

**THIRD PARTY INTERVENTION
IN THE EUROPEAN COURT OF HUMAN RIGHTS**

Application No. 12294/07

Between

Necati ZONTUL

Applicant

and

GREECE

Respondent

**WRITTEN COMMENTS
BY THE CENTER FOR JUSTICE AND ACCOUNTABILITY**

Pursuant to Rule 44(2) of the Rules of Court

5 July 2010

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I. INTRODUCTION

1. These written comments are submitted by the Center for Justice and Accountability (“CJA”) pursuant to leave granted by the President of the Grand Chamber of the European Court of Human Rights in accordance with Article 36 §2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“Convention”) and Rule 44 §2 of the Rules of the Court.¹
2. The present case raises critical questions regarding the absolute prohibition of torture and ill-treatment as well as State obligations to protect the rights of persons identifying as or perceived as lesbian, gay, bisexual, and transgender (“LGBT”) under Articles 3 and 14 of the Convention. Specifically, this case raises issues relating to the proper classification of sexual violence as torture, the equal application of human rights protections to LGBTs and the necessity of adequate sentencing for bias motivated violence against LGBTs.
3. International, regional and ad-hoc human rights bodies have acknowledged that rape is a particularly severe form of torture. Moreover, the definition of rape is not limited to non-consensual intercourse, but instead includes penetration with an object. Finally, United Nations treaty bodies as well as the jurisprudence of this Court have found that a single act may amount to torture and therefore a single act of rape may be properly classified as torture.
4. Second, this comment argues that although sexual orientation and gender identity are not explicitly protected by international covenants, international jurisprudence and policy has extended the application of human rights protections to individuals on these grounds. This trend was first recognized by the United Nations Human Rights Committee in *Toonen v. Australia*, and has been followed by regional human rights bodies and domestic courts. Several international declarations, most notably the general comments of the Committee Against Torture, explicitly state that the absolute prohibitions on torture and ill-treatment extend to instances of violence motivated by the sexual orientation or gender identity of the victims.
5. Finally, this submission argues that States have an affirmative duty to effectively prosecute and punish individuals who commit torture, and that this duty includes the proper investigation of any possible bias against the victim’s actual or perceived sexual orientation. The international community considers the discriminatory use of violence as an aggravating factor in determining whether an act is torture. Moreover, a survey of national legislation reflects an increasing global consensus that violence motivated by bias against sexual orientation warrants harsher sentencing for a crime.
6. This submission draws upon laws and jurisprudence from international, regional and national systems demonstrating the rights of LGBTs to be free from torture and ill-treatment as well as the affirmative obligation of States to protect these rights by adequately holding state and non-state actors accountable for torture and ill treatment.

I. INTEREST OF CJA

7. CJA is an international human rights organization based in the United States that is dedicated to deterring torture and other severe human rights abuses around the world. CJA uses litigation to hold perpetrators individually accountable for human rights abuses and works to advance survivors’ rights, develop human rights law and advance the rule of law in countries transitioning from periods of abuse.

¹ Pursuant to letter dated 14 June 2010 by the Registrar, Søren Nielsen.

CJA has extensive experience in international law and human rights and is the leading non-governmental organization to bring cases against individual human rights abusers in both the United States and Spain using the principle of universal jurisdiction. In addition, CJA has authored and signed several amicus briefs in cases involving human rights violations before U.S. courts and the Inter-American Court of Human Rights. CJA uses a survivor-centered approach to litigation, providing survivors of torture and ill-treatment with access to justice in both national and international fora.

II. DISCUSSION

8. This submission argues that:

- A. The definition of torture under the European Convention and other human rights doctrines includes sexual violence and rape with an object.
- B. Human rights protections, and specifically the absolute prohibition of torture and ill-treatment, apply to LGBTs.
- C. Trends in international and national systems indicate that violence against individuals on account of their sexual orientation must be treated as an aggravating factor in determining the appropriate sentence for a crime.

