

**ROMANOV AND OTHERS**

**Applicants**

**-and-**

**RUSSIA**

**Respondent**

---

**WRITTEN SUBMISSIONS OF THE EQUAL RIGHTS TRUST**

---

**Introduction**

1. By letter dated 16 February 2018, the European Court of Human Rights (“the Court”) granted the Equal Rights Trust (“the Trust”) leave to make written submissions in the above proceedings. The Trust is an independent international organisation that works to combat discrimination and advance equality worldwide. The Trust published a report on LGBT rights and the Russian Courts in 2016<sup>1</sup> and has a particular focus on researching the global phenomenon of discriminatory torture and ill-treatment.<sup>2</sup> The Trust has previously been a Third Party Intervener before this honourable Court, including in the case of *Eremia and Others v Moldova* (No. 3564/11).
2. These proceedings concern a state’s response to attacks, perpetrated by private individuals, which were allegedly motivated by bias against sexual and gender minorities. All attacks took place during, or in the vicinity of, planned public demonstrations by members of Russia’s LGBT+ community. The Trust does not comment on the facts of the cases, but seeks to make submissions which are relevant to the circumstances.
3. It is the Trust’s submission that the cases arise from a culture of endemic discrimination on grounds of sexual orientation and gender identity in Russia and that it is both appropriate and necessary for the allegations to be examined under Article 14 in conjunction with Articles 3, 5, 8 and 11, rather than under those rights alone. The Trust’s submission focuses specifically on the Article 3 allegations and argues that it is critical that Article 14 of the Convention be examined where there is a *prima facie* case that violence is motivated by bias against sexual or gender minorities, since discrimination is a central element of the violation, and the state has specific obligations under Article 14 which arise from the alleged existence of discrimination.
4. It is the Trust’s submission that the present cases provide the Court with the opportunity to further develop its recent jurisprudence on the positive obligations of the state under Article 14 in respect of bias-motivated violence. In determining the extent of the state’s obligations under the Convention, the Court has consistently stated that:

*[I]n interpreting the provisions of the Convention and the scope of the State’s obligations in specific cases (...) the Court will also look for any consensus and common values emerging from the practices of European States and specialised international*

---

<sup>1</sup> Equal Rights Trust, *Justice or Complicity? LGBT Rights and the Russian Courts*, September 2016, available at: [http://www.equalrightstrust.org/ertdocumentbank/Justice%20or%20Complicity%20LGBT%20Rights%20and%20the%20Russian%20Courts\\_0.pdf](http://www.equalrightstrust.org/ertdocumentbank/Justice%20or%20Complicity%20LGBT%20Rights%20and%20the%20Russian%20Courts_0.pdf).

<sup>2</sup> Equal Rights Trust, *Shouting Through the Walls: Discriminatory Torture and Ill-Treatment, Case Studies from Jordan*, March 2017, available at: [http://www.equalrightstrust.org/ertdocumentbank/Jordan%20report\\_ENG\\_0.pdf](http://www.equalrightstrust.org/ertdocumentbank/Jordan%20report_ENG_0.pdf).

*instruments (...) as well as giving heed to the evolution of norms and principles in international law (...)*<sup>3</sup>

5. Accordingly, in these submissions, the Trust will draw upon relevant specialised international instruments and best practice as well as the Court's own relevant jurisprudence. The Trust submits that the following specialised instruments are particularly crucial considerations:
  - a) The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987 and has been adopted by 162 states (including by the Russian Federation in 1987), given its status as a specialised instrument in relation to the prevention of torture and ill-treatment.
  - b) Formal reports of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, given the Special Rapporteur's expert status and mandate under the Special Procedures of the Human Rights Council to examine questions relevant to torture and other cruel, inhuman or degrading treatment or punishment.
  - c) The "Principles on the application of international law in relation to issues of sexual orientation and gender identity" ("the Yogyakarta Principles"), which were adopted by a group of eminent human rights experts in 2006, and the "Additional Principles and State Obligations on the Application of International Human Rights Law in relation to Sexual Orientation, Gender Identity, Gender Expression And Sex Characteristics to Complement the Yogyakarta Principles" ("the Yogyakarta Principles plus 10"), which were adopted in 2017. Whilst these are not legally binding international instruments, they were drafted as being reflective of the existing state of international human rights law in relation to sexual orientation and gender identity,<sup>4</sup> and have been endorsed by the Council of Europe as "an important tool to identify the obligations of states to respect, protect and fulfil the human rights of all persons, regardless of their sexual orientation or gender identity",<sup>5</sup> as well as by the European Parliament.<sup>6</sup> The Yogyakarta Principles were invoked in the Joint Dissenting Opinion of Judges Sajó, Keller And Lemmens in *Hämäläinen v. Finland* [GC] (No. 37359/09, § 16), and both sets of Principles have also been relied upon by the Inter-American Court in its recent Advisory Opinion to Costa Rica on the issue of same-sex marriage.<sup>7</sup>
6. The Trust accordingly refers primarily to these instruments, in addition to other indicators of the evolution of norms and principles, throughout its submission.

