

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Maxim Grigoryevich Lapunov against Russian Federation

(Application no. 28834/19)

WRITTEN COMMENTS

Submitted jointly by

The AIRE Centre

FIDH

ILGA-Europe

ICJ

REDRESS

16 April 2020

By mail and fax

I. Introduction

1. These written comments are submitted jointly by the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), the Advice on Individual Rights in Europe (The AIRE Centre), Fédération Internationale des ligues des Droits de l'Homme (FIDH), the International Commission of Jurists (ICJ) and REDRESS (collectively, "Interveners"), with the leave of the Court under Rule 44 § 3 of the Rules of Court, granted on 5 March 2020. The Interveners submit the following:
 - a) Under international jurisprudence, in determining whether the threshold for torture or other prohibited ill-treatment has been attained, it is relevant to consider the actual or imputed sexual orientation, gender identity and/or expression and sex characteristics (SOGIESC) of the victim. Specifically, under the European Convention of Human Rights (ECHR), discrimination against lesbian, gay bisexual, transgender or intersex (LGBTI) persons may indicate a particular motive or intention, which is critical to assess if the treatment in question meets the ECHR Article 3 threshold.
 - b) The Contracting Parties have a positive obligation to protect persons under their jurisdiction from violence and harassment motivated by prejudice and hatred against their real or imputed SOGIESC, including the obligation to prevent, investigate, prosecute, punish and remedy such acts. In this context, Contracting Parties have the additional procedural obligation to take all reasonable steps to establish whether any hatred or prejudice connected to a protected characteristic may have played a role in the alleged violation.
 - c) The following factors are crucial for the Court's determination of the present case: (i) widespread discriminatory laws and practices against LGBTI people in Russia; (ii) the nature and prevalence of State-sanctioned anti-LGBTI violence; (iii) the failure of Russia's central authorities to effectively investigate such acts, including the systematic violence perpetrated against the LGBTI community in Chechnya in 2017.

II. ***The actual or imputed SOGIESC of the victim of violence should be taken into account in the assessment of Article 3 violations***

A. The Court's case-law

2. The following paragraphs highlight the Court's assessment of torture and ill-treatment in circumstances where discrimination or prejudice underpins the violence against LGBTI persons. In the context of discrimination based on one's actual or imputed SOGIESC, acts that in isolation would not have reached the minimum level of severity for an ECHR Article 3 violation may qualify as torture or ill-treatment.
3. The Court has acknowledged that the threshold for an Article 3 violation is relative;¹ it depends on all the circumstances of the case, including the personal characteristics of the victim, such as sex, age and state of health, and whether the victim was in a vulnerable situation.² The severity of ill-treatment also depends on the nature and context of the treatment or punishment in question, such as an atmosphere of heightened tension and emotions,³ the manner and method of its execution,⁴ its purpose and the underlying intention or motivation.⁵ Each of these factors is capable of carrying significant weight.⁶ Further, ill-treatment is not limited to physical acts; rather, it covers the infliction of psychological suffering through, *inter alia*, "feelings of fear, anguish and inferiority capable of humiliating and debasing".⁷
4. In light of the above, particular circumstances, which may heighten the risk of being exposed to discrimination, violence and abuse, can, in turn, cause the treatment of the victim to attain a minimum level of severity. For example, in *Milanović v. Serbia*, in finding a violation of Article 3 in conjunction with Article 14,⁸ the Court took into account the fact that the applicant was a "member of a vulnerable religious minority" and was being systematically targeted. In *Zontul v. Greece*, the Court found that the rape of a prisoner by a State agent – combining the infliction of bodily harm, damage to the health of a person placed under the authority of the State and unlawful abuse of the prisoner's sexual dignity – must be considered as a particularly serious and heinous form of ill-treatment, "given the ease with which the aggressor can abuse the vulnerability and the fragility of his victim."⁹
5. In the case of *Selmouni v. France*, the Court recalled that certain acts that were classified in the past as "inhuman and degrading treatment", as opposed to "torture", could be classified differently in the future.¹⁰ This is

¹ *Ireland v. United Kingdom*, no. 5310/71, 18 January 1978, Series A no. 25, § 162.

² *Khlaifia and Others v. Italy*, no. 16483/12, §160, with further references.

³ *Soering v. the United Kingdom*, no. 14038/88, § 100.

⁴ *Soering v. the United Kingdom*, no. 14038/88, § 100.

⁵ *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 117, *Abdu v. Bulgaria*, no. 26827/08, § 36.

⁶ *Nicolae Virgiliu Tănase v. Romania* [GC], § 121. It may well be sufficient for a finding of an Article 3 violation that the victim is humiliated in his or her own eyes, even if not in the eyes of others. *Nicolae Virgiliu Tănase v. Romania* [GC], §§ 116-118.

⁷ *Identoba and Others v. Georgia*, no. 73235/12, § 65, further citing *Gäfgen v. Germany* [GC], no. 22978/05, § 103, and *Eremia v. the Republic of Moldova*, no 3564/11. § 54. See also *Zontul v. Greece*, no 12294/07, § 88 and 89.

⁸ *Milanović v. Serbia*, no. 44614/07 § 89. Similarly, in *Okkali v. Turkey*, the Court regretted that the authorities and the Respondent State had not referred to the particular seriousness of the impugned act on account of the victim's age and noted that the authorities "could have been expected to regard the applicant's vulnerability as an aggravating factor." *Okkali v. Turkey*, no. 52067/99, § 70.

⁹ *Zontul v. Greece*, no 12294/07, § 88.

¹⁰ *Selmouni v. France* [GC], no. 25803/94, § 101.