A. Classification of rape as torture

i. An act of rape can amount to torture *per se*

9. This Court distinguishes torture from inhuman and degrading treatment under Article 3 of the Convention, attaching the “special stigma” of torture to acts of “deliberate inhuman treatment causing very serious and cruel suffering.”² In accordance with this distinction, this Court declared in *Aydin v. Turkey* that “[r]ape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence.”³
10. The ad-hoc tribunals of Rwanda and the former Yugoslavia have developed extensive jurisprudence recognizing rape as a form of torture. The Appeals Chamber for the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v. Kunarac et al.* found that “some acts establish *per se* the suffering of those upon whom they were inflicted. Rape is obviously such an act. . . . Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture.”⁴ The court added that the “[s]evere pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.”⁵

² See *Ireland v. the United Kingdom*, 18 January 1978, § 167, Series A, no. 25; *Aksoy v. Turkey*, 18 December 1996, §63, *Reports of Judgments and Decisions* 1996-VI.

³ *Aydin v. Turkey*, 25 September 1997, § 83, *Reports of Judgments and Decisions* 1997-VI.

⁴ *Prosecutor v. Kunarac et al.* (IT-96-23 & 23/1), Appeals Chamber, June 12, 2002, para. 150.

⁵ *Ibid.*, at para. 51; see also *Prosecutor v. Jean-Paul Akayesu* (ICTR-96-4-T), ICTR Trial Chambers, 2 September 1998, paras. 597, 687.

ii. Definition of rape includes penetration with an object

11. In *Prosecutor v. Jean Paul Akayesu*, the chambers of the ICTR defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”⁶ In *Kunarac*, the ICTY held that the act of rape includes penetration of the vagina or anus by “the penis of the perpetrator or any other object used by the perpetrator” under coercive or forceful circumstances.⁷ Accordingly, the forcible or coercive insertion of an object into an individual’s anus constitutes rape under both definitions. In *Prosecutor v. Musema*, the ICTR found that “variations on the acts of rape may include acts which involve the insertions of objects and/or the use of bodily orifices not considered to be intrinsically sexual.”⁸ The ICTY in *Prosecutor v. Furundžija* noted that “most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus.”⁹
12. The Inter-American Court of Human Rights has also categorized rape with an object as a form of torture. In *Penal Miguel Castro Castro v. Peru*, the Court reviewed jurisprudence arising from international and comparative criminal law and determined “[s]exual rape must also be understood as act of vaginal or anal penetration, without the victim’s consent, through the use of other parts of the aggressor’s body or objects, as well as oral penetration with the virile member.”¹⁰ In this case, the Court found that a finger vaginal inspection of an inmate carried out by several hooded prison guards in an abrupt manner fit the definition of rape and that the conduct was sufficiently severe to constitute torture.¹¹

iii. A single act of rape may amount to torture

13. Under the United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment (“CAT”), a single act of rape may amount to torture. Article 1 of the CAT defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person....”¹² The *travaux préparatoires* and comments on the original draft of the CAT reveal a suggestion by the United Kingdom to include the element of “systematic application” within the definition of torture, proposing that torture require more than one act.¹³ The notable absence of such language in the draft adopted by the United Nations General Assembly in December 1984 indicates that even a single, isolated act can be considered torture.
14. This Court has also concluded that a single act can amount to torture. In *Aydin*, this Court found that the accumulation of physical and mental violence, including rape, inflicted on the applicant amounted

⁶ *Akayesu*, *supra* note 5, at para. 598.

⁷ *Kunarac*, *supra* note 4, at para. 127.

⁸ *Prosecutor v. Musema* (ICTR-96-13-T), ICTR Trial Chambers, 27 January 2000, para. 221.

⁹ *Prosecutor v. Furundžija* (IT-95-17/1-T), ICTY Trial Chamber, 10 December 1998, para. 181.

¹⁰ Inter-American Court of Human Rights, *Miguel Castro Castro v. Peru*, Judgment of 25 Nov. 2006, Series C, No. 160, para. 310.

¹¹ *Ibid.*, at 312.

¹² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, 10 December 1984, 1465 U.N.T.S. 85.