### **Relevance of victim's status as a sexual or gender minority to the Article 3 analysis**

7. The relevance of a contextual assessment to the application of Article 3 is well-established. In *Ireland v UK* (No. 5310/71), the Court acknowledged that the question of whether ill-treatment has attained a minimum level of severity to engage Article 3 is "relative", depending on all the circumstances of the case including: "the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim..." (§ 162; see also *Identoba v Georgia* (No. 73235/12), § 65; *Abdu v Bulgaria* No. 26827/08, § 21).

<sup>3</sup> See, for example, *Opuz v Turkey* (No. 33401/02), § 164.

<sup>4</sup> Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity ("Yogyakarta Principles"), 2006, Introduction; Additional Principles and State Obligations on the Application of International Human Rights Law in relation to Sexual Orientation, Gender Identity, Gender Expression And Sex Characteristics to Complement the Yogyakarta Principles ("Yogyakarta Principles plus 10"), 2017, Introduction.

<sup>5</sup> Council of Europe, *Report by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly*, 2011, para 44; the Commissioner for Human Rights has also endorsed the Yogyakarta Principles and recommended all Council of Europe member states to take "concrete action" to build on the Principles: Council of Europe, *Contribution of the Commissioner for Human Rights to the work of the DH-LGBT*, CommDH(2009)7, 2009, pp. 8-9.

<sup>6</sup> European Parliament, *Report on the Annual Report on Human Rights in the World 2007 and the European Union's policy on the matter*, A6-0153/2008, 2008, para 141.

<sup>7</sup> Inter-American Court of Human Rights, *Advisory Opinion: Gender identity, and equality and non-discrimination for same-sex couples*, OC-24/17, 24 November 2017.

The Committee against Torture has recently reinforced the subjective aspect of the assessment, noting that “severe pain or suffering cannot always be objectively assessed”, and that much will depend on the negative physical and/or mental repercussions on the victim, taking into account the “vulnerability of the victim or any other status or factors.”<sup>8</sup>

8. In conducting its relative assessment, the Court has found the following to be relevant considerations as to whether or not there is ill-treatment:
  - a) a presumed discriminatory motive for violence (e.g. *B.S. v Spain* (No. 47159/08), § 40 in relation to a “presumed racial motive”);
  - b) discriminatory remarks and insults (these are an “aggravating factor” when making a determination of ill-treatment, e.g. *Abdu v Bulgaria* (above), § 23; *B.S. v Spain* (above), § 40; *Moldovan and Others v Romania* (no. 2) (Nos. 41138/98 and 64320/01), § 111); and
  - c) “discriminatory treatment” may itself reach the threshold of degrading treatment “where it attains a level of severity such as to constitute an affront to human dignity” (*Identoba v Georgia* (above), § 65).
9. Similarly, in *Osmani v Serbia*, the Committee against Torture decided that a victim’s particular vulnerability arising from his belonging to a minority group (in this case, being of Roma ethnic origin) and his “unavoidable association with a minority historically subjected to discrimination and prejudice” aggravated the physical and mental suffering he experienced.<sup>9</sup>
10. The relevance of a victim’s sexual orientation or gender identity, or their association with a sexual or gender minority, to the assessment of whether the threshold for Article 3 has been met, has been specifically explored and recognised by the Court:
  - (a) The victim’s status as a sexual or gender minority, and the existence of broader discrimination against such minorities, are matters that can be taken into account in the Court’s consideration of the victim’s particular vulnerability to suffering ill-treatment. In *Identoba v Georgia*, the Court stated that “the level of vulnerability of the applicants” was “particularly apparent” when assessed against the precarious position of the LGBT community and the prevalence of negative attitudes against them within the particular state (*Identoba v Georgia* (above), § 68; see also *M.C. and A.C. v Romania* (No. 12060/12), § 118).<sup>10</sup>
  - (b) The Court has specifically held that “treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority may, in principle, fall within the scope of Article 3” (*Smith v Grady* (Nos. 33985/96 and 33986/96), § 121), with a “clearly distinguishable homophobic bias” and “homophobic and transphobic overtones” playing the role of an “aggravating factor” and rendering ill-treatment “sufficiently severe” as to meet the relevant threshold (*Identoba v Georgia* (above), §§ 64, 65 and 70).
  - (c) The effect of treatment on the victim can be impacted by their membership or association with a sexual or gender minority in a particular social context, and this may be relevant in assessing whether the treatment arouses “feelings of fear, anguish and inferiority capable of humiliating and debasing them” (*Identoba v Georgia* (above), § 65; *Abdu v Bulgaria* (above), § 21).