because “the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.”¹¹

6. In other cases, the Court held that the threshold for finding an Article 3 violation in cases of ill-treatment with racist or discriminatory undertones against ethnic¹² or other minorities was met. In the *East African Asians case*, the European Commission on Human Rights accepted that discrimination based on race could, in certain circumstances, of itself amount to “degrading treatment” within the meaning of Article 3,¹³ emphasising that special importance should be attached to such discrimination as an affront to human dignity.¹⁴ Similarly, in *Cyprus v. Turkey*, the Court concluded that the discriminatory treatment of the Kapras Greek Cypriot community, which could only be explained by their ethnic origin, race and religion, amounted to degrading treatment that had attained the level of severity for an Article 3 violation.¹⁵ In a more recent case, the Court found an Article 3 violation, in particular, because “the infringement of human dignity [was] constituted by the presumed racial motive for the violence”.¹⁶ Discriminatory remarks and racist insults must be considered, at the very least, as an aggravating factor when considering a given instance of ill-treatment in the light of the Article 3 case law.¹⁷
7. The Interveners invite the Court to consider these principles when assessing prejudicial ill-treatment perpetrated against LGBTI persons, given that SOGIESC are the most basic components of self-determination and fundamental facets of an individual’s identity and awareness.¹⁸ The Court has stressed that discrimination based on sexual orientation is as serious as discrimination based on “race, origin or colour”.¹⁹ Furthermore, the Court has acknowledged that LGBTI persons may constitute vulnerable groups,²⁰ and has not excluded the possibility that treatment that is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority could, in principle, fall within the scope of treatment prohibited by Article 3.²¹
8. In *X v Turkey*, the Court found that the applicant had suffered discrimination on the basis of his sexual orientation, which had been the main reason for keeping him in solitary confinement.²² Further, in *O.M. v. Hungary*, the Court found a violation of Article 5(1) because the authorities ordered detention without considering the extent to which the applicant – a member of a vulnerable group by virtue of belonging to a sexual minority in Iran – was safe or unsafe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such minorities.²³
9. In the recent cases of *M.C. and A.C. v. Romania*²⁴ and *Identoba and Others v. Georgia*,²⁵ the Court held that there had been a violation of Article 3 taken in conjunction with Article 14 with respect to the applicants who had participated in LGBTI peaceful demonstrations, finding that the States failed to protect demonstrators from homophobic violence, and to launch an effective investigation. In both cases the Court concluded that: “the treatment, convincingly described by the applicants, to which they were subjected and which was directed at their identity and must necessarily have aroused in them feelings of fear, anguish and insecurity was not compatible with respect for their human dignity and reached the requisite threshold of severity to fall within the ambit of ECHR Article 3 taken in conjunction with Article 14”.²⁶ In *Identoba*, the Court reiterated that discriminatory treatment as such can in principle amount to degrading treatment within the meaning of Article 3 where it attains a level of severity such as to constitute an affront to human dignity.²⁷

¹¹ *Idem*.

¹² In *Moldovan v. Romania*, the failure of the Respondent State to provide adequate living conditions to members of the Roma community whose houses had been destroyed, along with the discriminatory way in which the victims had been treated, amounted to degrading treatment. The Court took into account the “general attitude of the authorities” which it found to have caused the applicants considerable mental suffering, thus diminishing their human dignity and arousing in them such feelings as to cause humiliation and debasement. See *Moldovan v. Romania*, nos. 41138/98 and 64320/01, at §§ 110 – 114.

¹³ *East African Asians v United Kingdom*, nos. 4403/70 and others, Commission Report, 14 December 1973, DR 78, p. 5, at p. 62. See also *Moldovan and Others v. Romania*, as cited above, § 111.

¹⁴ *East African Asians v. United Kingdom*, as cited above, §§ 196 and 207.

¹⁵ *Cyprus v. Turkey*, no. 25781/94, §§ 309-310, ECHR 2001-IV.

¹⁶ *Abdu v. Bulgaria* [Extracts], as cited above, § 39, *B.S. v. Spain*, no. 47159/08, § 41.

¹⁷ *Identoba and others v. Georgia*, no.73235/12, § 65, *Moldovan and Others v. Romania* (no. 2), nos. 41138/98 and 64320/01, § 111, ECHR 2005-VII (extracts), and *B.S. v. Spain*, as cited above, *Abdu v. Bulgaria*, as cited above, § 37-38.

¹⁸ *Y.Y. v Turkey*, no. 14793/08, §102.

¹⁹ *Vejdeland v. Sweden*, no. 1813/07, 9 February 2012, § 55.

²⁰ *Kiyutin v. Russia*, no. 2700/10, § 63 (citing *Schalk and Kopf v. Austria*, (no. 30141/04), § 97; *Smith and Grady v. the United Kingdom*, (nos. 33985/96 and 33986/96), § 90. See also Judge Salò’s partly dissenting opinion in *Abdi Mahamud v. Malta*, no. 56796/13: “Undeniably, the Court does take into consideration “in some instances” the applicant’s personal situation (circumstances and needs), that is to say his or her sex, age and state of health (see *Arutyunyan v. Russia*, no. 48977/07 § 68, 10 January 2012, and the case-law cited therein), when it has to determine whether ill-treatment attains a minimum level of severity. These are the personal considerations which may lead to particular vulnerability that can transform otherwise acceptable treatment into treatment attaining a minimum level of severity. *I do not consider this list exhaustive, as, for example, sexual orientation can be another relevant personal circumstance.*” (emphasis added)

²¹ *Identoba and others v. Georgia*, no.73235/12, § 65, citing *Smith and Grady v. United Kingdom*, nos. 33985/96 and 33986/96, § 121, ECHR 1999-VI.

²² *X v Turkey*, no. 24626/09, 27 May 2013, § 57.

²³ *O.M. v. Hungary*, no. 9912/15, 5 July 2016, § 53.

²⁴ *M.C. and A.C. v. Romania*²⁴ no. 12060/12.

²⁵ *Identoba and others v. Georgia*, no.73235/12.

²⁶ *M.C. and A.C. v. Romania*, § 119; *Identoba v. Georgia*, § 71.

²⁷ *Identoba and others v. Georgia*, no.73235/12, § 65, citing *East African Asians v. the United Kingdom*, nos. 4403/70 et al., Commission’s report of 14 December 1973, § 208, *Smith and Grady v. the UK*, nos. 33985/96/33986/96, § 121 and *Moldovan and Others v. Romania* (no. 2), nos. 41138/98 and 64320/01, § 111.

B. International and regional law and practice

10. UN independent human rights institutions, Treaty Bodies and Special Procedures, including the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (UN Special Rapporteur on Torture), have acknowledged the need to take into account discriminatory elements and vulnerabilities when assessing whether the minimum thresholds under international law of torture or other cruel, inhuman and degrading treatment or punishment have been met.
11. Indeed, the UN Committee Against Torture (UN CAT) has emphasized that the discriminatory use of mental or physical violence or abuse is an important factor in determining whether an act constitutes torture.²⁸ More specifically, the UN CAT has held that States are obliged to protect from torture or other ill-treatment all persons regardless of sexual orientation or gender identity, and to prohibit, prevent and provide redress for torture or other ill-treatment in all contexts of State custody or control.²⁹
12. Furthermore, The UN Human Rights Council adopted a resolution on “Human rights, sexual orientation and gender identity” for the first time in 2011 and subsequently in 2014 and 2016, expressing grave concern with respect to “acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity”.³⁰
13. According to the UN Special Rapporteur on Torture, “States should interpret the torture protection framework against the background of other human rights norms, such as those developed to eliminate racial discrimination and discrimination and violence against women, and those designed to protect the rights of children and persons with disabilities.”³¹ Accordingly, States have a heightened obligation to protect from torture and other forms of abuse certain minorities or marginalised individuals or populations who are especially at risk of such abuses.³²
14. International and regional human rights bodies, institutions and independent human rights experts have highlighted the precarious position of LGBTI persons and the greater risks, as compared with the rest of the population, they face of becoming victims of discriminatory violence perpetrated by State agents and private actors.³³ That enhanced risk, resulting in part from the perceived failure of the individuals concerned to conform to socially constructed gender expectations, is particularly pronounced in States in which persons are criminalised, stigmatised, persecuted or harassed for their actual or perceived gender identity or expression, sexual orientation or non-adherence to dominant social norms regarding gender and sexuality.³⁴
15. In assessing the level of pain and suffering experienced by victims of gender-based violence, States must examine the *totality of the circumstances*, “including the victim’s social status; extant discriminatory legal, normative and institutional frameworks that reinforce gender stereotypes and exacerbate harm; and the long-term impact on victims’ physical and psychological well-being, enjoyment of other human rights and their ability to pursue life goals.”³⁵
16. In light of the above, UN independent human rights institutions and experts have considered that violence against LGBTI persons may constitute torture or other cruel, inhuman or degrading treatment or punishment taking into consideration the pain and suffering caused and the *implicit discriminatory purpose and intent* of that violence.³⁶ According to the UN Special Rapporteur on Torture: “*Full integration of a gender perspective into any analysis of torture and ill-treatment is critical to ensuring that violations rooted in discriminatory social norms around gender and sexuality are fully recognised, addressed and remedied. [...] The purpose and intent elements of the definition of torture are always fulfilled if an act is gender-specific or perpetrated against persons on the basis of their sex, gender identity, real or perceived sexual orientation or non-adherence to social norms around gender and sexuality.*”³⁷

