

KLOBUČAR v. CROATIA

Application no. 28416/14

WRITTEN SUBMISSIONS ON BEHALF OF
THE AIRE CENTRE (ADVICE ON INDIVIDUAL RIGHTS IN EUROPE),
ILGA-EUROPE (THE EUROPEAN REGION OF THE INTERNATIONAL
LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION), AND
THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)
INTERVENERS

pursuant to the Section Registrar's notification of 18 May 2015

8 June 2015

A. INTRODUCTION

1. These written submissions are presented on behalf 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"), hereinafter "the interveners".
2. The present case provides the Court with an important opportunity to identify the scope of the Contracting Parties' procedural obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention' or ECHR) arising in connection with allegations of ill-treatment at the hands of State officials. These obligations include the duty to take all reasonable steps to identify whether there has been any discriminatory motive behind the treatment said to be in violation of the Convention, based, for example, on homophobia or animus or prejudice against one's real or imputed same-sex sexual orientation and/or gender identity or expression.
3. The interveners' written submissions below focus on the following:
 - i. The nature and scope of the positive obligations of the Contracting Parties under the Convention in respect of allegations disclosing credible evidence of treatment prohibited under Article 3;
 - ii. Same-sex sexual orientation and/or gender identity as a ground of discrimination; and
 - iii. The duty to take all reasonable steps to identify any discriminatory motive in connection with allegations of ill-treatment.

B. THE CONTEXT

4. This case raises questions of considerable public importance about the nature and scope of the positive obligations of the Contracting Parties under Article 3 of the Convention.
5. In this context, this Court has repeatedly and consistently held that, pursuant to Article 1 of the Convention, taken in conjunction with Article 3, Contracting Parties are required to take all necessary legislative, administrative, judicial and/or other measures to ensure that allegations disclosing credible evidence of Article 3 prohibited treatment are effectively investigated, and when warranted, appropriately sanctioned, including through criminal prosecution. For instance, in its judgment in the *Labita v. Italy* case, this Court's Grand Chamber held that,

where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. As with an investigation under Article 2, such investigation should be capable of leading to the identification and punishment of those responsible [...] Otherwise, the general legal prohibition of torture and inhuman and 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.¹

6. In the context of Article 3, read in conjunction with Articles 1 and 13, Contracting Parties must therefore not only enact criminal law provisions criminalizing acts amounting to Article 3 prohibited treatment, but must also "put them in practice through effective investigation and prosecution."² The duty to conduct an effective investigation into allegations disclosing

¹ *Labita v. Italy* [GC], no. 26772/95, judgment, 6 April 2000, § 131; *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V; *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII, p. 3288, § 102; and, *mutatis mutandis*, *Velikova v. Bulgaria*, no. 41488/98, § 70, ECHR 2000-VI; and *Georgescu v. Romania*, no. 25230/03, judgment, 13 May 2008, § 71.

² *M.C. v. Bulgaria*, no. 39272/98, judgment, 4 December 2003, § 153.

credible evidence of police wrongdoing is a consistent enjoinder in the jurisprudence of this Court. This obligation has been ascribed to a "procedural aspect" or "procedural limb" of Article 3, but the same duty can, in certain circumstances,³ also arise under other provisions of the Convention, notably Article 8.⁴ In light of this, the interveners invite the Court to consider the following remarks as also applicable to treatment in breach of Article 8 of the Convention in its determination of the present case.

7. The duty to investigate effectively is of critical importance to this Court's determination of the present case. This Court has made clear that an effective investigation is critical to discharging the Contracting Parties' obligation to ensure that the enjoyment of rights guaranteed under the Convention is practical and effective.⁵ Through its case law this Court has identified the following minimum standards to ensure the effectiveness of an investigation in connection with allegations disclosing credible evidence of Article 3 prohibited treatment:
 - a. The investigation must be independent, impartial and subject to public scrutiny, and the competent authorities must act with diligence and promptness;⁶
 - 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.⁷ 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;⁸
 - c. The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, a detailed statement of the allegations from the alleged victim, eyewitness testimony, forensic evidence and, where appropriate, medical reports;⁹
 - 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;¹⁰ and
 - 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 events in question.¹¹

³ See, e.g., *X and Y v. The Netherlands*, no. 8978/80, judgment, 26 March 1985, where the Court held, "[t]his is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated", § 27.

