

**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**Application no. 50231/13**

**B E T W E E N:**

**PAVLA SABALIĆ**

**Applicant**

**- and -**

**CROATIA**

**Respondent**

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

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**A. INTRODUCTION**

1. This case raises questions of considerable public importance about the nature and scope of the positive obligations of Member States under the European Convention on Human Rights (the “**Convention**”). Pursuant to Article 1 of the Convention, they are required to take the necessary legislative, administrative, judicial and/or other measures to prevent the commission of violent crimes; and to ensure that if committed they are effectively investigated, prosecuted and, appropriately punished. There are additional procedural obligations where such acts of violence are motivated in whole or in part by prejudice against an individual’s real or imputed sexual orientation or gender identity, requiring Member States, for example, to take all reasonable steps to establish whether any hatred or prejudice connected to a protected characteristic may have played a role in the violent attack.<sup>1</sup>
2. This intervention is lodged by 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**”) and the International Commission of Jurists (“**ICJ**”) (together, “**the interveners**”). The expertise and experience of the interveners is set out in the application for leave to intervene dated 28 March 2014.
3. The intervention is in two parts: first, an overview of the prevalence and nature of violent crimes motivated, in whole or in part, by prejudice against people’s real or imputed sexual orientation and/or gender identity in Council of Europe Member States, and the manner in which Member States have (or have not) responded to those crimes (paragraphs 4 to 13 below); and second, a survey of the international, EU and comparative law addressing the procedural and substantive obligations, as relevant, arising from Articles 3, 8, 13 and 14 of the Convention, to secure effective protection, accountability and redress for individuals in respect of crimes of violence, and the enhanced obligations where such crimes are based, in whole or in part, on hatred of protected characteristics of individual victims, including, in particular, victims’ real or imputed sexual orientation or gender identity (paragraphs 14 to 31 below), as well as accountability and redress where such violent hate crimes are committed.

**B. THE CONTEXT: HATE CRIMES**

*Crimes based on sexual orientation and/or gender identity*

4. The Council of Europe defines hate crimes as “*crimes committed on the 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.*”<sup>2</sup> The Organization for Security and Co-operation in Europe defines a hate crime as a criminal offence with a bias motive. It defines a bias motive as one which “*requires some form of prejudice on account of a personal characteristic. Bias can be felt in respect of a person, or a characteristic or an idea (where the victim symbolizes that characteristic or idea).*”<sup>3</sup>

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<sup>1</sup> On this point, see this Court’s jurisprudence cited at footnote 36.

<sup>2</sup> Explanatory Memorandum to Council of Europe Recommendation CM/Rec(2010)5.

<sup>3</sup> OSCE Office for Democratic Institutions and Human Rights, Hate Crime Laws – A Practical Guide (2009), p. 16-17.

5. To the extent that Member States have adopted specific legal provisions directed at hate crimes, they tend to operate in one of two ways.<sup>4</sup> The first and most effective method is to create qualifications/enhanced penalties for all or specified crimes committed on the basis of a relevant bias.<sup>5</sup> In respect of the European Union's Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law (2008/913/JHA) (the "Framework Decision") on race hate crimes, this method was adopted by 7 EU Member States including Belgium and the United Kingdom. The alternative method, which remains much more susceptible to under-reporting of hate crimes and/or judicial failures to take the issue into consideration, is the approach of making a racist/xenophobic motivation an aggravating factor.<sup>6</sup> This method has been adopted by a number of other Member States. However, a number of Member States' domestic laws are silent as to hate crimes on the basis of sexual orientation and/or gender identity and expression.

*The prevalence of hate crimes against people based on their real or imputed sexual orientation and/or gender identity or expression*

6. The recording and monitoring of hate crimes on the basis of sexual orientation and/or gender identity remains very limited throughout many Member States. The European Union's Agency for Fundamental Rights ("EU FRA") 2012 Report on the visibility of hate crimes in the European Union concluded that:
- a. Only 4 EU Member States have comprehensive data collection mechanisms pertaining to hate crime (in general) and 14 Member States only have limited data collection mechanisms in place.<sup>7</sup>
  - b. Only 8 EU Member States record official data on crime motivated by prejudice against the victim's real or imputed sexual orientation as compared with 25 EU Member States that record racist/xenophobic crime.<sup>8</sup>
7. Although the limited nature of data collection and publication on hate crimes is not commensurate with the scale, gravity and widespread nature of these crimes, even the partial data that exists demonstrates that the problem is extensive. The relevant data is identified in greater detail in the **Appendix** to these submissions.
8. The prevalence of hate crimes has been acknowledged within and beyond the Council of Europe:
- a. The Council of Europe's Parliamentary Assembly's Resolution 1948 (2013) noted 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 radicalization 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."*

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<sup>4</sup> Art. 4 of the Framework Decision expressly provides that Member States have an option between these two methods.