²⁸ Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entry into force 26 June 1987, in accordance with article 27), defines torture, inter alia, as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for [...] *any reason based on discrimination of any kind.*” See, also, the International Criminal Tribunal for Rwanda explicitly adopted the Convention’s definition of torture in *Prosecutor v Akayesu*, see *Prosecutor v Akayesu* (1998), §§593–594, Case No. ICTR-96-4-T, ICTR Trial Chamber I, judgment of 2 September 1998.

²⁹ UN Committee against Torture (UN CAT), General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, UN Doc. CAT/C/GC/2, § 21.

³⁰ UN Human Rights Council, Resolution on Human rights, sexual orientation and gender identity (A/HRC/RES/27/32), 26 September 2014; UN Human Rights Council, Resolution on Protection against violence and discrimination based on sexual orientation and gender identity (A/HRC/RES/32/2), 30 June 2016.

³¹ Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/73/207), 20 July 2018, § 64.

³² UN Committee Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2, available at: <https://www.refworld.org/docid/47ac78ce2.html>.

³³ Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/73/207), 20 July 2018, § 76 (d). Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/31/57), 5 January 2016, § 34-35; IACHR, Violence Against LGBTI Persons, OAS/Ser. L/V/II.rev.1, 12 November 2015; Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (A/HRC/38/43), 11 May 2018, § 26.

³⁴ A/73/207, as cited above, § 70; see also Report of the United Nations High Commissioner for Human Rights, “Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity”, 17 November 2011, A/HRC/19/41.

³⁵ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/31/57), 5 January 2016, § 68.

³⁶ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (A/HRC/38/43), 11 May 2018, §§ 26 and 28.

³⁷ A/HRC/31/57, as cited above, §§ 6 and 8.

17. Discrimination on grounds of sexual orientation or gender identity may contribute to the dehumanisation of the victim, which, in turn, usually creates the conditions for torture or other ill-treatment to take place.³⁸ The intentional infliction of severe pain and suffering “for any reason based on discrimination of any kind” may constitute torture under Article 1 of the Convention against Torture.³⁹ Similar observations have been made at the regional level. In Europe, the Committee of Ministers of the Council of Europe has emphasised that sexual orientation and gender identity are factors which, in combination with one or more others, such as race or sex, will increase the risk of human rights abuses faced by the persons concerned.⁴⁰
18. The Inter-American Commission on Human Rights (IACHR) approaches violence committed against LGBTI persons through the lens of prejudice, a concept that contextualises violence “as a social phenomenon, as opposed to violence being understood as taking place in isolation”.⁴¹ In two cases before the IACHR concerning attacks on individuals motivated by prejudice against their sexual orientation and gender identity, the Commission emphasised the link between discrimination and violence against LGBTI persons and explained that violence against LGBTI people can acquire a particular meaning, since it can be used to punish and degrade victims for being who they are.⁴² In a very recent judgement in the case of *Azul Rojas Marin v. Peru*, the Inter-American Court of Human Rights (“IACtHR”) classified as torture the detention and rape of the victim – who at the time identified as a gay man – by police staff, and noted the violence was motivated purely by the victim’s sexual orientation, and therefore could be classified as a “hate crime”.⁴³ The IACtHR concluded that such discriminatory torture not only breached the victim’s rights, “but it was also a message to all LGBTI people, as a threat to the freedom and dignity of this entire social group”.⁴⁴ Further, in *Vicky Hernández and Family v. Honduras*, which concerned an alleged extrajudicial killing of a transgender woman,⁴⁵ the IACHR framed its findings against the backdrop of heightened violence and discrimination against the LGBTI community in Honduras. It concluded that the murder of Vicky Hernandez was based on prejudice against her gender identity and expression. It further noted that such violence, “constitutes an affront to the right of all persons to self-determination and to freely choose the options and circumstances that give meaning to his or her existence, in accordance with his or her own choices and convictions.”⁴⁶

III. Contracting Parties have a positive obligation under the Convention to investigate and prosecute allegations of ill-treatment and torture with discriminatory elements

A. The Court’s case-law concerning Articles 3 of the ECHR

19. The Court’s case-law supports the Interveners’ position that Contracting Parties are under a positive obligation under the Convention to conduct an adequate investigation into allegations of discriminatory ill-treatment.
20. Article 3, read in conjunction with Articles 1 and 13, requires the implementation of effective criminal law mechanisms to deter the commission of offences against personal integrity, backed up by law-enforcement machinery⁴⁷ for the prevention, suppression and punishment of such offences.⁴⁸ The mere passage of a law prohibiting hate crimes is insufficient to protect minority groups effectively from crimes motivated wholly or in part by hate or prejudice. 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”.⁴⁹ The Contracting Parties’ positive obligation 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”.⁵⁰
21. This heightened standard applies to the procedural obligation to effectively investigate and prosecute violence with homophobic or transphobic undertones. This is because such motivations are “particularly destructive to fundamental rights”,⁵¹ and have far-reaching implications not just for an individual victim, but also, at a wider societal level. The Interveners submit that the same conclusion should apply *mutatis mutandis* to violence motivated by prejudice or hatred against one’s actual or perceived SOGIESC.

³⁸ UN General Assembly, Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment (A/56/156), 3 July 2001, § 19. See also A/HRC/19/41, as cited above, § 34.

³⁹ A/73/207, as cited above, § 74; UN Convention against Torture, Article 1.

⁴⁰ Explanatory memorandum to Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted by the Committee of Ministers on 31 March 2010.

⁴¹ IACHR, Report on Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, 12 November 2015, OAS/Ser.L/V/II. Doc 36/15 Rev 1, § 44.

⁴² IACHR, Report No. 24/18 Case 12.982, Report on Merits *Azul Rojas Marín and Others v. Perú*, 24 February 2018, §§ 95 and 99 (courtesy translation from Spanish).

⁴³ IACtHR, *Azul Rojas Marín v. Perú*. Preliminary Exceptions, Merits and Reparations. Judgement of 12 March 2020. Serie C No. 402, §§ 163-165.