---

<sup>8</sup> Committee against Torture, *General Comment No. 4 (Advance Unedited Version)*, 9 February 2018, § 17.

<sup>9</sup> Committee against Torture, *Osmani v Serbia*, Communication Number 261/2005, 8 May 2009, para 10.4.

<sup>10</sup> The Court’s approach in this regard is consistent with the Special Rapporteur on Torture’s recommendation that the “totality of the circumstances, including (...) extant discriminatory legal, normative and institutional frameworks” should be examined when assessing the level of pain and suffering experienced by victims: Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/HRC/31/57, 2016, § 68.

(d) In *M.C. and A.C. v Romania*, the emotional distress experienced by the victims was exacerbated by, *inter alia*, the fact they were attacked because they were participating in a gay march, and the Court noted that the fact that the treatment was “directed at their identity” must “necessarily have aroused in them feelings of fear, anguish and insecurity” (*M.C. and A.C. v Romania* (above), §§ 117 and 119).

### **Consideration under Article 14**

11. In many cases “[w]here a substantive Article of the Convention has been invoked both on its own and together with Article 14 and a separate breach has been found of the substantive Article, it is not generally necessary for the Court to consider the case under Article 14” (*Chassagnou and others v France* Nos. 25088/94, 28331/95 and 28443/95, § 89). However, the Court will consider Article 14 if there is an important legal purpose to determining whether the applicant has suffered discrimination (*Dudgeon v United Kingdom*, No. 7525/76, § 49) or if inequality of treatment is a fundamental aspect of this case and so Article 14 should be considered (*Dudgeon v United Kingdom*, No. 7525/76, *Chassagnou and Others v France* Nos. 25088/94, 28331/95, 28443/95, *Aziz v Cyprus*, No. 69949/01).
12. In cases involving alleged bias-motivated violations of Article 3, the Court has held that the issues may fall to be examined under either Article 3 or Article 14 or “may require simultaneous examination under both Articles”; the Court has held that this question should be “decided in each case in the light of its facts and the nature of the allegations made” (*M.C. and A.C. v Romania* (above), § 105; *Identoba v Georgia* (above), § 63, following *Nachova and Others v Bulgaria* [GC] (Nos. 43577/98 and 43579/98), §161). The Trust respectfully submits that in cases where the facts and/or the nature of the allegations raise a *prima facie* case that the violence is bias-motivated, the conditions set out in paragraph 11 above will necessarily be met, since the discriminatory nature of the alleged breach of Article 3 will be key to a proper understanding of its causes, consequences, solutions or impact. As such, the case should be examined under Article 14. It is respectfully submitted that the following are (non-exhaustively) factors relevant to the determination of a *prima facie* case that violence is bias-motivated: (i) whether the victim of the violence is a member of a minority which is particularly stigmatised and subject to widespread discrimination in the state in question; (ii) if the violence took place during, or in the vicinity of, planned public demonstrations by members of the minority community and the perpetrators are counter-protestors; and (iii) the fact that the victim(s) expressly raised allegations of the existence of a bias-motive to the relevant authorities (as in *Identoba v Georgia* (above), §64, and *M.C. and A.C. v Romania* (above), § 106).
13. It is the Trust’s view that there are important reasons for considering this issue under Article 14 in conjunction with Article 3. Notably, **discriminatory** torture, inhuman and degrading treatment is qualitatively distinct from other instances of torture, inhuman and degrading treatment.
14. Firstly, bias-motivated violence of sexual and gender minorities is often **caused by** other broader forms of discrimination and inequality. It has been recognised that structural gender inequalities and socially constructed notions of gender contribute to sexual and gender minorities’ susceptibility to ill-treatment, with members of such minorities being disproportionately subjected to torture and ill-treatment as a result of their actual or perceived non-conformity with socially constructed gender expectations.<sup>11</sup> By failing to examine the broader discrimination operating in cases of bias-motivated violence against sexual and gender minorities and the state’s reaction to this, the Court does not tackle the underlying oppression resulting from a person’s sexual or gender minority status, and cannot ensure the equal treatment of such persons as required by Article 14 of the Convention.
15. Secondly, bias-motivated violence of sexual and gender minorities **impacts disproportionately and differently** upon these individuals. Ill-treatment of sexual and gender minorities has been