⁴ *M.C. v. Bulgaria*, § 153.

⁵ See this Court's jurisprudence discussed below. See also, the Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations (Adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies), in particular, Guideline V. The duty to investigate and Guideline VI. Criteria for an effective investigation.

⁶ *Beganović v. Croatia*, no. 46423/06, judgment, 25 June 2009, § 75; *Çelik and İmret v. Turkey*, no. 44093/98, judgment, 26 October 2004, § 55.

⁷ *Mikheyev v. Russia*, no. 77617/01, judgment, 26 January 2006, §§ 107-108; *El-Masri v. The Former Yugoslav Republic of Macedonia* [GC], no. 39630/09, judgment, 13 December 2012, § 182; *Bureš v. the Czech Republic*, no. 37679/08, judgment, 18 October 2012, § 123.

⁸ *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, judgment, 6 July 2005, § 115.

⁹ *Beganović v. Croatia*, § 75; *Bati and Others v. Turkey*, nos. 33097/96 and 57834/00, judgment, 3 June 2004, § 134; *C.A.S. and C.S. v. Romania*, no. 26692/05, judgment, 20 March 2012, § 70; *Mikheyev v. Russia*, § 108. This Court has held that there is a duty to take "all reasonable steps available to them to secure...evidence concerning [such] incident[s]...", *Šečić v. Croatia*, no. 40116/02, judgment, 31 August 2007, § 54.

¹⁰ *El-Masri v. The Former Yugoslav Republic of Macedonia*, §182.

¹¹ *Beganović v. Croatia*, §§ 93-94; *B.S. v. Spain*, no. 47159/08, judgment, 24 July 2012, §§ 58-59; see also *Nachova and Others v. Bulgaria*, §§ 160-161; *Šečić v. Croatia*, §§66-70; *Milanović v. Serbia*, no. 44614/07, judgment, 14 December 2010, §§ 96-97; *Fedorchenko and Lozenko v. Ukraine*, no. 387/03, judgment, 20 September 2012, § 65; *Virabyan v. Armenia*, no. 40094/05, judgment, 2 October 2012, § 218; *Bekos and Koutropoulos v. Greece*, no. 15250/02, judgment, 13 December 2005, § 69.

8. The interveners submit that, any deficiency in an investigation that “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.”¹² “A requirement of promptness and reasonable expedition is implicit in this context. A prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. Tolerance by the authorities towards such acts cannot but undermine public confidence in the principle of lawfulness and the State’s maintenance of the rule of law”.¹³ In evaluating the effectiveness or otherwise of an investigation, this “Court has often assessed whether the authorities reacted promptly to the incidents reported at the relevant time. Consideration has been given to the opening of investigations, delays in taking statements and to the length of time taken for the initial investigation”.¹⁴
9. The fifth requirement identified above – which might be described as a duty to identify whether there has been any discriminatory motive behind the treatment said to be in violation of the Convention – is particularly important in the context of the Court’s determination of the present case. Although often assessed in the context of Article 14,¹⁵ 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 13.¹⁶
10. In the case of *Turan Cakir v. Belgium*,¹⁷ the applicant had complained of physical ill-treatment by the police, accompanied, *inter alia*, by threats and racist insults. In its judgment, in addition to finding that the violence inflicted on the applicant had amounted to a violation of Article 3 of the Convention, this Court held that the failure to properly and adequately investigate the applicant’s complaints of ill-treatment had violated the procedural obligations under this same provision, and that the authorities had also failed in their obligation, under Article 14 taken in conjunction with Article 3, to take all the necessary measures to ascertain whether discriminatory conduct could have played a role in the events in question.
11. As to the content of the duty to take all reasonable steps to establish whether any hatred or prejudice connected to a protected characteristic may have played a role in the events in question, in its judgment in the case of *B.S. v. Spain*, for example, which concerned an ineffective investigation into the possible racist motivation for ill-treatment allegedly suffered by the applicant at the hands of the police, this Court has stated,

where 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 fully reasoned, impartial and objective

¹² *Nachova and Others v. Bulgaria*, §113.