⁴⁴ *Idem*, § 165 (courtesy translation from Spanish).

⁴⁵ IACHR Report No. 157/18, Case 13.051 Report on Merits *Vicky Hernández and Family v. Honduras*, 7 December 2018, §§ 56 et seq.

⁴⁶ IACHR Report No. 157/18, Case 13.051 Report on Merits *Vicky Hernández and Family v. Honduras*, 7 December 2018, §§ 62 and 66, further citing IACtHR, Case of *Atala Rifo and Girls. v. Chile*, Merits, Reparations and Costs, Judgment of February 24, 2012, Series C. No. 239, § 136.

⁴⁷ *O’Keeffe* §148. See also *X and Y v the Netherlands*, no. 8978/80, §27; *Beganović* §71; *M.C. v Bulgaria*, no. 39272/98, §149.

⁴⁸ *Beganović v. Croatia*, no. 46423/06, § 71. See also *A v. the UK* (100/1997/884/1096) (23 September 1998) §22; *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, §96; *Sečić v. Croatia*, no. 4116/02, § 53.

⁴⁹ *Airey v Ireland* (1979-80) 2 EHRR 305, §24. See also Article 13 of the Convention.

⁵⁰ *Beganović v. Croatia*, §79.

⁵¹ *Sečić v. Croatia*, no. 4116/02, § 67.

22. 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. The Court has identified the following minimum standards that make an investigation "effective": first, the investigation must be independent, impartial and subject to public scrutiny, and the competent authorities must act with diligence and promptness.⁵² Second, 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.⁵³ 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.⁵⁴ Third, 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.⁵⁵ Fourth, the investigation must be capable of leading to the identification and punishment of those responsible for the alleged events and of establishing the truth.⁵⁶ Fifth, the authorities must also take all reasonable steps to establish whether any hatred or prejudice connected to a protected characteristic may have played a role in the attack.⁵⁷
23. The fifth requirement identified above is particularly important in the context of the present case. In *Identoba and Others v. Georgia* and *M.C. and A.C. v. Romania*, the Court emphasised the obligation of the authorities to take all reasonable steps necessary to unmask the role of possible homophobic motives for the violent events in question.⁵⁸ This is an obligation to use best endeavours: 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 decisions, without omitting suspicious facts that may be indicative of violence motivated by, for instance, racial or religious intolerance, or violence motivated by gender-based discrimination.⁵⁹ Failure to do so was found to contravene Article 3 in combination with Article 14 ECHR, in light of the "clearly homophobic hate speech uttered by the assailants during the incident".⁶⁰ According to the Court, without such a rigorous approach from the law-enforcement authorities, "prejudice-motivated crimes would unavoidably be treated on an equal footing with ordinary cases without such overtones, and the resultant indifference would be tantamount to **official acquiescence** to or even **connivance with hate crimes**."⁶¹
24. The requirement to effectively investigate is the precursor to a State's duty to effectively prosecute hate crimes motivated by prejudice against sexual orientation and/or gender identity. 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*."⁶² By analogy, the Interveners contend that criminal law proscribing violent crimes requires that investigations be followed by appropriate prosecutions when the evidence warrants them.

B. International and regional law and practice

25. The case-law of this Court, as summarised above, finds support in the jurisprudence of the UN Human Rights Committee,⁶³ the UN CAT,⁶⁴ the IACHR⁶⁵ and IACtHR⁶⁶, and the African Commission on Human and People's Rights.⁶⁷
26. Human rights institutions, including Courts, have emphasised States' special responsibility to investigate and protect from discriminatory violence directed against vulnerable groups, irrespective of whether such violence is perpetrated directly by the State or by non-State actors. For example, in *Rosendo Cantú et al. v. Mexico*, which

⁵² *Beganović*, as cited above, §75; *Çelik and İmret v Turkey*, no. 44093/98, § 55.

⁵³ *Mikheyev v Russia*, no. 77617/01, §§ 107-108; *El-Masri v The Former Yugoslav Republic of Macedonia*, no. 39630/09, §182; *Bureš v. The Czech Republic* no. 37679/08, §123.

⁵⁴ *Nachova* §115.

⁵⁵ *Beganović* §75; *Bati and Others v Turkey*, nos. 33097/96 and 57834/00, §134; *C.A.S and C.S v Romania*, no. 26692/05, §70; *Mikheyev*, as cited above, §108.

⁵⁶ *El-Masri* §182.

⁵⁷ *Beganović* §§93-94; *B.S. v Spain*, no. 47159/08, ("*B.S. v Spain*") §§58-59; see also *Nachova*, as cited above, §§160-161; *Šečić*, as cited above, §§ 66-70; *Milanović v Serbia*, no. 44614/07, §§ 96-97; *Fedorchenko and Lozenko v Ukraine*, no. 387/0, § 65; *Virabyan v Armenia*, no. 40094/05, § 218; *Bekos and Koutropoulos v Greece*, no. 15250/02, § 69.

⁵⁸ *Identoba v. Georgia*, as cited above, § 77; similar facts in *M.C. and A.C. v. Romania*, as cited above, § 124.

⁵⁹ *M.C. and A.C. v. Romania*, No. 12060/12, §113, citing *inter alia Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, §160, *Mudric v. the Republic of Moldova*, no. 74839/10, §§60-64 and *Identoba and Others v. Georgia*, as cited above, § 67.

⁶⁰ *Identoba v. Georgia*, as cited above, § 77; similar facts in *M.C. and A.C. v. Romania*, as cited above, § 124.

⁶¹ *M.C. and A.C. v. Romania*, No. 12060/12, § 124, *Nachova and Others v. Bulgaria* [GC], 2005, § 160; *Stoica v. Romania*, 2008, § 119; *Virabyan v. Armenia*, 2012, § 218; *Šečić v. Croatia*, 2007, § 67. See also Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention: https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf, § 227.

⁶² *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.

⁶³ 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.

⁶⁴ See, e.g., HRC CO, CAT/MNG/CO/1 (20 January 2011) §25; HRC CO, CAT/C/KWT/CO/2 (28 June 2011) §25; HRC CO, CAT/C/BGR/CO/4-5 (14 December 2011) §28; HRC CO, CAT/C/NOR/CO/6-7 (13 December 2012) §21; HRC CO, CAT/C/RUS/CO/5 (11 December 2012) §15.

⁶⁵ *Vargas Areco v Paraguay*, IACtHR, (Series C) No. 155, judgement of 26 September 2006, §81. *Servellón-García v Honduras*, IACHR (Series C) No. 152, judgement of 21 September 2006, § 119.

⁶⁶ 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.