---

<sup>11</sup> See, for example, UN General Assembly, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/56/156, 2001, § 19; Committee against Torture, *General Comment No. 2*, UN Doc. CAT/C/GC/2, 2008, § 22; Yogyakarta Principles (see above, note 4), Introduction.

noted to not only undermine the integrity and dignity of the victim,<sup>12</sup> and weaken their sense of self-worth, but also to “lead many to conceal or suppress their identity and to live lives of fear and invisibility”.<sup>13</sup> Where the ill-treatment is motivated by bias against sexual and gender minorities, it also has a particular effect in terms of contributing “to the process of the dehumanization of the victim, which is often a necessary condition for torture and ill-treatment to take place”.<sup>14</sup>

16. Thirdly, bias-motivated violence against sexual or gender minorities **results in** other forms of discrimination against sexual and gender minorities. Broader discriminatory attitudes against members of sexual minorities mean that they often face obstacles in seeking legal accountability, since they are at risk of further victimisation, breach of confidentiality and harassment (including further physical violence),<sup>15</sup> and in accessing medical treatment in public hospitals, where they are at risk of receiving inadequate treatment or even being victims of assault on the grounds of their gender identity.<sup>16</sup>
17. Finally, if bias-motivated violence against sexual or gender minorities is to be effectively tackled, it demands a **particular response** which recognises the discriminatory causes and consequences of the treatment.<sup>17</sup> For example, as indicated in the Yogyakarta Principles, measures taken to prevent future ill-treatment of sexual and gender minorities are unlikely to be fully effective unless they seek to tackle underlying societal stigma and prejudice against such minorities.<sup>18</sup>
18. To fail to recognise bias-motivated violence against sexual and gender minorities as a problem which affects sexual and gender minorities as a group, by treating it as discrimination, is to fail to acknowledge the systemic problems that sexual and gender minorities face in society and the impact of the treatment on their humanity and dignity. Recognition of discrimination where it occurs is a critical first step to its eradication. In relation to race discrimination, for example, the Court has said that to fail to treat race discrimination as such is to “turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights”.<sup>19</sup> The Trust submits that this principle is also applicable in relation to discrimination because of sexual orientation or gender identity.

### **Positive obligations and the relevance of the discriminatory nature of the violence**

19. It is well-established that states have a positive obligation to take measures “to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals” (*M.C. and A.C. v Romania* (above), §§ 109 and 111).<sup>20</sup> Whilst such positive obligations are enshrined under Article 3 of the Convention, the Court has recognised that they are also part of the state’s positive duties under Article 14 to secure the enjoyment of Article 3 without discrimination (*M.C. and A.C. v Romania* (above), § 105, *Identoba v Georgia* (above), § 63). The Trust respectfully submits that it is essential that the examination

---

<sup>12</sup> *Ibid.*, UN General Assembly, § 19

<sup>13</sup> Yogyakarta Principles (see above, note 4), Preamble; Council of Europe, *Resolution 1728 (2010) of the Parliamentary Assembly – Discrimination on the basis of sexual orientation and gender identity*, adopted on 29 April 2010, § 3; Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe to member States on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted 31 March 2010, Comments.