¹³ Secretary General in implementation of the Commission on Human Rights resolution 18, *Addendum to the Question of the Human Rights of all Persons Subjected to Any Form of Detention or Imprisonment, in Particular: (a) Draft Convention on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, (Thirty-Fifth session)*, E/CN.4/1314/Add.1, 18 January 1979, at section II, paras. 1-2 (The UK Proposed “that the words ‘systematically and’ should be inserted before ‘intentionally’ in the second line of paragraph 1.”)

to a breach of Article 3 of the Convention. However, the Court added that either of the grounds, taken separately, would be torture, thereby recognizing that a single act of rape can amount to torture.¹⁴

B. Human rights protections, including the absolute prohibition of torture and ill treatment, apply to LGBTs

15. The European Convention on Human Rights, the International Covenant on Civil and Political Rights (“ICCPR”), and the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) do not explicitly include sexual minorities as a protected group. At the time these documents were drafted, the rights of sexual minorities were under-acknowledged. As recognition of sexual orientation and gender identity status has expanded, and evidence of targeted attacks and discrimination of sexual minorities has become indisputable, courts and international bodies have extended human rights protections to LGBT persons.

i. International and regional jurisprudence extending human rights to LGBTs

16. In *Toonen v. Australia*,¹⁵ the United Nations Human Rights Committee considered whether laws criminalizing homosexuality violated the applicant’s right to privacy and equal protection of the law, articles 17 and 26 of the ICCPR respectively. In finding that the laws in question did in fact contravene the ICCPR, the Committee reasoned that the protections of the ICCPR apply to acts of discrimination based on sexual status and that the term “sex” in Articles 2 [States must respect and ensure individual rights regardless of distinction of any kind] and 26 [individuals are entitled to equal protection of the law, regardless of distinction] of the ICCPR must be taken to include sexual orientation.¹⁶ *Toonen* is widely considered a landmark decision establishing the application of human rights protections to sexual minorities.

17. The European Commission of Human Rights acknowledged the *Toonen* decision in the case of *Sutherland v. United Kingdom*. The applicant in *Sutherland*, a 17 year-old homosexual male, argued that a law maintaining a higher age of consent for homosexual acts than for heterosexual acts violates the applicant’s right to privacy and right to be free from discrimination, provided for by Article 8 and Article 14 of the Convention respectively. The Commission did not feel it necessary to classify the appropriate grounds for discrimination. Instead, the Commission held that the law violates Articles 8 and 14 of the Convention regardless of whether discrimination on sexual orientation is a difference of treatment based on “sex” or “other status.”¹⁷ This Court has consistently upheld the ruling in *Sutherland* that human rights protections extend to sexual minorities.¹⁸

ii. International treaties, resolutions, and declarations extending human rights to LGBTs

18. International bodies have also recognized that human rights protections should be extended to sexual minorities. In 1997, the Treaty of Amsterdam amended the treaties establishing the European Union and European Community to explicitly prohibit discrimination based on, *inter alia*, sexual orientation

¹⁴ *Aydin*, *supra* note 3, at para. 86.

¹⁵ Human Rights Committee, *Toonen v. Australia* (Communication No. 488/1992) (31 March 1994).

¹⁶ *Ibid*, at §8.7.

¹⁷ *Sutherland v. the United Kingdom*, no. 25186/94, Commission decision of 1 July 1997, Decisions and Reports 31, §51. Following this decision, the United Kingdom enacted legislation equalizing the age of consent between homosexual and heterosexual acts. This Court acknowledged that the legislation was a satisfaction of the remedy and the Court struck the case from its list. *Sutherland v. the United Kingdom* (striking out) [GC], no. 25186/94, 27 March 2001.

¹⁸ *See, e.g., S.L. v. Austria*, no. 45330/99, §28, ECHR 2003-I (considering discrimination based on sexual orientation as an appropriate ground for violations of Articles 8 and 14).

and to affirmatively combat discrimination based on this ground.¹⁹ Presently, Article 13 of the Treaty on European Union and of the Treaty Establishing the European Community recognizes the rights of sexual minorities to be free from discrimination.²⁰ In addition, several resolutions of the European Parliament passed in 2006 and 2007 invoked Article 13 as part of its expressions of concern regarding increased racist and homophobic violence in Europe.²¹