⁶⁷ See, e.g., African Commission decision 245/02, *Zimbabwe Human Rights NGO Forum v Zimbabwe* (15 May 2006).

concerned the rape and torture of an indigenous Mexican girl, the IACtHR noted that: “from the moment that the State became aware that a rape had been committed against an individual who is a member of a particularly vulnerable group, given her status as an indigenous person and a minor, it had the obligation to conduct a serious and effective investigation to confirm the truth of the matter and to determine who was responsible”.⁶⁸ Further, in *Azul Rojas Marin v. Peru*, the IACtHR noted that when indicia show that violence could have been motivated by prejudice against the sexual orientation or gender expression of the victim, States should take all reasonable steps to secure relevant evidence and undertake investigative steps to determine if violence was indeed motivated by discrimination.⁶⁹ The Court warned that failure by State authorities to do so could, in itself, constitute a form of discrimination, prohibited by Article 1 of the American Convention on Human Rights.

27. In the area of LGBTI rights, the States’ positive obligation to duly investigate allegations of ill-treatment and torture with discriminatory elements against the LGBTI community is widely recognised in international and regional standards. On 29 September 2015, 12 UN entities released a joint statement calling for an end to violence and discrimination against LGBTI people. The statement calls on States to do more to “protect LGBT[I] persons from violence, torture and ill-treatment, including by: (i) investigating, prosecuting and providing remedy for acts of violence, torture and ill-treatment against LGBTI adults, adolescents and children, and those who defend their human rights [...]”.⁷⁰ Reported concerns include ineffective police action, failure to register cases, loss of documents, inappropriate classification of acts, including physical assault as a minor offence, and investigations guided by stereotypes and prejudices.⁷¹
28. Under international and regional human rights standards, States must:
- (a) Make special efforts to investigate any homophobic or transphobic connotations in an act of violence and 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.⁷² As discriminatory motives “are tricky to prove”, the “quality of investigations [is] all the more important”.⁷³
 - (b) Prosecute the alleged perpetrators and, if found guilty, convict and sanction them with penalties commensurate with the gravity of the offence.⁷⁴ States must ensure that when determining sanctions, a biased motive related to sexual orientation or gender identity be taken into account as an aggravating circumstance.⁷⁵
 - (c) Ensure that all acts of brutality by law enforcement officers and other agents be independently, promptly and thoroughly investigated, and that those responsible be brought to justice.⁷⁶
 - (d) Establish judicial procedures responsive to the needs of victims.⁷⁷ Offer appropriate remedies, including redress and reparation and, where appropriate, medical and psychological support.⁷⁸
 - (e) Make special efforts to eradicate deeply rooted practices of mistreatment and disrespect by police agents with regard to LGBTI persons who are victims or witnesses of crime.⁷⁹ In this regard, the Interveners also emphasise the critical importance of training law enforcement officials to avoid derogatory language related to sexual orientation, gender identity, or gender expression, and refrain from making biased assumptions in their receipt, processing and investigation of complaints.⁸⁰
29. Overall, States must exercise due diligence in investigating violence that is based on prejudice, since impunity for human rights violations leads to repetition.⁸¹ Deficiencies in the investigation and prosecution include (i) prejudice in the conduct of investigations, (ii) lack of a differentiated approach which often leads to the crime in question (i.e. violence against LGBTI persons) not being “categorised as often as they should be as hate crimes or crimes motivated by prejudice”, as well as (iii) the “acquittal or mitigated sentencing of perpetrators due to the sexual orientation or gender identity of the victim”.⁸²

⁶⁸ IACtHR, *Rosendo Cantú et al. v. Mexico*, 31 August 2010, § 103.

⁶⁹ IACtHR, *Azul Rojas Marin v. Peru*. Preliminary Exceptions, Merits and Reparations. Judgement of 12 March 2020. Serie C No. 402, § 196.

⁷⁰ Available at: <https://www.ohchr.org/EN/Issues/Discrimination/Pages/JointLGBTIstatement.aspx>.

⁷¹ A/HRC/29/23, as cited above, §24.

⁷² 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, Section I.A.1 and Explanatory Memorandum to Recommendation CM/Rec(2010)5 of the Council of Europe Committee of Ministers to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity (Recommendation CM/Rec (2010)5), Section I.A.3.

⁷³ Recommendation CM/Rec (2010)5, p. 23.

⁷⁴ See, e.g., HRC CO, CAT/C/NOR/CO/6-7 (13 December 2012) §21.

⁷⁵ Recommendation CM/Rec (2010)5, Section I.A.2.

⁷⁶ See OHCHR report “Born Free and Equal - Sexual Orientation and Gender Identity in International Human Rights Law”, p. 29.

⁷⁷ African Commission on Human and Peoples’ Rights, Resolution 275: Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity.

⁷⁸ Yogyakarta Principles of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2007), Principle 3.

⁷⁹ IACHR, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, as cited above, §§ 464-465.

⁸⁰ IACHR, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, as cited above, §§ 464-465.

⁸¹ IACHR, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, as cited above, § 438.

⁸² *Ibid.*, § 490 et seq.

IV. **Contextual information concerning widespread discriminatory laws and practices against LGBTI people in Russia, including systematic ill-treatment and impunity in Chechnya**

30. The past years have witnessed a climate of rising homophobia across Council of Europe Member States,⁸³ manifesting at its worst in Russia.⁸⁴ In the 2019 assessment of ILGA-Europe's Rainbow Europe Map looking at LGBTI equality laws and policies across Europe, Russia ranks 46th among the 49 European countries with a score of 10%.⁸⁵ Anti-LGBTI rhetoric has become one of the most common forms of hate speech. It is widely reflected in expressions declaring homosexuality a disease or a crime, resulting in stigma, intolerance, and strongly rooted in public attitudes against the LGBTI community.⁸⁶ According to ECRI, particularly worrying is the fact that homophobic sentiment is being actively fuelled by public figures, including by the President of the Russian Federation.⁸⁷ The Federal law "for the Purpose of Protecting Children from Information Advocating for a Denial of Traditional Family Values",⁸⁸ referred to as the 'Gay Propaganda Law', acts as an endorsement for discrimination and violence against LGBTI people in Russia and reinforces the lower level authorities' unwillingness to take action to prevent anti-LGBTI violence. UN Special Procedures have expressed concerns about the laws and related developments in Russia,⁸⁹ and the ECtHR ruled that by adopting such laws the authorities were reinforcing stigma and prejudice and encouraging homophobia.⁹⁰
31. Russia lacks a comprehensive anti-discrimination legislation, and no initiatives have been taken to legislate on the matter.⁹¹ The LGBTI community faces an ongoing situation of legal uncertainty concerning the application of basic human rights to their everyday life situations, as the judiciary has taken no clear position in this regard. While the Constitutional Court has confirmed that sexual orientation is covered by the notion of a "social group"⁹² for the purposes of the Criminal Code and the Code of Administrative Offences application, in reality, this conclusion has been rarely applied to protect LGBTI persons.
32. The persistence of hate-motivated violence against LGBTI persons and the authorities' failure to acknowledge its discriminatory nature have been extensively documented.⁹³ In addition, many obstacles hinder victims' access to courts. Victims are reluctant to report violence based on sexual orientation and gender identity due to intimidation by law enforcement authorities and the foreseeable ineffectiveness of the remedy. Even when complaints are initiated, the hate motive is rarely acknowledged.⁹⁴ In a recent incident, a Moscow jury acquitted a man accused of killing a gay man in a hate-motivated crime, finding him guilty of a lesser charge despite sufficient evidence reportedly proving the discriminatory nature of violence being based on victim's sexual orientation.⁹⁵
33. According to a survey by the Russian LGBT Network, analysing data on law enforcement authorities, less than 6% of LGBTI victims of discrimination and hatred violence filed a complaint between October 2014 and August 2015.⁹⁶ The federal authorities have never officially acknowledged the existence of discrimination against the LGBTI community nor the urgent necessity to adopt and implement measures to combat hate crimes.⁹⁷
34. In 2015 the amendment to the Law "On the Constitutional Court of the Russian Federation" granted the Constitutional Court the power to refuse the implementation of any international human rights body decision in case of a conflict with the Federal Constitution.⁹⁸ This fuels the risk of and disregard to the rule of law and