<sup>14</sup> UN General Assembly (see above, note 11), § 19

<sup>15</sup> UN General Assembly (see above, note 11), §§19 and 21; Human Rights Council (see above, note 10), § 9; Human Rights Council, High Commissioner for Human Rights report, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, UN Doc. A/HRC/29/23, 2015, § 25.

<sup>16</sup> UN General Assembly (see above, note 11), §§ 19 and 22.

<sup>17</sup> For example, the Yogyakarta Principles (see above, note 4) note at Principle 28 the importance of responses which are sensitive to victim’s sexual orientation or gender identity; see also Committee against Torture, *Concluding Observations on Costa Rica*, UN Doc CAT/C/CRI/CO/2, 2008, § 11; Committee against Torture, *General Comment No. 3*, UN Doc. CAT/C/GC/3, 2012, § 8.

<sup>18</sup> Yogyakarta Principles (see above, note 4), Principle 5E.

<sup>19</sup> *Nachova and Others v Bulgaria* [GC], Nos. 43577/98 and 43579/98, § 160.

<sup>20</sup> See also Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe (see above, note 13), Preamble; Human Rights Council, High Commissioner for Human Rights report (see above, note 15), § 13.

of the state's positive obligations with regard to bias-motivated violence proceeds under Article 14 in order to recognise the true nature of the violence and the distinct ways in which measures of prevention, protection, investigation, prosecution and reparation are required to address it. It is also essential in order to alert the state to the need to implement effective measures that address the particular needs of sexual and gender minorities in reaction to any finding that it has failed to comply with its obligations.

20. Whilst Russia has not ratified Protocol 12 to the Convention, it is submitted that the Explanatory Report to Protocol 12 provides relevant guidance as to the extent to which Article 14 imposes positive obligations upon states to eliminate discrimination.<sup>21</sup> In considering whether Article 1(1) of Protocol 12 imposes positive obligations, the Explanatory Report explains that, in relations between private persons, "a failure to provide protection in such relations might be so clear-cut and grave that it might engage clearly the responsibility of the State".<sup>22</sup> It is submitted that a failure to provide protection in respect of violence motivated by bias against sexual and gender minorities is so grave that it entails state responsibility under Article 14, and that Article 14 imposes a positive obligation of due diligence upon states in respect of such violence. Such an interpretation of Article 14 is also necessary in order to render the right enshrined in Article 14 practical and effective, since states which fail to act diligently in tackling bias-motivated violence against sexual and gender minorities may be considered to be tacitly condoning such violence,<sup>23</sup> and undermine public confidence in the state's anti-discrimination policy (*Identoba v Georgia* (above) § 80).

**(a) Duty to prevent**

21. The Court has recognised that states have a specific duty to *prevent* bias-motivated ill-treatment on the part of private individuals (*M.C. and A.C. v Romania* (above), § 105; *Identoba v Georgia* (above), § 63). Given the link between discrimination and such ill-treatment, prevention necessitates the enactment of an effective and comprehensive system of criminal and civil law that prohibits and eliminates discrimination on the grounds of sexual orientation and gender identity in both the public and private sphere,<sup>24</sup> including "hate crime laws that sanction homophobic and transphobic violence",<sup>25</sup> and the effective enforcement of such laws in a non-discriminatory manner.<sup>26</sup>
22. In addition to adopting and enforcing effective legislation, it is submitted that the duty to prevent necessitates the *repeal* of laws that support discrimination and oppression.<sup>27</sup> As noted by the Special Rapporteur on torture:

*States fail in their duty to prevent torture and ill-treatment whenever their laws, policies or practices perpetuate harmful gender stereotypes in a manner that enables or authorizes, explicitly or implicitly, prohibited acts to be performed with impunity. States are complicit in violence against women and lesbian, gay, bisexual and transgender*

---

<sup>21</sup> While the scope of the obligation imposed by Article 1(1) of Protocol 12 differs from Article 14 in that it applies to "any right set forth by law", the nature of the obligation is the same; like Article 14, it provides that rights "shall be secured without discrimination".