19. In 2008, the Organization of American States (OAS) unanimously approved a resolution recognizing that human rights protections apply to individuals subject to acts of violence and related human rights violations on account of their sexual orientation and gender identity.²² That same year, States from all regional groups of the United Nations, including the European Union, issued a Joint Statement on Sexual Orientation, Gender Identity and Human Rights to the General Assembly affirming the application of existing human rights standards to sexual minorities. The Joint Statement, to which Greece is a signatory, condemned “human rights violations based on sexual orientation or gender identity wherever they occur, in particularly ... the practice of torture and other cruel, inhuman and degrading treatment or punishment [on these grounds].”²³ The Joint Statement also recognized that human rights protections apply equally to every person, regardless of sexual orientation, and urged States to “ensure that human rights violations based on sexual orientation or gender identity are investigated and perpetrators held accountable and brought to justice.”²⁴
20. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity aim to codify the application of international human rights norms to sexual minorities. In particular, Principle 5 extends ‘The Right to Security of the Person’ to “[e]veryone, regardless of sexual orientation or gender identity”, and Principle 10 applies ‘The Right to Freedom from Torture and Cruel, Inhuman or Degrading Treatment or Punishment’ to everyone, “including for reasons relating to sexual orientation or gender identity.”²⁵ In 2009, the Committee on Economic, Social, and Cultural Rights adopted language of the Yogyakarta Principles in its General Comment, number 20, on non discrimination in economic, social and cultural rights.²⁶ In addition, the European Parliament’s 2007 report on Human Rights in the World voiced support for the Principles.²⁷
21. Moreover, numerous United Nations procedures recognize the escalating violence against individuals based on their sexual orientation and acknowledge the application of human rights protections to these

¹⁹ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, para. 7, 2 October 1997, 1997 O.J. (C 340).

²⁰ Consolidated Version of the Treaty Establishing the European Community, art. 13, 2006 O.J. (C 321).

²¹ European Parliament resolution on the increase in racist and homophobic violence in Europe, OJ C 300 E, 9.12.2006, p. 491; *see also* European Parliament resolution on homophobia in Europe, OJ C 287 E, 24.11.2006, p. 179, §2 (“[H]aving regard to Article 13 of the Treaty establishing the European Community...[The European Parliament] [c]alls on Member States to ensure that LGBT people are protected from homophobic hate speech and violence and ensure that same-sex partners enjoy the same respect, dignity and protection as the rest of society.”); *see also* European Parliament resolution of 26 April 2007 on homophobia in Europe, OJ C 74 E, 20.3.2008, p. 776, §3.

²² Organization of American States, *Human Rights, Sexual Orientation, and Gender Identity*, 3 June 2008, AG/RES. 2435 (XXXVIII-O/08).

²³ Joint statement on sexual orientation, gender identity and human rights at United Nations, GAOR, 63rd Session, U.N. Doc. A/63/635 at § 6, 22 December 2008.

²⁴ *Ibid.*, at § 12.

²⁵ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, pp. 13,17, March 2007.

²⁶ Committee on Economic, Social, and Cultural Rights, General Comment 20. Art 2(2) (Forty-second session, 2009), U.N. Doc E/C.12/GC/20, §32.

²⁷ European Union: European Parliament, *European Parliament resolution on the Annual Report on Human Rights in the World 2007 and the European Union's Policy on the Matter (2007/2274(INI))*, 8 May 2008, P6_TA(2008)0193 at § 142.

individuals. The United Nations Working Group on Arbitrary Detention held that Articles 2 and 26 of the ICCPR, guaranteeing equality before the law and the right to equal legal protection against all forms of discrimination, apply to sexual minorities and that the arbitrary detention of an individual solely on the basis of their sexual orientation violates these articles.²⁸ The United Nations Special Rapporteur on torture spoke out against the torture and discrimination of sexual minorities and expressed concern over information received that rape of men or male-to female transsexuals was treated as “sexual assault,” a designation attaching a lighter penalty than the more serious crime of rape in a number of countries.²⁹ The Special Rapporteur further noted that “members of sexual minorities are a particularly vulnerable group with respect to torture” and that “the single most important factor in the proliferation and continuation of torture is the persistence of impunity, be it of a *de jure* or *de facto* nature.”³⁰