⁸³Council of Europe's Parliamentary Assembly's Resolution 1948 (2013): <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20010&lang=en>.

⁸⁴ ILGA-Europe's Rainbow Package: <https://www.ilga-europe.org/rainboweurope>, reflecting on region-wide and country specific legal, political and social developments, carried out over the past decade.

⁸⁵ Ibid.

⁸⁶ European Commission against Racism and Intolerance (ECRI) Report on Russia, 2018, CRI (2019)2 p. 9. [Hereinafter ECRI Report on Russia 2018]

⁸⁷ ECRI Report on Russia 2018, p. 16.

⁸⁸ Federal Law "On Amending Article 5 of the Federal Law "On protection of children from information harmful to their health and development" and certain legislative acts in order to protect children from the information propagandizing the denial of family values", 29 June 2013, No. 135-FZ.

⁸⁹ See report of the United Nations High Commissioner for Human Rights on discrimination and violence based on sexual orientation and gender identity (A/HRC/29/23), 2015, § 48; Communications reports of special procedures (A/HRC/23/51), 2013, UKR 3/2012, p. 31, (A/HRC/25/74), 2014, MDA 4/2013, p. 51, RUS 3/2013, p. 23, RUS 4/2013, p. 40, (A/HRC/26/21), 2014, NGA 1/2014, p. 40, UGA 1/2014, p. 53, UGA 1/2013; p. 23, (A/HRC/27/72), 2014, KGZ 1/2014, p. 55.

⁹⁰ See Case of *Bayev and Others vs. Russia*, No. 67667/09, 44092/12 and 56717/12, Judgement of the European Court of Human Rights, 20 June 2017 § 83.

⁹¹ Equal Rights Trust Report 2016, p. 34.

⁹² Judgment of the Constitutional Court of Russia, 23 September 2014, No. 24-P, regarding the "propaganda of non-traditional sexual relations" (Постановление Конституционного Суда Российской Федерации от 23 сентября 2014 года No 24-П).

⁹³ SOVA Center for Information and Analysis report: Criminal Activity of the Ultra-Right. Hate Crimes and Counteraction to Them in Russia in 2019: https://www.sova-center.ru/en/xenophobia/reports-analyses/2020/02/d42031/#_Toc31629938.

⁹⁴ Russian LGBT Network, "Monitoring of human rights violations and discrimination based on sexual orientation and gender identity in 2014", 2014 (Мониторинг нарушений прав человека и дискриминации по признаку сексуальной ориентации и гендерной идентичности в 2014, году).

⁹⁵ Man Killed in Homophobic Attack in Moscow Deserves Justice: <https://www.hrw.org/news/2020/02/10/man-killed-homophobic-attack-moscow-deserves-justice>; <https://www.themoscowtimes.com/2020/02/07/russian-jury-acquits-gay-mans-murder-suspect-a69208>.

⁹⁶ Russian LGBT Network, "Hate crimes motivated by victim's gender identity or sexual orientation committed in Russian Federation in 2014", 2014, available at: <http://www.lgbtnet.org/en/reptseing>.

⁹⁷ Equal Rights Trust Report 2016, p. 14.

⁹⁸ Judgment of the Constitutional Court of the Russian Federation, 14 July 2015, No. 21-P (Постановление Конституционного Суда Российской Федерации от 14 июля 2015 No 21-П). Equal Rights Trust, "Justice or Complicity? LGBT Rights and the Russian Courts", Report, September 2016 [Hereinafter Equal Rights Trust Report 2016], p. 28. Also Federal Law of the Russian Federation no. 7-KFZ introduced amendments to the Federal Constitutional Law no. 1-FKZ of 21 July 1994 on the Constitutional Court of the Russian Federation which empowered the Constitutional Court of the Russian Federation to determine whether findings by international bodies on protection of

promotes impunity. Noteworthy is the Conclusion of 16 March 2020 issued by the Russian Constitutional Court determining that the series of changes to the country's Constitution developed under Presidential initiative in recent weeks do not contradict any of the current Constitution's unalterable clauses. Among others the said Conclusion provided an interpretation of "traditional family": to be composed by a man and a woman, banning any departure from this notion as prohibited by the "propaganda law".⁹⁹

General Situation of Impunity and discriminatory practices against the LGBTI community in Chechnya

35. During the two recent devastating Chechen conflicts (1994-1996 and 1999-2009), both Russian federal and the Chechen armed forces committed grave atrocities, including abductions, enforced disappearances, torture and extra-judicial executions.¹⁰⁰ Following the wars, Russia established absolute control over the population of the Chechen Republic by instituting a totalitarian regime in the hands of Chechnya's President Ramzan Kadyrov. Over the years, hostile and even "barbaric" treatment was used against citizens and social groups considered "unfit" for the traditional Chechen society, including the LGBTI community.¹⁰¹ The regime has received consistent and substantial financial support as well as political autonomy and legal immunity from the Russian authorities, which explains the ongoing climate of terror and impunity in the Republic.¹⁰²
36. Evidence reveals the prevalence of organised and premeditated nature of actions by Chechen and federal authorities resulting in the impossibility of identification of those responsible for the human rights violations.¹⁰³ As a consequence, crimes continue to be perpetrated with total impunity especially in the form of an unofficial organised detention system leading to enforced disappearance.¹⁰⁴
37. The history of appalling human rights violations is evidenced by the vast number of cases before the European Court of Human Rights.¹⁰⁵ The Committee of Ministers has repeatedly condemned the lack of implementation of the Chechen judgements,¹⁰⁶ and Human Rights Watch has denounced the absence of adoption of reforms to "address the underlying causes of the violations".¹⁰⁷ This general climate of impunity enabled the Chechen authorities to commit atrocities against the LGBTI community in 2017 and hindered the victims' access to fair and thorough criminal proceedings and legal redress at the national level.
38. The case of the purge of people with a non-heterosexual orientation and/or LGBTI people in 2017 is particularly well documented.¹⁰⁸ It happened in several "waves" or "purges".¹⁰⁹ Although the largescale persecutions temporarily "stopped because of the international outcry",¹¹⁰ new cases were reported by the Russian LGBT Network in January 2019.¹¹¹ The anti-gay purge has been considered as "unique in its magnitude and its horror".¹¹² While there were cases of violence against LGBTI people in the late 2000s, they were more isolated incidents, whereas the events of 2017 and thereafter were well organised and orchestrated and took the form of mass violence. The new wave of persecution was related to the idea of "purification of the nation".¹¹³
39. As a result of mass arrests and violence, LGBTI people and members of their families were forced to flee Chechnya and neighbouring republics to avoid persecution from the local authorities and hostile relatives.¹¹⁴ The Russian LGBT Network reported the evacuation of some 135 LGBTI people from Chechnya.¹¹⁵ Other

human rights and freedoms (including those of the ECtHR) are to be implemented or not.