<sup>22</sup> Explanatory Report to Protocol 12 to the European Convention on Human Rights, § 26.

<sup>23</sup> See, *mutatis mutandis*, *Eremia v Moldova* (No. 3564/11), § 89.

<sup>24</sup> Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, OAS/Ser.L/V/II.rev.1 Doc. 36, 2015, § 418; Yogyakarta Principles (see above, note 4), Principle 2(A); Human Rights Council, High Commissioner for Human Rights report (see above, note 15), § 79(c).

<sup>25</sup> Human Rights Council (see above, note 10), § 73(d); see also United Nations Office of the High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, 2012, p. 19.

<sup>26</sup> See, for example, Human Rights Council (see above, note 10), § 73(d); Committee against Torture (see above, note 11), § 21.

<sup>27</sup> See, for example, Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe (see above, note 13), § 18; Inter-American Commission on Human Rights (see above, note 25), §§ 424-425.

persons whenever they create and implement discriminatory laws that trap them in abusive circumstances.<sup>28</sup>

23. It is submitted that it is relevant for the Court to consider the extant legal framework in Russia when determining whether the state has met its duty to prevent ill-treatment in the present case. As regards the enactment of an effective and comprehensive system of criminal law, the Trust notes that, under Russia's Criminal Code, the fact that a crime has been committed by reason of "hatred or enmity with respect to some social group" is a ground for imposing aggravated punishment,<sup>29</sup> and also affects the proscribed minimum and maximum sentence (or other penalty) for certain crimes.<sup>30</sup> Whilst these provisions do not expressly sanction homophobic and transphobic violence, Russia's Constitutional Court has interpreted the term "social group" to include LGBT persons.<sup>31</sup> In terms of laws that support discrimination and suppression, the Trust refers to the Court's recognition of the potential of Russia's anti-propaganda law to "reinforce stigma and prejudice and encourage homophobia" (*Bayev and others v Russia* (Nos. 67667/09, 44092/12 and 56717/12), § 83).<sup>32</sup>
24. Finally, the obligation to prevent the discriminatory ill-treatment of members of sexual and gender minorities requires the implementation of other preventive measures. According to the Yogyakarta Principles, the Yogyakarta Principles plus 10 and other relevant instruments, these measures include: the institution of education and training programmes aimed at eliminating discriminatory or prejudicial attitudes;<sup>33</sup> the use of awareness-raising campaigns, directed at both the general public and actual and potential perpetrators;<sup>34</sup> new and improved training, sensitisation and guidelines for police and other public and private sector officials in a position to prevent such acts;<sup>35</sup> the collation of statistics and research regarding the extent, causes and effects of discriminatory violence;<sup>36</sup> and the establishment of specialised hate crime prosecution units.<sup>37</sup>

#### **(b) Duty to protect**

25. The state also has an obligation to intervene effectively to protect individuals when they are at risk of ill-treatment from private individuals.<sup>38</sup> The Committee against Torture has noted that, where the state authorities fail to exercise due diligence where they "know or have reasonable grounds to believe" that ill-treatment is being committed by private actors, the state "bears complicity" since the failure to intervene "facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity".<sup>39</sup> Similarly, the Court has consistently held

---

<sup>28</sup> Human Rights Council (see above, note 10), § 10.

<sup>29</sup> Criminal Code of the Russian Federation, Article 63(1)(e).

<sup>30</sup> The court is referred to the Trust's publication "*Justice or Complicity? LGBT Rights and the Russian Courts*" for further discussion of the relevant provisions (see above, note 1)

<sup>31</sup> Judgment of the Russian Constitutional Court, 23 September 2014, No. 24-П (Постановление Конституционного Суда Российской Федерации от 23 сентября 2014 года, № 24-П), Para 2.1.

<sup>32</sup> The High Commissioner for Human Rights has noted, more broadly, that "anti-propaganda" laws can "contribute to ongoing persecution of members of the LGBT community": Human Rights Council, High Commissioner for Human Rights report (see above, note 15), § 48..

<sup>33</sup> Yogyakarta Principles (see above, note 4), Principle 2(C); Yogyakarta Principles plus 10 (see above, note 4), Principle 30(E).