22. The United Nations Committee Against Torture, the implementing body for the CAT, has also acknowledged the vulnerability of LGBTs to violence and State obligations to prevent and deter such violence. In a general comment issued in 2008, the Committee underscored the non-derogable nature of the prohibition against torture, regardless of an individual’s distinguishing characteristics.³¹ The Committee stressed that States’ laws implementing their obligations under the CAT must be applied, in practice, to all persons “regardless of ... sexual orientation.”³²

C. International and national trends indicate that States must treat crimes motivated by bias relating to sexual orientation as an aggravating circumstance

i. International treaties, procedure and jurisprudence

23. This Court has held that Article 3 of the Convention requires States to take measures to ensure that individuals are not subject to torture or ill-treatment.³³ The United Nations Human Rights Committee has also identified an affirmative duty for State parties to the ICCPR to effectively prosecute and punish individuals who commit violence, explaining that “it is the duty of the State Party to afford everyone protection through legislative and other measures as may be necessary against acts prohibited in Article 7 [prohibiting torture and ill-treatment], whether inflicted by people acting in their official capacity, outside of their official capacity or in a private capacity....”³⁴ The Committee has also urged States to prohibit discrimination based on sexual orientation.³⁵
24. The Committee Against Torture expressed that “the discriminatory use of mental or physical violence or abuse is an important factor in determining whether an act constitutes torture.”³⁶ The Committee

²⁸ Working Group on Arbitrary Detention, Opinion 7/2002 (Egypt), E/CN.4/2003/8/Add.1, p. 73, para. 28, January 24, 2003.

²⁹ UN General Assembly, *Torture and other cruel, inhuman or degrading treatment or punishment: Note by the Secretary-General*, para. 18, U.N. Doc A/56/156 (3 July 2001).

³⁰ *Ibid* at para. 19.

³¹ This Court has affirmed that Article 3 of the Convention is absolute and makes no provision for derogation or exception, irrespective of the victim’s conduct. See *Selmouni v. France* [GC], no. 25803/94, § 95, 28 July 1999, ECHR 1999-V.

³² UN Committee Against Torture, General Comment 2, *Implementation of Article 2 by States Parties*, para. 21, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (November 2007).

³³ In *A v. the United Kingdom*, this Court found unanimously that the United Kingdom had violated Article 3 of the Convention by failing to provide sufficient protection to a nine-year-old boy beaten by his stepfather with a garden cane. *A v. the United Kingdom*, 23 September 1998, § 22, Reports of Judgments and Decisions 1998-VI.

³⁴ Human Rights Committee (HRC), General Comment 20, Art. 7 at 30 (Forty-fourth session, 1992) Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

³⁵ HRC, Concluding Observations: Poland, at 23 (Sixty-sixth session, 1999) U.N. Doc. CCPR/C/79/Add.110 (1999).

³⁶ Committee Against Torture, General Comment 2, *supra* note 32, at para. 20.

stressed that “[t]he protection of certain minority or marginalized individuals or populations at risk of torture is a part of the obligation to prevent torture or ill-treatment”³⁷

25. Indeed, this Court has found that a State’s failure to properly investigate violence motivated by a victim’s distinguishing characteristic is a violation of Article 14 [discrimination] taken in conjunction with the positive obligations under Article 3 [torture] of the Convention. In *Šečić v. Croatia*, this Court held that:

[t]reating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be turning 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.³⁸

In *Bekos v. Greece*, two males of Roma descent were arrested and taken into custody, where they were subject to interrogation and severe beatings with a truncheon. In addition, one applicant was raped with a truncheon and the other applicant was threatened with the same. This Court found that the alleged facts fell within the scope of Article 3 of the Convention and the failure of authorities to investigate the racial motivation behind the crimes amounted to a violation of Article 14 in conjunction with Article 3.³⁹ While these cases concern racially biased discrimination, this Court has found that Article 14 prohibits discrimination based on sexual orientation.⁴⁰

26. Where the international community has expressed the importance of considering the discriminatory use of violence as an aggravating factor in determining whether an act is torture, States have formalized this commitment to human rights by codifying their consideration of bias-motivation as an aggravating factor in various pieces of national law.

