non-State actors, and hold perpetrators accountable, and establish systems for the recording and reporting of such incidents.”*⁴¹
31. More specifically, the Committee of Ministers has recommended: *“Member states should ensure **effective, prompt and impartial investigations into alleged cases of crimes and other incidents, where the sexual orientation or gender identity of the victim is reasonably suspected** to have constituted a motive for the perpetrator; they should further ensure that particular attention is paid to the investigation of such crimes and incidents when allegedly committed by law enforcement officials or by other persons acting in an official capacity, and that those responsible for such acts are effectively brought to justice and, where appropriate, punished in order to avoid impunity. Member states should ensure that when determining sanctions, a **bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance.**”*⁴²
32. And yet examples of ineffective investigations and prosecutions are numerous and as widespread as the incidents of violence that require investigation. ILGA-Europe has identified evidence of ineffective investigations into hate crimes, particularly in Eastern Europe – including the following examples⁴³:
- 32.1. **Croatia:** Hate speech and violence went unaddressed at Split Pride events in 2011 and 2012. *“In 2012...like the year before, there were numerous calls for a violent gathering against Split Pride... The media also published that football fans are planning attacks with Molotov cocktails. Our organizations received threats, and faeces were left in front of the entrance of Domine’s office, and then tear gas was thrown into the Domine’s office. **We informed the Public Prosecutor’s office on all threats and brought criminal complaints against perpetrators, but they were never found and we never received replies to our criminal complaints in regards to threats and calls to violence through Facebook pages.**”*⁴⁴
- 32.2. **Georgia:** The LGBT organization Identoba held a peaceful march in Tbilisi on May 17 2012. *“In front of the law enforcement officers, religious extremists violated the right of freedom of assembly of the participants... – broke posters and LGBT flags, insulted the participants verbally and threatened them with physical abuse and destruction. **The police interfered only after several participants of the demonstration were physically abused by the opponents of the LGBT demonstration. Police responded late.**”* Those perpetrators that were caught were brought to the court for an administrative offence and **were fined, rather than receiving criminal charges.** A request for proper criminal proceedings went unanswered⁴⁵.

⁴¹ “Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity” - Report of the United Nations High Commissioner for Human Rights – 17 November 2011

⁴² 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, Appendix I. A. 1-2

⁴³ See further the incidents set out in para 14 above

⁴⁴ “Report on implementation of the 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 in Croatia” - Compliance Documentation Report – Section III – Freedom of expression and peaceful assembly, paragraph 14 – Kontra Lesbian Group

⁴⁵ “The Council of Europe’s Recommendation to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity in Georgia - Monitoring of Implementation” - Extended version – CASE #112A - Women's Initiatives Support Group

- 32.3. **Hungary:** "[At the Budapest Pride March in June 2011] a group of activists held up signs calling for the extermination of gays and shouting "Dirty faggots, dirty faggots!"..... **the authorities argued that the incidents did not constitute incitement to hatred** as "holding up the signs might have incited hatred, but not active hatred" and thus the incident "does not reach the minimum level of criminal sanctioning"⁴⁶.
- 32.4. **Montenegro:** At a concert held in Podgorica to celebrate the International Day against Homophobia on May 16th 2011, unidentified perpetrators threw first a tear gas bomb and then a lit torch. According to the statements of eyewitnesses, **police officers who were securing the entrance told the perpetrators to leave the area without arresting them or taking any other official measures**. Concert organizers filed criminal complaints against the unidentified person(s) and enclosed material evidence they had in their possession. **18 months after the complaint was filed the concert organizers had been given no official information by the Police Directorate on steps taken to identify the perpetrators or on the progress of any investigation.**⁴⁷
- 32.5. **Serbia:** "The offices of the Novi Sad Lesbian Organization were violently attacked more than 10 times in 2011, **and nobody was prosecuted even though the police had the attackers caught on tape** by the video surveillance system."⁴⁸
- 32.6. **Turkey:** In June 2012, the third trans pride event in Istanbul was attacked by counter-demonstrators. Despite these attacks, **no counter-demonstrators were prosecuted**⁴⁹.
- 32.7. **Ukraine:** LGBT Pride organizers announced at a May 20, 2012 press conference that they were cancelling a march scheduled for that day in Kiev following police claims that they could not protect participants from potential violence by neo-Nazi and nationalist groups who were planning a protest at the same time and location. Just after the May 20 press conference, five men beat Kiev Pride organizers Svyatoslav Sheremet and Maksim Kasyanchuk. **The authorities opened a criminal investigation but failed to identify the suspects despite the existence of video recordings of the attack, and failed to record the attacks as hate crimes motivated by the victims' sexual orientation and LGBT activism.**⁵⁰