<sup>5</sup> EU FRA, Making hate crime visible in the European Union: acknowledging victims' rights (2012), p. 27.

<sup>6</sup> Ibid, p. 27. Under such systems, even where Judges take the aggravating factor into consideration this is unlikely to be visible from subsequent official statistics which often refer only to the type of crime and penalty applied. By adopting an aggravating factor rather than enhanced penalty qualification system, the hate element is also less likely to be considered in police reports and investigations which may culminate in the formulation and prosecution of charges.

<sup>7</sup> Ibid, pp. 31, 36.

<sup>8</sup> Ibid, p. 31.

- b. As the United Nations Office of the High Commissioner for Human Rights (“OHCHR”) concluded in 2012, “LGBT individuals are at particular risk of targeted violence at the hands of private actors. Homophobic and transphobic violence has been recorded in all regions.”<sup>9</sup>

### *The impact of hate crimes*

9. As with other types of hate crime, the serious impact of hate crimes perpetrated partly or wholly on account of sexual orientation or gender identity operates on at least three distinct levels:
  - a. First, at an **individual** level, violence/harassment motivated by bias against a person’s sexual orientation or gender identity violates that person’s human dignity and may cause pain or suffering equivalent to torture or inhuman and degrading treatment; moreover, it always amounts to an attack on the protected autonomy of individuals and their right to give expression to their personal identity and personhood.
  - b. Second, at the level of the relevant **group** (whether defined by sexual orientation, gender identity or a combination of the same) hate crimes on the basis of sexual orientation or gender identity serve to segment and divide society and sanction the ill treatment of particular groups upon segmentation. They also serve to reinforce feelings of insecurity, fear and marginalisation within other members of the relevant group.
  - c. Third, at a **societal** level the classification and segmentation of society underlying hate crime bias serve to perpetuate divisions of society, to sanction ill-treatment and to restrict the freedom of all individuals (whether of the affected group or not) to live autonomously with the equal protection of the law. It is necessary to confront and censure these acts in order to establish and maintain the constituting principles of human dignity and fundamental rights underlying the Convention. As the Explanatory Memorandum to the Council of Europe’s Committee of Ministers 2010 Recommendation on combatting discrimination on the grounds of sexual orientation or gender identity recognised, hate crimes against lesbian, gay, bisexual, and/or transgender (“LGBT”) people constitute attacks on the fundamental basis of democratic values: “[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.*”
10. Prior to the present case, this Court has not yet had the occasion directly to consider the adequacy of Member States’ legal obligations to put in place effective systems to protect people against hate crimes on the basis of their real or imputed sexual orientation and gender identity and to identify and prosecute perpetrators when such crimes occur. The Court has, however, considered hate crimes against individuals motivated by prejudice against other protected characteristics and the interveners submit that the Court ought to explicitly confirm the applicability, *mutatis mutandis*, and content of the principles that emerge from such cases in the present claim concerning hate crimes against LGBT people. The problem of violent hate crimes against LGBT people has been recognised, though never directly addressed, in the Court’s case law. The interveners contend that sexual orientation or gender identity or expression should be treated in the same way as categories such as race, ethnicity and religion that are commonly covered by hate crime laws, because sexual orientation or gender identity or expression is a characteristic that is fundamental to a person’s sense of self. It is, moreover, used as a marker of group identity.

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<sup>9</sup> OHCHR, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* (2012), p.15.