ii. Relevant legislation from State signatories to the European Convention on Human Rights⁴¹

27. Recently, the Committee of Ministers of the Council of Europe adopted recommendations concerning the protection of LGBTs, recommending that Member States “ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity...”⁴² The recommendation instructs Member States to effectively investigate allegations of bias-motivation on account of sexual orientation, especially when the violence is committed by a State actor, and to ensure that “when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance.”⁴³
28. The emergence of similar provisions in support of imposing aggravated sentences for bias-motivated offenses against LGBTs demonstrates widespread support for extending human rights norms to sexual minorities and is a powerful tool in the assessment of a country’s *de jure* and *de facto* commitment to

³⁷ *Ibid*, at 21.

³⁸ *Šečić v. Croatia*, no. 40116/02, §67, 31 May 2007, ECHR 2007-VI.

³⁹ *Bekos and Koutropoulos v. Greece*, no. 15250/02, §§ 69-75, ECHR 2005-XIII (extracts).

⁴⁰ See discussion, *supra*, at para. 17.

⁴¹ See also Addendum 1 (attached) for a legislative survey on aggravated sentences outside of Europe.

⁴² Council of Europe Committee of Ministers, *Recommendation to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity*, ¶ 2 (Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers’ Deputies), CM/Rec(2010)5.

⁴³ *Ibid*, at Appendix to Recommendation CM/Rec(2010)5, ¶¶ 1-2.

protecting LGBTs. While great variation exists among cultures and legislative models across international jurisdictions, two common elements are present: 1) legislation seeks to specifically and publicly target crime motivated by, grounded in, or aggravated by bias on account of an individual's sexual orientation; and 2) legislation seeks to deter such crimes by imposing heavier penalties for hate crimes than for parallel crimes not motivated by bias. The legislation in these States is notable not only for its presence, but also for its implementation and enforcement in practice.

a. France⁴⁴

29. Law 2003-239 of 18 March 2003 created articles 132-77 of the French Penal Code, which stipulate that a crime motivated by the victim's sexual orientation would constitute an aggravating circumstance.⁴⁵ Homophobic motivation is considered an aggravating factor for all offenses.⁴⁶ In April 2006, for example, two gay men waiting at a bus stop were assaulted by two men passing by in a car. Upon arrest, the attackers expressed the homophobic motivation behind the attack. The offenders received one-year prison sentences and were forced to pay compensatory damages to the victims.⁴⁷

b. United Kingdom

30. The Criminal Justice Act of 2003 provides for enhanced sentencing penalties for crimes related to sexual orientation.⁴⁸ Article 146 of the Act offers that if an offense is "motivated (wholly or partly) by hostility towards persons who are of a particular orientation ... then the court must treat the fact that the offense was committed in any of those circumstances as an aggravating fact, and must state in open court that the offense was committed in such circumstances."⁴⁹ The Crown Prosecution Service (CPS) has taken steps to encourage and improve the process of prosecuting homophobic hate crimes. A 2007 CPS report, "Guidance on Prosecuting Cases of Homophobic and Transphobic Crime," offers that

[p]rejudice, discrimination or hatred of members of any part of our community based on their sexual orientation or gender identity have no place in a civilized society; any such prejudice, discrimination or hate that shows itself in the commission of crime must be thoroughly and properly investigated and firmly and rigorously prosecuted in the courts. A clear message must be sent so that those who commit such crimes realize that they will be dealt with firmly under the criminal law: the CPS has a vital role to play in delivering this aim....⁵⁰

In June 2006, two men were sentenced to life imprisonment for beating a bartender to death. The verdict is considered the first time that motivation on the basis of sexual orientation bias was treated as an aggravating factor during sentencing in the United Kingdom.⁵¹

⁴⁴ France, like Greece, is a civil law country and member of the Council of Europe and European Union.

⁴⁵ Law No. 2003-239 of 18 March 2003, creating Criminal Code of France, Article 132-77.

⁴⁶ European Union Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis*, 121-122 (2008).