Please also see the opinion of Venice Commission: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)005-e).

⁹⁹ Заключение Конституционного Суда РФ о соответствии положениям глав 1, 2 и 9 Конституции Российской Федерации не вступивших в силу положений Закона РФ о поправке к Конституции РФ «О совершенствовании регулирования отдельных вопросов организации и функционирования публичной власти», а также о соответствии Конституции РФ порядка вступления в силу статьи 1 данного Закона в связи с запросом Президента РФ, 16 Марта 2020: <http://doc.ksrf.ru/decision/KSRFDecision459904.pdf>; See also: <https://meduza.io/en/news/2020/03/16/russia-s-constitutional-court-finds-in-favor-of-new-amendments-proposed-by-putin>.

¹⁰⁰ Freek van der Vet, "Transitional Justice in Chechnya: NGO Political Advocacy for Implementing Chechen Judgments of the European Court of Human Rights", *Review of Central and East European Law* 38 (2013), p. 363.

¹⁰¹ Russian LGBT Network 2017 Report, p. 7.

¹⁰² Russian LGBT Network 2017 Report, p. 5.

¹⁰³ FIDH, Chechnya, 2002, pp. 26-27: in the absence of orders or written and accessible operational plans, the use of unidentifiable vehicles and masked men.

¹⁰⁴ OSCE 2018 Report, p. 32. Freek van der Vet, *op cit*, p. 364. A recent case delivered on 17 March 2020 confirms the systemic and ongoing nature of the problem., See *Turpulkhanova and Khasiyeva against Russia*, Apps nos. 53284/13 and 22543/15, 17 March 2020, where the Court found the lack of effective investigation into forced disappearance following the abduction and subsequent disappearance of the applicants' daughters in Grozny in November 2011 and July 2013 to constitute a violation of Article 2 of the Convention.

¹⁰⁵ See for an overview by Philip Leach, Egregious human rights violations in Chechnya: appraising the pursuit of justice, in: Lauri Mälksoo and Wolfgang Benedek (eds.), *Russia and the European Court of Human Rights, The Strasbourg Effect*, Cambridge University Press 2018, 255-294.

¹⁰⁶ Department for the Execution of Judgments of the European Court of Human Rights, CM/Inf/ DH(2010)26. Action of the Security Forces in the Chechen Republic of the Russian Federation: General Measures to Comply with the Judgments of the European Court of Human Rights; Update of Memorandum CM/Inf/DH(2008)33.

¹⁰⁷ Freek van der Vet, *op cit*, p.375.

¹⁰⁸ See in particular the report on LGBT Persecution in the North Caucasus by the Russian LGBT Network in cooperation with Elena Milashina (Novaya Gazeta) of July 2017 and the report by Piet De Bruyn for the Parliamentary Assembly of the Council of Europe of 8 June 2018.

¹⁰⁹ The first wave took place from December 2016 to February 2017, and the second wave from March 2017 to May 2017. The third wave happened in June 2017. OSCE 2018 Report, p. 13; Russian LGBT Network 2017 Report, pp. 3-4.

¹¹⁰ OSCE 2018 Report, p. 13.

¹¹¹ "Российская ЛГБТ-сеть: в Чечне начались новые задержания ЛГБТ, два человека убиты", <https://novayagazeta.ru/news/2019/01/14/148319-rossiyskaya-lgbt-set-v-chechne-nachalis-novye-zaderzhaniya-lgbt-dva-cheloveka-ubity>

¹¹² PACE, Piet De BRUYN 2018 Report, §27, p. 9, Referring to Hearing on 24 April 2018 in Strasbourg.

¹¹³ Russian LGBT Network 2017 Report, p. 9.

¹¹⁴ Russian LGBT Network in cooperation with Elena Milashina (senior reporter, Novaya Gazeta), *LGBT Persecution in the North Caucasus: a Report*, Saint-Petersburg, 2017 [Russian LGBT Network 2017 Report], p. 3.

¹¹⁵ OSCE 2018 Report, p. 15.

reports reveal that around 300 men had been affected by the purge; some 100 people had left Russia, 80 had relocated to other parts of the country, and 15 had died as a result of torture, honour killings or self-inflicted deaths.¹¹⁶ UN independent experts considered that the acts of persecution and violence on an unprecedented scale in the region constituted “serious violations of the obligations of the Russian Federation under international human rights law”.¹¹⁷ Their mass nature was accelerated due to the “snowball effect”: as the number of detainees grew, the persecutors got more and more informants in their hands. The victims were held in terrible physical conditions aimed at “breaking them” physically and psychologically and thus forcing them to give more names.¹¹⁸

40. Men who were suspected of having an intimate relationship with other men were detained based on the same scenario.¹¹⁹ They were picked up by police officers and military personnel at their homes, workplaces or on the streets for no particular reason. Testimonies from the victims confirm that they were taken to interrogation rooms and subjected to physical and verbal abuse, torture, including electric shocks, beatings, insults and humiliations and other measures that harmed their physical and psychological well-being. At least some people died as a result of torture.¹²⁰ The purpose¹²¹ was to make them confess that they were gay, and to make them give the names of other gays.¹²² They were mistreated and tortured on a daily basis mostly for about two weeks (some were detained for as long as a month) or until they made and signed a confession or reported others or expressed their willingness to cooperate. In most cases their relatives were not informed of their detention and there was no access to legal assistance.¹²³ The OSCE considered this treatment as illegal and arbitrary detention and torture, combined with inhuman treatment.¹²⁴ The UN CAT expressed its concern that “during the ‘anti-gay purge’ in March 2017, Chechen police and military officials and others arbitrarily detained and tortured with electric devices men presumed to be gay and encouraged their families to make them victims of honour killings”.¹²⁵
41. Upon their release, the victims were prohibited from leaving Chechnya and threatened to dissuade them not to initiate a criminal case.¹²⁶ In most cases, they were released in a kind of ceremony of “shaming their sins” to their relatives, who were told regularly to find “a proper solution” or “to get rid of the sick members of the family”. The report of the Russian LGBT Network based on testimonies of victims speaks of dozens of murders.¹²⁷
42. While both Chechen and federal authorities deny the very existence of LGBTI people in the Chechen Republic,¹²⁸ the Russian LGBT Network report indicates that those detainees, whose homosexuality was not confirmed, were released. This confirms the persecution was based on the victims’ perceived sexual orientation.¹²⁹
43. Even though the large-scale campaign of persecution has become more subtle, its effects continue. LGBTI people who have stayed in the Chechen Republic remain in danger; they know that reporting ill-treatment to the Chechen authorities would be of no avail; on the contrary, it would risk exposing them and their families to retaliation.¹³⁰
44. There are structural obstacles in the investigation of human rights violations in Russia, starting at the pre-investigation procedure. The application of the provisions of the Criminal Procedure Code of the Russian Federation (2001) and Federal Law 119-F3 of 20 August 2004 “On the State protection of victims, witnesses and other participants in criminal proceedings” is insufficient to protect the rights of persons who submit communications on the commission of a crime, especially those committed against LGBTI individuals.¹³¹ Due to the lack of explicitly stated procedural guarantees, the preliminary investigative check-up is vulnerable to manipulations, especially when it comes to gathering and checking the information on a crime communicated.¹³² In relation to Russia’s failure to criminalise torture as an independent crime and absence of the definition of