¹³ *Case of 97 members of the Gldani Congregation of Jehovah’s Witnesses and 4 Others v. Georgia*, no. 71156/01, judgment, 3 May 2007, § 97 and see also cases cited therein.

¹⁴ *Identoba and Others v. Georgia*, no. 73235/12, judgment, 12 May 2015, § 66, and see also *Stoica v. Romania*, no. 42722/02, § 67, 4 March 2008, cited therein.

¹⁵ See below at paragraphs 10, 22-24 and 26.

¹⁶ *B.S. v. Spain*, § 59: “the 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 and Others v. Bulgaria*, § 161 (in the context of Article 2 of the Convention); *Bekos and Koutropoulos v. Greece*, § 70.

¹⁷ *Turan Cakir v. Belgium*, no. 44256/06, judgment, 10 March 2009.

*decisions, without omitting suspicious facts that may be indicative of racially induced violence.*¹⁸

The interveners submit that this approach must also be applied in analogous cases of suspected discrimination on the ground of sexual orientation.

12. The Court has acknowledged that such motivations are “particularly destructive to fundamental rights,”¹⁹ and have far-reaching implications not just for an individual victim but also at a wider societal level.
13. As this Court has further acknowledged, the duty to investigate implies an obligation to act “diligently with the required determination to identify and prosecute those responsible.”²⁰ To similar effect, the Committee of Ministers of the Council of Europe has underlined that, “States have a duty to prosecute where the outcome of an investigation warrants this.”²¹ In the absence of a duty to effectively prosecute, “the general legal prohibition of torture and inhuman or degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.”²²
14. The interveners submit that in circumstances where an investigation discloses motives based on hate or prejudice for an act of violence, a failure to criminally prosecute will risk undermining public confidence in the Contracting Parties’ 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.”²³
15. In conclusion, the interveners wish to emphasize that, in accordance with this Court’s case law, when there is credible evidence that the Article 3 prohibited treatment may have been inflicted solely or in part because of animus or prejudice on the grounds of an individual’s real or imputed sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status,²⁴ a critical requirement of an effective investigation is that the Contracting Parties must take all reasonable steps to establish whether any hatred or prejudice connected to one or more of the abovementioned protected grounds played a role in the events in question.²⁵

¹⁸ *B.S. v. Spain* § 58. Conversely, in *Balogh v. Hungary*, no. 47940/99, judgment, 20 July 2004, while the Court found violations of Article 3 of the Convention in connection with the ill-treatment that the police had inflicted on the applicant, a Hungarian national, of Roma ethnic origin, and the inadequacy of the investigation, it also held that the allegations of discrimination under the Convention were unsubstantiated, and that therefore there had been no violation of Article 14.

¹⁹ *Beganović v. Croatia*, §75. See also: *Šečić v. Croatia*, § 67 (in the context of racially motivated violence); *Milanović v. Serbia*, § 97 (in the context of religiously motivated violence); *Virabyan v. Armenia*, § 218 (in the context of politically motivated violence).

²⁰ *Velev v. Bulgaria*, no. 43531/08, judgment, 16 April 2013, § 53; *Shishkovi v. Bulgaria*, no. 17322/04, judgment, 25 March 2010, § 38.

²¹ Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, Guideline “VIII. Prosecutions”.

²² *El-Masri v. The Former Yugoslav Republic of Macedonia*, § 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, recognizing 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.”

²³ *Beganović v. Croatia*, § 75.

²⁴ Those are the grounds enumerated in Article 14 of the Convention and Article 1(1) of Protocol 12 to the Convention.

²⁵ *Beganović v. Croatia*, §§ 93-94; *B.S. v. Spain* §§ 58-59; see also *Nachova and Others v. Bulgaria*, §§ 160-161; *Šečić v. Croatia*, §§ 66-70; *Milanović v. Serbia*, §§ 96-97; *Fedorchenko and Lozenko v. Ukraine*, § 65; *Virabyan v. Armenia*, § 218; *Bekos and Koutropoulos v. Greece*, § 69.