⁴⁷ Anna Crickley, Office of OSCE on Combating Racism, Xenophobia and Discrimination, Remarks at International Conference on LGBT Human Rights (July 26-29, 2006); Office for Democratic Institutions and Human Rights, *Challenges and Responses to Hate-Motivated Incidents in the OSCE Region* (2006).

⁴⁸ United Kingdom Criminal Justice Act 2003, c. 1 s. 146.

⁴⁹ Michael McClintock & Paul LeGendre, *Overview Hate Crime Report Card*, 37 (Human Rights First 2007).

⁵⁰ Human Rights First, *Violence Based on Sexual Orientation and Gender Identity Bias* (2008) 11-12.

⁵¹ Nigel Morris & Genevieve Roberts, *Homophobic killers jailed as hate crimes soar*, *The Independent* (London), 17 June 2006.

c. Croatia⁵²

31. On June 9, 2006, the Croatian parliament adopted an amendment to Article 89 of the Criminal Code, defining a 'hate crime' as "any criminal act according to the Criminal Code, committed by reasons of hatred toward a person on the basis of his/her ... sexual orientation..."⁵³ Croatian officials have confirmed that this provision allows for enhanced penalties during the sentencing stage for all offenses that meet the definition of a hate crime.⁵⁴ In February 2008, Josip Šitum was the first person to be found guilty on attempted assault and hate crime charges for throwing Molotov cocktails at homosexuals during the Zagreb Pride parade in the summer of 2007. He was sentenced to fourteen months imprisonment and fourteen months mandatory psychiatric treatment. A statement by Zagreb Pride called Šitum's sentence "a great turning point for the entire [LGBT community] and our position in society because it is the first ruling for a crime conditioned by hate based on sexual orientation."⁵⁵

d. Sweden⁵⁶

32. Chapter 29 Section 2(7) of Sweden's Criminal Code enables courts to take into account the homophobic motives of a perpetrator as an aggravating circumstance in sentencing all crimes.⁵⁷ Swedish courts have found homophobic motivations to be aggravating factors in sentencing in numerous cases. In April 2005, for example, two men had their prison sentences increased for an attack on a lesbian couple when the Court of Appeal for the Regions of Skåne and Blekinge considered the homophobic nature of the assault as a statutory aggravating factor.⁵⁸ In May 2005, the District Court of Kalmar sentenced a student to three months in prison for an assault on an openly gay classmate, specifically taking into account the crime's homophobic nature.⁵⁹ The District Court of Luleå, ruling on 31 January 2006, took into special account two arsonists' homophobic intentions as aggravating circumstances during sentencing. The men had thrown fire bombs into a building used by the local Swedish Federation for Lesbian, Gay and Transgender Rights in the northern town of Piteå. Both were convicted and sentenced to four and half years in prison upon consideration of the aggravating factors of their offenses.⁶⁰

e. Romania⁶¹

33. As of 2006, the Romanian Penal Code has defined aggravating circumstances as applying to those offenses committed on the grounds of, *inter alia*, sexual orientation.⁶² Homophobic motivation is

⁵² Croatia, like Greece, is a civil law country and member of the Council of Europe and European Union.

⁵³ Daniela Petkovic, Ministry of the Interior of the Republic of Croatia, Remarks on Participating and implementing LEOP on CHC in Croatia (Nov. 20-21, 2006), *located in* Meeting on Best Practices in Combating Anti-Semitism.

⁵⁴ Human Rights First, *Hate Crime Report Card - Croatia* (2008).

⁵⁵ Rex Wockner, *Hate Crime Conviction in Zagreb Crime Incident*, SF Bay Times, March 6, 2008.

⁵⁶ Sweden, like Greece, is a civil law country and member of the Council of Europe and European Union.

⁵⁷ Law 2003:408 [Sweden] entered into force on 1 July 2003; *See also* ILGA-Europe, *Laws against homophobic hate crime and hate speech in Europe* (2009) (attached at Addendum 2).

⁵⁸ Court of Appeal for the Regions of Skåne and Blekinge, ruling 25 April 2005 in Case No. B 463-04, *available in* Office of the Ombudsman Against Discrimination on Grounds of Sexual Orientation, *Criminal Law – Assault and Battery – Hate Crimes Legislation – Aggravating Circumstances* (2005).