¹¹⁶ Council of Europe, LGBTI in Europe, Think Together conference 2018.

¹¹⁷ The UN experts: Mr. Vitit Muntarbhorn, Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; Mr. Sétondji Roland Adjovi, Chair-Rapporteur of the Working on Arbitrary Detention; Ms. Agnes Callamard, Special Rapporteur on extrajudicial, summary or arbitrary executions; Mr. Nils Melzer, Special Rapporteur on torture and other cruel, inhumane and degrading treatment or punishment; and Mr. David Kaye, Special Rapporteur on the promotion and protection the right to freedom of opinion and expression

¹¹⁸ Russian LGBT Network 2017 Report, p. 13.

¹¹⁹ Russian LGBT Network 2017 Report, p. 9.

¹²⁰ Russian LGBT Network 2017 Report, p. 30.

¹²¹ The Special Rapporteur of the Commission on Human Rights has warned about the threats and high risk of sexual violence towards LGBTI detained. All instances of rape and other forms of sexual abuse of comparable gravity committed against people in detention (as elsewhere) on the grounds of their SOGI would entail harm serious enough to be persecutory in nature. The report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/56/156, 3 July 2001, § 23. See also, the 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, § 34-38.

¹²² UN Office of the High Commissioner for Human Rights, “End abuse and detention of gay men in Chechnya, UN human rights experts tell Russia,” April 13, 2017, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21501>, [Hereinafter UNOHCHR 2017].

¹²³ OSCE 2018 Report, p. 13.

¹²⁴ OSCE 2018 Report, p. 14.

¹²⁵ CAT/C/RUS/CO/6, § 32.

¹²⁶ Russian LGBT Network 2017 Report, p. 30.

¹²⁷ *Ibid*, p. 16.

¹²⁸ PACE, Piet De BRUYN 2018 Report, §55, p. 14.

¹²⁹ Russian LGBT Network 2017 Report, p. 30.

¹³⁰ PACE, Piet De BRUYN 2018 Report, § 3.

¹³¹ OSCE 2018 Report, p. 31. See The Criminal Procedure Code of the Russian Federation (2001), see at http://www.consultant.ru/document/cons_doc_LAW_34481.

¹³² OSCE 2018 Report, pp. 30-31.

torture in the Criminal Code, the UN CAT has voiced concern on numerous occasions, stressing that it hinders effective investigations and the failure to reflect the grave nature of the crime of torture, coupled with disproportionately lower charges for the acts by perpetrators that violate the prohibition of ill-treatment.¹³³

45. In April 2018, the Russian LGBT Network obtained access to 18 volumes of documentation about cases collected by the Russian federal authorities, including a document evidencing that the authorities had chosen not to launch a criminal case “due to the absence of a crime having been committed”.¹³⁴ The UN CAT expressed concern “at reports that Chechen law enforcement officials themselves participated in the pre-investigation into these allegations and that ... no facts were established and thus no criminal proceeding was opened”.¹³⁵
46. Not only Chechen policemen are not interested in protecting victims and witnesses in this situation, but they do everything to silence them and their relatives. They have all the data that makes it easy to exert pressure on these people even outside of Chechnya. It is known that in a search of victims and witnesses Chechen policemen travel to other regions of Russia and enjoy the support of the Ministry of Internal Affairs on the ground. In such circumstances, victims and witnesses do not have the opportunity to apply to law enforcement agencies to report crimes or seek protection.¹³⁶
47. Nearly three years after the publication of the findings by Novaya Gazeta,¹³⁷ and despite international calls, no substantive investigation has been conducted into the wave of persecution against LGBTI people that took place in Chechnya in 2017. Similarly, no measures have been taken to address the overall discrimination, harassment and violence to which LGBTI people are subjected on a daily basis.

V. Conclusion

48. Despite a number of recent jurisprudential and legal advances, State violence against the LGBTI community is still a real problem in many parts of Europe. The Interveners invite the Court to:
 - a. Explicitly recognise the LGBTI community as a particularly vulnerable group and, therefore, assert that verbal and physical attacks perpetrated against LGBTI persons could reach the minimum threshold of severity under ECHR Article 3 when the discriminatory motive or intent behind such acts is given due consideration.
 - b. Call on States to comply with their heightened duty to effectively investigate the discriminatory element of torture and ill-treatment committed against LGBTI people, including by gathering all relevant evidence, and conducting an investigation capable of leading to the identification, prosecution and eventual punishment of alleged perpetrators through the imposition of sanctions that are commensurate with the gravity of the offence, and ensuring victims’ access to appropriate remedies and support.

¹³³ CAT, Concluding observations on the sixth periodic report of the Russian Federation, https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/RUS/CAT_C_RUS_CO_6_32062_E.pdf, §§ 8 and 9

¹³⁴ PACE, Piet De BRUYN 2018 Report, §42, p. 12

¹³⁵ *Ibid.*, § 47 (b). Consequently, the UN CAT recommended to the Russian Federation to inter alia “impartially and effectively investigate all past and ongoing human rights violations, including [...] torture, in the northern Caucasus” and to “[e]nsure that victims of torture, their family members, their lawyers [...] are protected against retaliation by public officials and that claims of such retaliation, including the above-mentioned cases in Chechnya, are investigated with a view to bringing the perpetrators to justice”.

¹³⁶ Russian LGBT Network 2017 Report, p. 31, HRW Report on Anti-Gay Purge, 2017, p. 33, “The Chechen Ministry of Internal Affairs did not reveal persecution of gays in the republic [МВД Чечни не обнаружило преследования геев в республике],” Meduza, May 13, 2017, <https://meduza.io/news/2017/05/13/mvd-chechni-neobnaruzhilo-presledovaniya-geev-v-respublike> (accessed May 15, 2017), OSCE 2018 Report, pp. 14-15.

¹³⁷ <https://novayagazeta.ru/articles/2017/04/01/71983-ubiystvo-chesti>