11. The present case provides the Court with an important opportunity to emphasise the extent of Member States' obligations to put in place effective, robust procedures to deter, detect, investigate, prosecute and punish hate crimes perpetrated wholly or partly because of the victim's real or imputed sexual orientation and/or gender identity and to identify the specific content of those positive obligations.
12. States' responses to hate crimes on the basis of sexual orientation and/or gender identity are highly variable. The lack of accurate and effective collection, analysis and publication of data relating to hate crimes in many Member States compounds the difficulties in (a) acting effectively to protect the rights of victims of hate crimes and (b) recognising the extent of the problem of hate crimes against, *inter alia*, LGBT people within and between Member States.
13. Documented examples of Member States' responses to specific instances of hate crimes against LGBT people suggests that States' responses are often inadequate and/or positively harmful to the victims of such crimes. The relevant failings disclosed by recent events include the following:
- a. Failures of law enforcement agencies to take necessary steps to conduct an effective investigation into a hate crime. For example, in June 2011, following a violent attack on 5 volunteers at the Sofia LGBT Pride march, the Bulgarian police failed to follow up on the victims' claims that the attack could have been captured on the CCTV cameras of nearby foreign embassies. This omission may have contributed to the failure to identify the perpetrator.<sup>10</sup> This is contrary to this Court's recognition of a duty on Member States to take "*all reasonable steps available to them to secure...evidence concerning [such] incident[s]...*"<sup>11</sup>
  - b. Complicity of law enforcement agencies/failure to prevent violence against LGBT people. In January 2013, Russian law enforcement officers failed to intervene to stop an assault on LGBT demonstrators in Voronezh protesting the Russian Parliament's reading of a draft bill providing for the punishment of the promotion of homosexuality.<sup>12</sup> This is contrary to the requirement that States take positive measures to safeguard participants' ability to participate in demonstrations without fear of being subjected to physical violence by their opponents.<sup>13</sup>
  - c. Failures to record/document hate crimes. In June 2012, the authorities in Kiev, Ukraine failed to record a physical attack on the organiser of Kiev Pride, during which he was called a "*fug*", as a hate crime. Likewise, a serious attack by masked men on an event for Transgender Day of Remembrance was characterised by police as "*hooliganism*" rather than a hate crime.<sup>14</sup>

<sup>10</sup> Amnesty International, *Changing laws, changing minds: Challenging homophobic and transphobic hate crimes in Bulgaria* (June 2012, Eur 15/001/2012), p.6.

<sup>11</sup> *Šečić v Croatia* (Application No. 40116/02) (31 August 2007) ("*Šečić*") §54.

<sup>12</sup> Human Rights Watch, "Russia: Reject Homophobic Bill", 27 January 2013 (<http://www.hrw.org/news/2013/01/26/russia-reject-homophobic-bill>).

<sup>13</sup> *Plattform "Arzte für das Leben" v Austria* (Application No. 10126/82) (21 June 1988), §32.

<sup>14</sup> Human Rights Watch, "Ukraine: Investigate Brutal Attack on Gay Activist", 26 June 2012 (<http://www.hrw.org/news/2012/06/26/ukraine-investigate-brutal-attack-gay-activist>).

## C. THE SCOPE OF A STATE'S POSITIVE LEGAL OBLIGATIONS

### Articles 3, 8 and 13

14. Article 3 enshrines “one of the most fundamental values of democratic society,”<sup>15</sup> prohibiting, in absolute terms, torture or inhuman or degrading treatment or punishment. Article 1 of the Convention imposes a positive obligation on States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment. This includes ill-treatment at the hands of private individuals. As to the content of this positive obligation, this Court’s jurisprudence has made clear that Article 3, read in conjunction with Articles 1 and 13, requires the implementation of effective criminal law mechanisms:

*“Article 3 requires States to put in place effective criminal-law provisions to deter the commission of offences against personal integrity, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions ... and this requirement also extends to ill-treatment administered by private individuals ...”*<sup>16</sup>

15. This is self-evidently correct, because “effective measures of deterrence against grave acts ... can only be achieved by the existence of effective criminal-law provisions backed up by law enforcement machinery.”<sup>17</sup> The positive obligation on Member States to bring to justice perpetrators of acts of ill-treatment thus serves “to ensure that acts of ill-treatment do not remain ignored by the relevant authorities and do provide effective protection against acts of ill-treatment.”<sup>18</sup>