C. SEXUAL ORIENTATION AND/OR GENDER IDENTITY

16. The principle of equality before the law and equal protection of the law and the right to be free from discrimination are at the core of the values that the Convention seeks to guarantee. They are enshrined in Article 14 of the Convention, which, albeit not free-standing, sets out the right to the enjoyment of Convention rights without discrimination.²⁶ Protocol no. 12 to the Convention provides a free-standing right not to be subjected to discrimination.²⁷
17. The case law of this Court makes clear that not every distinction or difference in treatment constitutes discrimination. As the Court held in its judgment in the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'".²⁸ In its judgment in the case of *D.H. and Others v. Czech Republic*, this Court held that, "[d]iscrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations...".²⁹ Thus, not every distinction in or difference of treatment amounts to prohibited discrimination.³⁰
18. However, discriminatory treatment on certain grounds is inherently suspect, attracting enhanced scrutiny, and highly unlikely to be considered as lawful under the Convention. For example, in *D.H. and Others v. the Czech Republic*, this Court has held that, "the notion of objective and reasonable justification must be interpreted as strictly as possible" in circumstances where the difference in treatment is based on race or ethnic origin.³¹
19. For historical reasons, neither Article 14 of the Convention nor Article 1 of Protocol 12 explicitly lists sexual orientation (or gender identity) as a protected status. However as the Convention is a living instrument, in a series of cases, this Court has expressly stated that the list in Article 14 is non-exhaustive and that the concept of one's sexual orientation is included among the "other" grounds protected by Article 14,³² reiterating on several occasions that sexual orientation attracts the protection of Article 14 of the Convention.³³ Moreover, this

²⁶ Article 14 provides that, "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

²⁷ Article 1 of Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms CETS No.: 177 reads as follows: "(1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. (2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1." The Explanatory Report to Protocol 12 explains that "20. The list of non-discrimination grounds in Article 1 is identical to that in Article 14 of the Convention. This solution was considered preferable over others, such as expressly including certain additional non-discrimination grounds (for example, physical or mental disability, sexual orientation or age), not because of a lack of awareness that such grounds have become particularly important in today's societies as compared with the time of drafting of Article 14 of the Convention, but because such an inclusion was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included. It is recalled that the European Court of Human Rights has already applied Article 14 in relation to discrimination grounds not explicitly mentioned in that provision (see, for example, as concerns the ground of sexual orientation, the judgment of 21 December 1999 in the case of *Salgueiro da Silva Mouta v. Portugal*)."

²⁸ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, nos. 9214/80; 9473/81; 9474/81, judgment, 28 May 1985, Series A, No. 94, § 72.

²⁹ *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, judgment, 13 November 2007, § 175.

³⁰ See also Explanatory Report on Protocol No. 12, §§ 18-19.

³¹ *D.H. and Others v. the Czech Republic*, § 196.

³² For example, see, *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, judgment, § 28, ECHR 1999-IX; *Fretté v. France*, no. 36515/97, judgment, 26 February 2002, § 32; *S.L. v. Austria*, no. 45330/99, judgment, 9 January 2003; and *E.B. v. France* [GC], no. 43546/02, judgment, 22 January 2008.

³³ *Kozak v. Poland*, no. 13102/02, judgment, 2 March 2010, § 83; *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, judgment, 21 October 2010, § 108; *X v. Turkey*, no. 24626/09, judgment, 9 October 2012, § 50.

Court has also held that, where the difference of treatment is based solely on the applicant's sexual orientation, such distinction would amount to discrimination under the Convention.³⁴

D. THE DUTY TO TAKE ALL REASONABLE STEPS TO IDENTIFY ANY DISCRIMINATORY MOTIVE

20. Although the aforementioned cases involved allegations of discrimination on the grounds of race, religion and political opinion, in light of the above (paragraphs 16-19), the same principles must apply *mutatis mutandis* to cases involving allegations disclosing credible evidence of discrimination motivated in whole or in part by animus or prejudice against an individual's real or imputed sexual orientation or gender identity. As a consequence, the Committee of Ministers of the Council of Europe has affirmed that

*1. 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.*³⁵

21. The Committee of Ministers has also emphasized that: "2. 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."³⁶

22. As this Court has recently reiterated in its judgment in the case of *Identoba and Others v. Georgia*, the Contracting Parties' duty to "investigate the existence of a possible link between a discriminatory motive and the act of violence can fall under the procedural aspect of Article 3 of the Convention, but may also be seen to form part of the authorities' positive responsibilities under Article 14 of the Convention to secure the fundamental value enshrined in Article 3 without discrimination".³⁷