33. Particularly given the widespread nature of these investigative failures, it is imperative for the protection of LGBTI rights across Europe that the Court maintains its position that where an arguable breach is raised an effective investigation is a necessary element of compliance with Article 3 & 8 ECHR. In this regard it is vital that the Court (despite this being an obligation of means and not ends) scrutinises rigorously claims that prima facie flawed investigations were carried out with due care and attention.

⁴⁶ "Report about the Implementation of the Council of Europe Recommendation to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (CM/Rec(2010)5) in Hungary" - Summary Report - Appendix, Section ii, "Hate speech" - Háttér Support Society for LGBT People in Hungary

⁴⁷ "Montenegro - Report on the implementation of the Council of Europe Committee of Ministers' Recommendation CM/Rec (2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity" - section 1A - "Hate Crimes and other hate motivated incidents" - Juventas, December 2012

⁴⁸ "Report on implementation of the 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 in Serbia" - Compliance Documentation Report, Appendix I.A "Hate crimes" and other hate motivated incidents - paragraph 3 - Labris organisation for lesbian human rights

⁴⁹ "Human Rights Violations of Lesbian, Gay, Bisexual and Transgender (LGBT) People in Turkey: A Shadow Report - Submission the 106th Session of the Human Rights Committee" - Social Policies Gender Identity and Sexual Orientation Studies Association (SPoD); International Gay and Lesbian Human Rights Commission (IGLHRC); Kaos GL Association; Siyah Pembe Üçgen İzmir; İstanbul LGBT

⁵⁰ Human Rights Watch open letter to the President of the European Council - 21 February 2013

34. The obligation to investigate effectively is of particular relevance where the inhuman and degrading treatment in question is a hate crime - motivated by prejudice, including prejudice based on sexual orientation or gender identity. A failure to ensure that a prohibition is effective in practice will send out a message that the discrimination in question is not taken seriously and may even suggest tacit approval of the actions of the perpetrators because of a prejudice shared by the investigating authorities. As recognised by the UN High Commissioner for Human Rights: *“Even where systems exist, incidents may go unreported or are misreported because victims distrust the police, are afraid of reprisals or threats to privacy, are reluctant to identify themselves as LGBT or because those responsible for registering the incidents fail to recognize motives of perpetrators.”*⁵¹

Need for training

35. Simply calling for better investigations does not provide the practical and effective protection that the Convention requires. Unless the police, prosecutors and the courts are sensitive to the rights of LGBTI victims of crime and witnesses, to the indicators that a crime has been motivated by hatred of sexual orientation or gender identity, to the importance of identifying that motivation and the seriousness of it, there remains a significant risk that the criminal law will be ineffective and that perpetrators will continue to act with impunity.

36. It is therefore vital that law enforcement agencies receive adequate training on LGBTI rights and hate crimes, and that a failure to provide such training is recognised by the Court as a failure to provide adequate protection against such crimes. See, mutatis mutandis, *Opuz v Turkey* (2009), §§ 192-198. One significant consequence of a lack of training, particularly in conservative countries where public opinion remains hostile to minority sexual identities, is that the authorities themselves - particularly the police - may demonstrate hostility and prejudice to LGBTI victims of crime. This contributes to a reluctance to report crimes to the police. For example, the survey carried out by the EU Fundamental Rights Agency in 2013 recorded that amongst the LGBTI Romanians completing the survey who had been physically or sexually attacked in the past 5 years, only 9% said that they or someone else had reported the most recent attack to the police⁵².