16. The mere passage of law prohibiting hate crimes is insufficient to protect minority groups effectively from crimes motivated wholly or in part by hate or prejudice. That is clear from the evidence outlined above. This reality has been recognised by this Court, which has repeatedly underlined that States have an obligation to ensure that Convention rights are “practical and effective” and not “theoretical and illusory.”<sup>19</sup> In the context of Article 3, read in conjunction with Articles 1 and 13, Member States must therefore not only enact criminal law provisions criminalising hate crimes, but must also “put them in practice through effective investigation and prosecution.”<sup>20</sup>

17. Both the duty to effectively investigate and the duty to effectively prosecute are of critical importance to the Court’s determination of the present case.

18. As to the duty to effectively investigate, this Court has made clear that this is a central element of the obligation on Member States to ensure that the rights guaranteed under the Convention are practical and effective.<sup>21</sup> The Court has made clear that the duty to conduct an effective investigation applies irrespective of whether treatment contrary to Article 3 has been inflicted through the involvement of a State agent, or by a private individual.<sup>22</sup> Specifically, the Court has stated “[e]ven though the scope of the State’s positive obligations might differ between cases where

<sup>15</sup> *O’Keeffe v Ireland* (Application no. 35810/09) [GC] (28 January 2014) (“*O’Keeffe*”) §144; *Dordević v Croatia* (Application no. 41526/10) (24 July 2012) (“*Dordević*”) §137 (“The Court reiterates that Article 3 of the Convention must be regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe.”)

<sup>16</sup> *Beganović v Croatia* (Application no. 46423/06) (25 June 2009) (“*Beganović*”) §71. See also *A v the United Kingdom* (100/1997/884/1096) (23 September 1998) §22; *Nachova and Others v Bulgaria* [GC] (Application nos. 43577/98 and 43579/98) (6 July 2005) (“*Nachova*”) §96; *Šečić* §53.

<sup>17</sup> *O’Keeffe* §148. See also *X and Y v the Netherlands* (Application no. 8978/80) (26 March 1985) §27; *Beganović* §71; *M.C. v Bulgaria* (Application no. 39272/98) (4 December 2003) (“*M.C. v Bulgaria*”) §149.

<sup>18</sup> *Beganović* §79.

<sup>19</sup> *Airey v Ireland* (Application no. 6289/13) (9 October 1979), §24. See also Article 13 of the Convention.

<sup>20</sup> *M.C. v Bulgaria* §153 (emphasis added).

<sup>21</sup> See case law discussed below. See also, Committee of Ministers, Guidelines adopted by the Committee of Ministers on 30 March 2011 at the 1110<sup>th</sup> meeting of the Ministers’ Deputies, Article VIII (“*CM Guidelines, Art VIII*”).

<sup>22</sup> *Bureš v The Czech Republic* (Application no. 37679/08) (18 October 2012) (“*Bureš*”) §122; *Denis Vasilyev v Russia* (Application no. 32704/04) (17 December 2009) (“*Denis Vasilyev*”) §100.

*treatment contrary to Article 3 has been inflicted through the involvement of State agents and cases where violence is inflicted by private individuals, the requirements as to an official investigation are similar.*"<sup>23</sup>

19. The jurisprudence of this Court finds support<sup>24</sup> in the Charter of Fundamental Rights of the European Union,<sup>25</sup> and in the jurisprudence of the UN Human Rights Committee,<sup>26</sup> the UN Committee against Torture,<sup>27</sup> the Inter-American Commission on Human Rights<sup>28</sup> and the African Commission on Human and People's Rights.<sup>29</sup> The UN Human Rights Committee's General Comment No. 31 is particularly instructive:

*"8. ... [T]he 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. ...*

*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 ...*

*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."*<sup>30</sup>

20. What, then, is required in order to make an investigation effective? This Court has identified the following minimum standards:

- a. The investigation must be **independent, impartial** and subject to **public scrutiny**, and the competent authorities must act with **diligence and promptness**.<sup>31</sup>

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<sup>23</sup> Bureš §122; Denis Vasilyev §100.

<sup>24</sup> This Court has recognised the importance of ensuring that the Convention is "interpreted in harmony with other rules of international law of which it forms part" (see, e.g., *Rantsev v Cyprus* (Application no. 25965/04) (7 January 2010), §275 (and cases cited therein). This is, of course, consistent with the principles of international treaty interpretation and, in particular, *Vienna Convention on the Law of Treaties*, art. 31(3)(c).