23. In *X. v. Turkey*, this Court found a violation of Article 14 of the Convention taken in conjunction with Article 3, when it held that the applicant in that case had suffered discrimination on the grounds of his sexual orientation, given that his homosexuality, as opposed to his need for protection, had been the main reason for placing him in solitary confinement for a total of over 8 months.³⁸

24. Furthermore, in *X. v. Turkey*, this Court reminded the authorities of their obligation, under Article 14 of the Convention taken in conjunction with Article 3, to take all possible measures to determine whether or not a discriminatory attitude had played any part in their decision to place the applicant in that case in solitary confinement (see, *mutandis mutandis*, *B.S. v. Spain*).³⁹ In its judgment in the case of *Zontul v. Greece*,⁴⁰ where the applicant had

³⁴ *Alekseyev v. Russia*, § 108. "Where a difference of treatment is based on sex or sexual orientation, the margin of appreciation afforded to the State is narrow, and in such situations the principle of proportionality does not only require that the measure chosen be generally adapted to the objective pursued; it must also be shown that it was necessary in the circumstances", *X v. Turkey*, § 50.

³⁵ 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 (Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies), Appendix to Recommendation CM/Rec(2010)5, I. Right to life, security and protection from violence - A. "Hate crimes" and other hate-motivated incidents, available at [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec\(2010\)5&Language=lanEnglish&Site=COE&BackColorInternet=BBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec(2010)5&Language=lanEnglish&Site=COE&BackColorInternet=BBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864).

³⁶ *Ibid*, § 2.

³⁷ *Identoba and Others v. Georgia*, § 63.

³⁸ *X v. Turkey*, §§ 56-58.

³⁹ *X v. Turkey*, § 55.

asserted that he had been raped because of his homosexuality,⁴¹ this Court set out the submissions of the third party intervener in the case emphasizing the Contracting Parties' obligation, particularly in cases of torture or other ill-treatment, to ensure the adoption and implementation of legislative measures that provide, *inter alia*, that discrimination on the grounds of sexual orientation and/or gender identity should be treated as an aggravating circumstance in the commission of the relevant offence/s.⁴² Eventually, however, in *Zontul v. Greece*, this Court did not pronounce itself on this question.⁴³

25. In its recent judgment in the case of *Identoba and Others v. Georgia*,⁴⁴ in the context of determining whether an effective investigation had been conducted into the incident from which the application in that case had arisen, this Court pronounced itself directly on the Contracting Parties' legal obligations to take all reasonable steps to identify whether or not homophobia or prejudice against one's real or imputed same-sex sexual orientation and/or gender identity or expression might have played a role in the infliction of treatment said to be in violation of the Convention.
26. In *Identoba and Others v. Georgia*, this Court considered that, in light of domestic criminal legislation expressly providing that discrimination on the grounds of sexual orientation and gender identity should be treated as an aggravating circumstance in the commission of an offence, it is "essential for the relevant domestic authorities to conduct the investigation in that specific context, taking all reasonable steps with the aim of unmasking the role of possible homophobic motives for the events in question". Further, this Court went on to hold that, "without such a strict approach from the law-enforcement authorities, prejudice-motivated crimes would unavoidably be treated on an equal footing with ordinary cases ... and the resultant indifference would be tantamount to official acquiescence to or even connivance with hate crimes".⁴⁵ In light of this, among other things, the Court went on to find a violation of the respondent State's positive obligations under Article 3 taken in conjunction with Article 14 of the Convention.⁴⁶
27. In light of the above, the interveners invite this Court in its determination of the present case, *a fortiori*, to consider the scope of Protocol 12, Article 1, which provides a general non-discrimination clause, thereby affording expanded protection (as compared to Article 14 of the Convention) in cases concerning, among others, discrimination "in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner".⁴⁷
28. In this context, the interveners consider that in assessing compliance with the Contracting Parties' obligation to conduct an effective investigation into allegations of police ill-treatment disclosing evidence of potential violations of the Convention, including in respect of discrimination on the grounds of one's sexual orientation, the Court would wish to have regard to specific provisions in domestic criminal legislation pertaining to sexual orientation as

⁴⁰ *Zontul v. Greece*, no. 12294/07, judgment, 17 January 2012.