37. The need for training is widely acknowledged. EU Directive 2012/29 on the rights, support and protection of victims of crime states that “victims of crime should be recognised and treated in a respectful, sensitive and professional manner without discrimination” and must be “protected from secondary and repeat victimisation”, and recognises the importance to achieving these ends of training “officials involved in criminal proceedings”.⁵³ The need for enhanced training of law enforcement agencies has already been recognised by the Committee of Ministers in their 2010 Recommendation: *“Member states should take appropriate measures to ensure that victims and witnesses of sexual orientation or gender identity related “hate crimes” and other hate-motivated incidents are encouraged to report these crimes and incidents; for this purpose, member states should 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** and provide adequate assistance and support to victims and witnesses.”* Similar recognition has come from the UN Commissioner on Human Rights who recommended that Member States: *“(g) Implement appropriate sensitization and training programmes for police, prison officers, border guards, immigration officers and other law enforcement personnel, and support public information campaigns to counter homophobia and transphobia among the general public and targeted anti-homophobia campaigns in schools”*⁵⁴.

⁵¹ “Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity” - Report of the United Nations High Commissioner for Human Rights - 17 November 2011

⁵² EU LGBT Survey 2013 - <http://fra.europa.eu/DVS/DVT/lgbt.php>

⁵³ Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime

⁵⁴ See para 84 of *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity* - Report of the United Nations High Commissioner for Human

Conclusions

38. The events giving rise to this application must be viewed against a backdrop of widespread and frequent hostility and violence towards LGBTI people due to their sexual orientation and/or gender identity, and of frequent official failure to deal with such hostility and violence appropriately and effectively. This is relevant both to the credibility of the Applicants' claims, and to the wider importance of the Court's assessment of this application.
39. The importance of upholding the rights of LGBTI people to live their lives without fear of violence motivated by ignorance and hatred is amplified when dealing with attacks that follow the exercise of Article 10 & 11 rights. Such attacks strike at the core of the Convention's protections. In addition to violating physical and psychological integrity they threaten the victims' own rights to express themselves openly and with others and, crucially, create an environment of intimidation that undermines the right of personal autonomy and self determination. To combat them the State must meet its positive obligation under the Convention to protect LGBTI people from hate crime, including by ensuring that there is a practical and effective justice system in place to identify, arrest and punish those responsible for such crimes. A state's failure to treat seriously allegations of this kind is more than merely a failure to respect the rights of the victims, but a failure to respect the rights of LGBTI people in general to live with dignity and without fear.

Rights. – 17 November 2011. It is further observed that the 2012 meeting of the UN Human Rights Council 'panel on ending violence and discrimination against individuals based on their sexual orientation and gender identity' noted *"the value of education and training in sensitizing public officials, police, judges, teachers and other key groups to the impact of discrimination based on sexual orientation and gender identity and related human rights challenges facing LGBT persons."* - Human Rights Council panel on ending violence and discrimination against individuals based on their sexual orientation and gender identity, Geneva, 7 March 2012 – summary of discussion (<http://www.ohchr.org/Documents/Issues/Discrimination/LGBT/SummaryHRC19Panel.pdf>)

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Annex - Principal resolutions and reports referred to in these submissions

United Nations

1. “Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity” - Report of the United Nations High Commissioner for Human Rights - - A/HRC/19/41 - 17 November 2011

Council of Europe

2. 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
3. Discrimination on the basis of sexual orientation and gender identity - Resolution 1728 (2010) of the Parliamentary Assembly of the Council of Europe
4. Tackling discrimination on the grounds of sexual orientation and gender identity - Resolution 1948 (2010) of the Parliamentary Assembly of the Council of Europe
5. “Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe”, Commissioner for Human Rights, Council of Europe, Strasbourg, June 2011

European Union

6. European Union lesbian, gay, bisexual and transgender survey – European Union Agency for Fundamental Rights – 2013 - <http://fra.europa.eu/en/theme/lgbt>

ILGA-Europe

7. "Violence against lesbian, gay, bisexual, transgender and intersex people in the OSCE region" - by ILGA-Europe for the OSCE's 2012 annual hate crimes report - March 2013