<sup>25</sup> Articles 2 and 4, interpreted in conjunction with Article 52(3). See also Article 1 which recognises dignity as "not only a fundamental right in itself" but "the real basis of fundamental rights."

<sup>26</sup> See, e.g., Human Rights Committee General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) ("General Comment 31"), §§8, 15, 18. See also, e.g., Human Rights Committee Concluding Observations ("HRC CO"), CCPR/C/POL/CO/6 (15 November 2010), §§5, 8; HRC CO, CCPR/C/RUS/CO/6 (29 October 2009) §27.

<sup>27</sup> See, e.g., HRC CO, CAT/MNG/CO/1 (20 January 2011) §25 ("The State party shall establish effective policing, enforcement and complaints mechanisms with a view to ensuring prompt, thorough and impartial investigations into allegations of attacks against persons on the basis of their sexual orientation or gender identity in line with the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity"); HRC CO, CAT/C/KWT/CO/2 (28 June 2011) §25 ("The State party should also promptly, thoroughly and impartially investigate all cases of discrimination and ill-treatment of these vulnerable groups, and punish those responsible for these acts. The State party should conduct awareness-raising campaigns for all officials who are in direct contact with victims of such violence, as well for the population at large"); HRC CO, CAT/C/BGR/CO/4-5 (14 December 2011) §28 ("The State party should enhance the enforcement of anti-discrimination legislation and ensure that violent acts, discrimination and hate speech are systematically investigated, prosecuted and the perpetrators convicted and punished"); HRC CO, CAT/C/NOR/CO/6-7 (13 December 2012) §21; HRC CO, CAT/C/RUS/CO/5 (11 December 2012) §15 ("All acts of violence and discrimination against members of such groups should be promptly, impartially and effectively investigated, the perpetrators brought to justice, and redress provided to the victims. The Committee recommends that statistics be compiled regarding all crimes against members of such groups made vulnerable, and on the outcomes of investigations, prosecutions and remedial measures taken in relation to such crimes").

<sup>28</sup> See, e.g., Inter-American Commission on Human Rights, Case 11.137, *Juan Carlos Abella, Argentina* (18 November 1997) (OEA/Ser.L/V/11.98), §392.

<sup>29</sup> See, e.g., African Commission decision 245/02, *Zimbabwe Human Rights NGO Forum v Zimbabwe* (15 May 2006).

<sup>30</sup> General Comment 31, §§8, 15, 18.

<sup>31</sup> *Beganović* §75; *Çelik and İmret v Turkey* (Application no. 44093/98) (26 October 2004) §55.

- b. The investigation must be **thorough**. This means that the authorities must always make a serious attempt to find out what happened and must not rely on hasty or ill-founded conclusions.<sup>32</sup> In order to be thorough, the investigation must address all aspects of the human rights violations concerned. The investigation must therefore be **sufficiently broad** and must not be conducted within an excessively narrow investigative framework.<sup>33</sup>
  - c. The authorities must take whatever reasonable steps they can to **secure the evidence** concerning the incident, including, *inter alia*, a detailed statement concerning the allegations from the alleged victim, eyewitness testimony, forensic evidence and, where appropriate, medical reports.<sup>34</sup>
  - d. The investigation must be capable of leading to the **identification and punishment** of those responsible for the alleged events and of **establishing the truth**.<sup>35</sup>
  - e. The authorities must take **all reasonable steps** to establish whether any **hatred or prejudice** connected to a protected characteristic may have played a role in the attack.<sup>36</sup>
21. The interveners submit that, in cases where violence is perpetrated by a private individual, the minimum standards set out above are required in order to guarantee an effective investigation. In particular, any deficiency in an investigation which *"undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required measure of effectiveness."*<sup>37</sup>
22. The fifth requirement identified above – which might be described as a duty to **unmask the hate or prejudice that was the motive for a crime**<sup>38</sup> – is particularly important in the context of the present case. Although often assessed in the context of Article 14,<sup>39</sup> this Court has made clear that this also forms part of the positive obligation to effectively investigate under Article 3, in conjunction with Articles 1 and 13.<sup>40</sup> As to the content of the duty, this Court has stated:

*"[W]here the State authorities investigate violent incidents, they have an additional obligation to take all reasonable measures to identify whether there were racist motives and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Admittedly, proving racial motivation will often be extremely difficult in practice. The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute. The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver*

<sup>32</sup> *Mikheyev v Russia* (Application no. 77617/01) (26 January 2006) ("*Mikheyev*") §§107-108; *El-Masri v The Former Yugoslav Republic of Macedonia* (Application no. 39630/09) (13 December 2012) ("*El-Masri*") §182; *Bureš* §123.

<sup>33</sup> *Nachova* §115.

<sup>34</sup> *Beganović* §75; *Bati and Others v Turkey* (Application nos. 33097/96 and 57834/00) (3 June 2004) §134; *C.A.S and C.S v Romania* (Application no. 26692/05) (20 March 2012) ("*C.A.S and C.S*") §70; *Mikheyev* §108.

<sup>35</sup> *El-Masri* §182.

<sup>36</sup> *Beganović* §§93-94; *B.S. v Spain* (Application no. 47159/08) (24 July 2012) ("*B.S. v Spain*") §§58-59; see also *Nachova* §§160-161; *Šečić* §§66-70; *Milanović v Serbia* (Application no. 44614/07) (14 December 2010) ("*Milanović*") §§96-97; *Fedorchenko and Lozenko v Ukraine* (Application no. 387/03) (20 September 2012) ("*Fedorchenko*") §65; *Virabyan v Armenia* (Application no. 40094/05) (2 October 2012) ("*Virabyan*") §218; *Bekos and Koutropoulos v Greece* (Application no. 15250/02) (13 December 2005) ("*Bekos*") §69.

<sup>37</sup> *Nachova* §113.

<sup>38</sup> See, generally, EU FRA, Making hate crime visible in the European Union: acknowledging victims' rights (2012).

<sup>39</sup> See below at paragraph 31.

<sup>40</sup> *B.S. v Spain* §59: "[T]he authorities' duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 3 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 of the Convention to secure respect without discrimination for the fundamental value enshrined in Article 3. Owing to the interplay of the two provisions, issues such as those in the present case may fall to be examined under one of the two provisions only, with no separate issue arising under the other, or may require examination under both Articles. This is a question to be decided in each case on its facts and depending on the nature of the allegations made ..." See also: *Nachova* §161 (in the context of Article 2 of the Convention); *Bekos* §70.



*fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of racially induced violence.”<sup>41</sup>*

*“The Court considers the foregoing to be necessarily true also in cases where the treatment contrary to Article 3 of the Convention is inflicted by private individuals. 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 facts that are particularly destructive to fundamental rights.”<sup>42</sup>*

23. The Court’s reasoning on why a prejudicial or hateful motive makes a difference is instructive. As the Court acknowledges, such motivations are “*particularly destructive to fundamental rights,*” and have far-reaching implications not just for an individual victim but also, as noted above, at a wider societal level.

24. Although the aforementioned cases involved hate crime motivated by race, religion and political opinion, the same principles must apply *mutatis mutandis* to cases involving hate crimes motivated by an individual’s real or imputed sexual orientation or gender identity. As a consequence, Member States must “*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.*”<sup>43</sup>

25. The Committee of Ministers goes on to state:

*“[Member States] 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 shall ensure that when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance.”<sup>44</sup>*

26. The obligation effectively to investigate and, in particular, to unmask and give weight to the motive for a crime, is of particular significance in the context of hate crimes motivated by sexual orientation and/or gender identity. As the UN High Commissioner for Human Rights has recognised:

*“[e]ven where systems exist, incidents may go unreported or 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.”<sup>45</sup>*

27. The requirement to effectively investigate is the precursor to a State’s duty to effectively prosecute hate crimes motivated by sexual orientation and/or gender identity. As this Court has acknowledged, the duty to investigate implies an obligation to act “*diligently with the required determination to identify and prosecute those responsible.*”<sup>46</sup> To similar effect, the Committee of Ministers has underlined that “*States have a duty to prosecute where the outcome of an investigation warrants this.*”<sup>47</sup> This is consistent with the requirement, under Article 13, to provide an effective remedy. In the absence of a duty to effectively prosecute, “*the general legal*

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<sup>41</sup> *B.S. v Spain* §58.