⁴¹ *Ibid*, § 79. This Court did find that the applicant had been subjected to an act of torture by virtue of having been raped (§ 93) and the judgment mentions the fact that the report of the internal administrative inquiry conducted by the national authorities concluded, among other things, that the applicant had been "belittled" on the grounds of his homosexuality (§ 16); and that in 2008 Greece had adopted legislation through which bias against one's sexual orientation could be taken into account as an aggravating circumstance (§ 81).

⁴² *Ibid*, §§ 81-82.

⁴³ Cf., in respect of the absence of consideration given to the applicant's transgender identity in *Halat v. Turkey*, no. 23607/08, judgment, 8 November 2011 notwithstanding this Court's eventual finding in its judgment in that case of a violation of the procedural aspect of Article 3 of the Convention arising from the failures of the investigation of allegations of ill-treatment in police custody.

⁴⁴ *Identoba and Others v. Georgia*, §§ 75-78 and 80-81.

⁴⁵ *Ibid*, § 77.

⁴⁶ *Ibid*, § 78 and § 81.

⁴⁷ Protocol No. 12, Explanatory Memorandum, § 22.

a bias motive and aggravating circumstance.⁴⁸ These in turn may have a bearing on the scope of the procedural obligations under the Convention pursuant to Article 1 of Protocol 12.

29. Finally, the interveners consider that evidence of widespread discrimination motivated by animus and/or prejudice against people's real or imputed same-sex sexual orientation and/or their gender identity should,⁴⁹ in certain circumstances, be considered as a sufficient trigger for the Contracting Parties' obligation to investigate effectively whether or not homophobia or prejudice against one's real or imputed same-sex sexual orientation and/or gender identity or expression might have played a role in the infliction of treatment said to be in violation of the Convention.⁵⁰

⁴⁸ The Croatian Criminal Code, pursuant to an amendment that entered into force on 1 January 2013, defines as a hate crime, "a crime committed because of ... sexual orientation or gender identity of another person. Such actions will be taken as an aggravating circumstance if this law does not explicitly prescribe heavier punishment". Criminal Code, Article 87(20). See Human Rights Council, UPR: National report, UN Doc. A/HRC/WG.6/22/HRV/1 (9 February 2015), para. 84. Also see OSCE/ODIHR, LegislationOnline – Croatia: Hate crime laws. <http://legislationline.org/topics/country/37/topic/4/subtopic/79> (last accessed 2 June 2015).

⁴⁹ See the Appendix at pp. 9-10 below featuring the relevant excerpts from the FRA – European Union Agency for Fundamental Rights, EU LGBT survey - European Union lesbian, gay, bisexual and transgender survey - Main results, October 2014, available online at http://fra.europa.eu/sites/default/files/fra-eu-lgbt-survey-main-results_tk3113640enc_1.pdf.

⁵⁰ See, *mutatis mutandis*, *Mižigárová v. Slovakia*, no. 74832/01, judgment, 14 December 2010, where the Court, *inter alia*, stated, "[t]he Court notes with concern the contemporaneous reports documented at paragraphs 57 *et seq.* above which relate to allegations of police brutality towards Roma in Slovakia. In respect of persons of Roma origin, it would not exclude the possibility that in a particular case the existence of independent evidence of a systemic problem could, in the absence of any other evidence, be sufficient to alert the authorities to the possible existence of a racist motive", § 122.

**APPENDIX: FRA – European Union Agency for Fundamental Rights,
EU LGBT survey - European Union lesbian, gay, bisexual and transgender survey
Main results, October 2014**

Relevant excerpts available online at http://fra.europa.eu/sites/default/files/fra-eu-lgbt-survey-main-results_tk3113640enc_1.pdf.

“Looking at the results by country shows important differences in the percentages of respondents that said they have felt personally discriminated against or harassed in the last 12 months on the grounds of sexual orientation, ranging from around 30 % in Denmark and the Netherlands to around 60 % in Croatia and Lithuania. In 10 EU Member States and Croatia, more than half of respondents have felt discriminated against or harassed in the past year on the basis of their sexual orientation (Figure 2)”, p. 26.