⁵⁹ District Court of Kalmar, ruling 26 May 2005 in Case No. B 1621-05, *available in* Office of the Ombudsman Against Discrimination on Grounds of Sexual Orientation, *Criminal Law – Assault and Battery – Hate Crimes Legislation – Aggravating Circumstances* (2005).

⁶⁰ District Court of Luleå, ruling 31 January 2006 in case no B 2737-05, *available in* Office of the Ombudsman Against Discrimination on Grounds of Sexual Orientation, *Criminal Law – Hate Crime – Arson – Homophobia as Aggravating Circumstance* (2006).

⁶¹ Romania, like Greece, is a civil law country and member of the Council of Europe and European Union.

⁶² Art. 75, C. Pen [penal code of Romania]; *See also* ILGA-Europe, *supra* note 57 (attached at Addendum 2).

considered an aggravating factor in common crimes.⁶³ Following passage of the 2006 legislation amending the Penal Code, Romania has been accredited with making “exemplary progress in combating rights abuses based on sexual orientation.”⁶⁴

34. Although Greece recently enacted similar legislation in 2008, Law 3719/2008,⁶⁵ it has not effectively implemented efforts to punish offenses committed with sexual orientation bias motivation. As recently as 2009 and following the enactment of Law 3719/2008, sixty-four percent of Greeks still considered bias on the grounds of sexual orientation in their country to be “fairly widespread” or “very widespread.”⁶⁶ Sixty percent continue to believe that not enough is being done in their country to fight discrimination.⁶⁷ Sexual orientation bias continues to exist in Greek society and, while the passage of Law 3719/2008 is an important step, it is clear that laws are only effective when enforced.
35. Laws that treat bias-motivated violence as an aggravating circumstance in sentencing provide a framework for law enforcement’s response to such crimes, with penalties that serve as deterrents and emphasize denunciation. Hate crime laws are “a simple acknowledgement of the greater seriousness of crimes motivated by racial, religious, or other hatred that harm whole communities.”⁶⁸ These laws and the understanding of hatred as an aggravating factor in sentencing are “especially important where prejudice dominates local government structure, in violation of national laws and policies.”⁶⁹ The above survey of laws demonstrates European States’ legal and practical commitment to the protection of sexual minorities, and illustrates the widespread recognition of human rights protections for sexual minorities.

III. CONCLUSION

36. The commentary above demonstrates the increasingly broad recognition of the special need of the LGBT community for human rights protections. International bodies, diverse national legislatures and a variety of courts and tribunals have articulated States’ responsibilities to extend protection against torture and ill-treatment to LGBTs and to provide adequate modes of redress in the event of such violations. Adopting and applying legislation that assigns aggravating circumstances to hate crimes motivated by bias against sexual orientation or gender identity is a crucial element in efforts to bring perpetrators to justice, educate the public, and advance the rule of law. Legislation must, however, be paired with effective and diligent enforcement if it is to serve the LGBT population it was designed to protect. The international community and the courts it has charged with upholding justice recognize State responsibility to respond to the needs of vulnerable minorities, including the responsibility to prevent and properly prosecute torture, ill-treatment and discrimination against sexual orientation or gender identity.

⁶³ European Union Agency for Fundamental Rights, *supra* note 46.

⁶⁴ Human Rights Watch, ‘*Hall of Shame*’ Shows Reach of Homophobia, 16 May 2006, available at www.hrw.org.

⁶⁵ N. 3719/2008 Ar. 23 (1) [Greece]. Article 23 of the 2008 Law 3719/2008 states, “At the end of Paragraph 3 of Article 79 of the Penal Code, (p.d.283/1985, FEK 106 A), the following is added: ‘the commission of an act out of ethnic, racial, religious hatred or hatred due to the different sexual orientation of the victim constitutes an aggravating circumstance.’”

⁶⁶ Eurobarometer Survey for the European Commission, *Discrimination in the E.U. 2009: Results for Greece*, November 2009.

⁶⁷ *Ibid.*

⁶⁸ McClintock, *supra* note 49, at 33.

⁶⁹ *Ibid* at 9.