<sup>42</sup> *Beganović* §75. See also: *Šečić* §67 (in the context of racially motivated violence); *Milanović* §97 (in the context of religiously motivated violence); *Virabyan* §218 (in the context of politically motivated violence).

<sup>43</sup> Committee of Ministers, Recommendation CM/Rec(2010)5, Appendix I. A. 1-2.

<sup>44</sup> *Ibid.*

<sup>45</sup> OHCHR, Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity (17 November 2011), §23.

<sup>46</sup> *Velev v Bulgaria* (Application no. 43531/08) (16 April 2013) §53; *Shishkovi v Bulgaria* (Application no. 17322/04) (25 March 2010) §38.

<sup>47</sup> CM Guidelines, Art VIII.

*prohibition of torture and inhuman or degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.*"<sup>48</sup> By analogy, and in light of this Court's case law that the requirements as to an effective investigation are similar in cases where violence is inflicted by private individuals to those where it is perpetrated by State officials, the interveners contend that the criminal law proscribing violent crimes requires that investigations be followed by appropriate prosecutions when the evidence warrants them.

28. It is self-evident that such a crime can only be effectively prosecuted, and the offender appropriately punished, if the hate or prejudice that was the motive for a crime is identified. In cases involving crimes motivated by sexual orientation and/or gender identity, or indeed any other protected characteristic, an effective prosecution mandates a criminal charge and a criminal prosecution.<sup>49</sup> Further, the penalty imposed must be commensurate with the gravity of the offence. The interveners submit that in circumstances where an investigation identifies a hateful or prejudicial motive for an act of violence, a failure to criminally prosecute will risk undermining public confidence in Member States' adherence to the rule of law throughout the Council of Europe. This is because the Contracting Party will, in effect, have turned a "*blind eye to the specific nature of facts that are particularly destructive to fundamental rights.*"<sup>50</sup>

29. The positive obligations on Member States to put in place effective criminal-law provisions to deter the commission of degrading hate crimes against LGBT people contrary to Article 3, and to investigate, prosecute and punish in a manner commensurate with their seriousness when they occur, are complemented by equivalent obligations for the purpose of securing effective protection of the private and family life rights of LGBT people under Article 8 of the Convention. These obligations may require the adoption of measures, similar to those set out above, "*in the sphere of the relations of individuals between themselves.*"<sup>51</sup> This Court has previously held that the concept of private life includes a person's psychological integrity, that same sex/homosexual partners (and any children of such couples) enjoy an Article 8 protected familial relationship<sup>52</sup> and that Member States have a positive duty to ensure respect for human dignity and moral integrity.<sup>53</sup> Although the Court has recognised the choice of the means to secure compliance with Article 8 is guided by the State's margin of appreciation, the Court has underlined that "*where fundamental values and essential aspects of private life are at stake, [Article 8] requires efficient criminal-law provisions.*"<sup>54</sup> The same imperative must exist, *mutatis mutandis*, in respect of the effective protection of families of homosexual couples and their children against hate crime targeting one or more members of such families. The requisite measures include the need to guarantee the effectiveness of a criminal investigation.<sup>55</sup>

30. Finally, the interveners emphasise the critical importance of **training** and **data collection** in satisfying the positive obligations under Article 3, 8 and 13 of the Convention.

- a. As to **training**, if police, prosecutors and the courts are not sensitive to the rights of victims of hate crimes, and to the indicators that a crime has been motivated by prejudice

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<sup>48</sup> *El-Masri* §182. See, more generally, OHCHR, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc E/CN.4/2005/102/Add.1 (2005), Principle 19, (recognising a duty to "*undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.*")

<sup>49</sup> See, e.g., HRC CO, CAT/C/NOR/CO/6-7 (13 December 2012) §21 ("*The State party should ensure that violent acts, discrimination and hate speech are systematically investigated, prosecuted and the alleged perpetrators prosecuted, if found guilty, convicted and sanctioned with penalties commensurate with the gravity of the offence.*")

<sup>50</sup> *Beganović* §75.

<sup>51</sup> *C.A.S and C.S* §71.