“Furthermore, there are marked variations by country. Respondents who have been employed or in education, or who have accessed one of the mentioned goods and services, in the last year are most likely to say they have felt discriminated against in one or more of these situations in the past 12 months because of being LGBT in Lithuania (42 %), Croatia (41 %), Bulgaria (40 %) and Romania (39 %)”, p. 34.

“Of those respondents who visited a café, restaurant, bar or nightclub in the last year, about one in five (18 %) felt personally discriminated against because of being LGBT in these places in the year before the survey. Lesbian women (23 %), bisexual women (20 %) and transgender (19 %) respondents are more likely than men respondents to say they felt discriminated against at these locations during the last year because of being LGBT (Figure 17). In Bulgaria and Croatia, about three out of 10 respondents felt personally discriminated against because of being LGBT when at a restaurant, bar, café or nightclub in the last year, and in a further 14 EU Member States at least a fifth of survey participants have felt discriminated against in this situation in the last 12 months because of being LGBT. Respondents living in the Netherlands (12 %), Denmark and Sweden (both 13 %), the Czech Republic (14 %) and Belgium (15 %) are the least likely to say they have felt personally discriminated against when at a restaurant, bar, café or nightclub in the last year because of being LGBT”, and “One in eight (13 %) respondents who looked for a house or apartment to rent or buy in the year preceding the survey say they felt personally discriminated against because of being LGBT. Lesbian women and transgender respondents are around twice as likely as bisexual respondents to say they felt discriminated against in this way. About one in five respondents living in Croatia (19 %), Lithuania (18 %), Poland (18 %) and Romania (18 %), say they felt personally discriminated against when looking for a house or apartment to rent or buy in the last year because of being LGBT, compared with one in 20 in Denmark, the Netherlands and Sweden” p. 41.

“Breaking down the data by country indicates that, in all EU Member States and Croatia, at least four out of 10 of those respondents who experienced violence in the past year say that the last attack or threat of violence happened partly or entirely because they were perceived to be LGBT. This ranged from fewer than half of the respondents in Sweden (46 %), Finland (48 %) and Denmark (49 %) to almost seven out of 10 in Croatia (69 %), Malta and Bulgaria (both 68 %) (Figure 34)”, p. 57.

“Among the countries covered by the survey, respondents in Bulgaria (26 %), Croatia (27 %), Lithuania (26 %) and Malta (26 %) are almost twice as likely as those in France (15 %), Luxembourg (14 %) and Spain (15 %) to have experienced hate-motivated violence in the 12 months leading up to the survey (Figure 47)”, p. 71.

“Looking at these results by the respondent’s country of residence, the last hate-motivated harassment incident is most likely to have included only verbal insults in the Netherlands, Denmark, France and Sweden, and most likely to have involved both verbal and non-verbal insults in Lithuania, Estonia, Poland, Bulgaria and Croatia (Figure 50)”, p. 73.

“Three quarters of all respondents think it is rare for public figures in politics, business and sports to be open about being LGBT. This result is consistent across LGBT groups. At the country level, however, responses vary dramatically. Around eight in 10 respondents in Cyprus, Slovenia

and Croatia, for example, think it is very rare for public figures to be open about being LGBT in their country, compared with fewer than one in 10 respondents in Belgium, Denmark, Finland, Germany, the Netherlands and Sweden”, p. 85.

“At least half of the respondents in all EU Member States say they avoid holding hands with a same-sex partner for fear of being assaulted or harassed, ranging from 89 % of respondents in Croatia and Cyprus, and 87 % of respondents in Romania to 49 % of respondents in Denmark and 45 % of respondents in Spain”, p. 87.

“As shown in Figure 63, in Lithuania, Hungary, Croatia, Bulgaria, Poland and Romania, at least six out of 10 of all respondents say that they avoid certain places or locations for fear of being assaulted, threatened or harassed because of being LGBT. This is almost twice as many respondents as in Sweden, Denmark, Finland and Luxembourg, for example”, p. 88.

“Conversely, the results indicate that, overall, respondents in Bulgaria, Croatia, Cyprus, Greece, Ireland, Italy Latvia, Lithuania, Poland and Romania generally experience a social environment that is less inclusive towards LGBT people and where they are more likely to be victims of violence, harassment and discrimination”, p. 99.