<sup>52</sup> *Schalk & Kopf v Austria* (Application no. 30131/04) (24 June 2010) §§90-95.

<sup>53</sup> *Dordević* §§151-152.

<sup>54</sup> *C.A.S and C.S* §71; *M.C. v Bulgaria* §150.

<sup>55</sup> *C.A.S and C.S* §72; *M.C. v Bulgaria* §152.

on the basis of sexual orientation or gender identity, there remains a real risk that the criminal law will be ineffective and that perpetrators will continue to act with impunity. More generally, it is clear that understanding the impact of hate crimes on individual victims will be central to ensure that victims receive the support and services that they require. The interveners submit that the failure to provide such training should, in certain circumstances, itself constitute a violation of the positive obligations inherent in Article 3, 8 and 13.<sup>56</sup>

- b. As to **data collection**, as noted above the recording and monitoring of hate crimes on the basis of sexual orientation and/or gender identity remains very limited throughout many Member States. The interveners consider that the collection, analysis and publication of data is critical to ensure effective compliance with the positive obligations inherent in Articles 3, 8 and 13. That data should include, at a minimum, statistics setting out the number and nature of incidents reported by the public to authorities, and details of charges and conviction rates.<sup>57</sup>

### *Articles 14, read in conjunction with Articles 3 and 8*

31. It is well established that sexual orientation attracts the protection of Article 14 (under the rubric of “*other status*”).<sup>58</sup> This Court has recognised the interplay between Article 14 and Article 3 in the context of the duty to unmask discriminatory motivations when investigating violent attacks.<sup>59</sup> The Court has, in particular, held that treating an act of violence that is motivated by a prejudice against a particular characteristic on equal footing with a violent attack that has no such motivation may give rise to a violation of Article 14.<sup>60</sup> That is to say: “*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 ...*”<sup>61</sup> So too, a failure to treat hate crimes against LGBT people on the basis of sexual orientation or gender identity with equivalent seriousness as other forms of hate crime (including insufficient systems for the recording of hate crimes on the basis of sexual orientation or gender identity, see paragraph 6 above) would be contrary to the guarantee against discrimination in the enjoyment of Convention rights and freedoms afforded by Article 14. The Interveners repeat the submissions made at paragraphs 14 to 30 above.

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<sup>56</sup> The significance of training in this context has been recognised, for example, by the Committee of Ministers (“*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,*” Committee of Ministers, Recommendation CM/Rec(2010)5) (emphasis added); see also CM Guidelines, Art VIII; and the UN Commissioner on Human Rights (recommending that Member States “*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,*” OHCHR, Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity (17 November 2011), §64. See, more generally, the EU Directive on Victims’ Rights (2012/29/EU), and ILGA Europe, *Guidelines for transposition, The EU Directive on Victims’ Rights (2012/29/EU) and homophobic and transphobic crime victims* (December 2013).

<sup>57</sup> See, e.g., HRC CO, CAT/C/MDA/CO/2 (29 March 2010) §27 (“*... the State party should ... Provide detailed information and statistics on the number and type of hate crimes, as well as on the administrative and judicial measures taken to investigate and prosecute such crimes and the sentences imposed*”); HRC CO, CAT/C/RUS/CO/5 (11 December 2012) §15 (“*All acts of violence and discrimination against members of such groups should be promptly, impartially and effectively investigated, the perpetrators brought to justice, and redress provided to the victims. The Committee recommends that statistics be compiled regarding all crimes against members of such groups made vulnerable, and on the outcomes of investigations, prosecutions and remedial measures taken in relation to such crimes.*”)

<sup>58</sup> *X v Turkey* (Application no. 24626) (9 October 2012) §50 (and cases cited therein); *Alekseyev v Russia* (Applications nos. 4916/07, 25924/08 and 14599/09) (21 October 2010) §108 (and cases cited therein).

<sup>59</sup> See fn. 39 above.

<sup>60</sup> *Beganović* §§93-94; *B.S. v Spain* §§58-59; see also: *Nachova* §§160-161; *Šečić* §§66-70; *Milanović* §§96-97; *Fedorchenko* §65; *Virabyan* §218; *Bekos* §69.

<sup>61</sup> *Šečić* §67.