<sup>34</sup> Yogyakarta Principles (see above, note 4), Principle 5(A); Committee on the Elimination of Discrimination against Women ("CEDAW Committee"), *Concluding Observations on Uganda*, UN Doc. CEDAW/C/UGA/CO/7, 2010, § 44.

<sup>35</sup> Yogyakarta Principles (see above, note 4), Principle 10; Human Rights Council, High Commissioner for Human Rights report (see above, note 15), § 40; CEDAW Committee (see above, note 34).

<sup>36</sup> Yogyakarta Principles plus 10 (see above, note 4), Principle 30(C); *Ibid.*, Human Rights Council, High Commissioner for Human Rights report, § 40.

<sup>37</sup> *Ibid.*, Human Rights Council, High Commissioner for Human Rights report.

<sup>38</sup> *Ibid.*, § 20.

<sup>39</sup> Committee against Torture (see above, note 11), § 18; the CEDAW Committee has similarly stated that the failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women when its authorities know or should know of the danger of violence "provides tacit permission or encouragement to acts of gender-based violence against women": CEDAW Committee, *General Recommendation No. 35*, UN Doc. CEDAW/C/35, 2017, §24.

that states have an obligation to take reasonable steps to prevent ill-treatment “of which the authorities knew or ought to have known” (e.g. *Identoba v Georgia* (above), § 66; *Eremia v Moldova* (No. 3564/11), § 49; *T.M. and C.M. v the Republic of Moldova* (No. 26608/11), § 36). The threshold has been met where an individual or group has given specific notice of the risk, such as where they have explicitly requested protection against foreseeable acts of bias-motivated ill-treatment at a demonstration or rally (e.g. *Identoba v Georgia* (above), §§ 72 and 80).

26. It is the Trust’s submission that general awareness of systemic or widespread discrimination against vulnerable groups is also highly relevant to the assessment of whether the authorities “knew or ought to have known” of the risk, with this giving rise to a heightened obligation to provide protection against discriminatory ill-treatment:
- a) The existence of a “history of public hostility towards the LGBT community” and “reports of negative attitudes towards sexual minorities in some parts of the society” have given rise to “an obligation to provide heightened State protection” on the grounds that the authorities “knew or ought to have known of the risks associated with any public event concerning that vulnerable community” (*Identoba v Georgia* (above), §§ 72 and 80).
  - b) A similar approach has been taken by the Court in relation to domestic violence, with the Court taking into account the prevalence of domestic violence and its discriminatory effect on women in its assessment of the state’s duty to protect (e.g. *Eremia v Moldova* (above), §§ 73 and 89; *T.M. and C.M. v the Republic of Moldova* (above), § 62).
27. Similarly, the Committee against Torture has taken the approach that state authorities must afford greater protection to groups known to be “especially vulnerable” to ill-treatment, such as the Romani ethnic group.<sup>40</sup> The Special Rapporteur on torture has also emphasised that states’ due diligence obligations are engaged where they “are aware of a pattern of violence or the targeting of specific groups by non-State actors”,<sup>41</sup> noting that they “have a heightened obligation to protect vulnerable and marginalized individuals from torture”,<sup>42</sup> including lesbian, gay, bisexual, transgender and intersex persons.<sup>43</sup>
28. Where the obligation to protect against discriminatory ill-treatment is engaged, it is submitted that the state authorities are required to take a range of measures to mitigate against the risk of further or potential violence, including conducting an immediate risk assessment and, where they have been alerted in advance to the existence of actual threats of bias-motivated ill-treatment, consider issuing protection, restraining or emergency barring orders against alleged perpetrators.<sup>44</sup> In view of the authorities’ obligation to provide “heightened” state protection where they are on notice of the risk of discriminatory ill-treatment, it is submitted that the mere provision of police presence at an event (such as a peaceful demonstration or rally, as in the present cases) will not be sufficient to discharge the state’s duty to protect; rather the police must take prompt action to intervene where violence arises (as opposed to “allowing the tension to degenerate into physical violence”: *Identoba v Georgia* (above), § 73), and should focus their actions on restraining the alleged perpetrators rather than disrupting the actions of the individuals to whom they owe their duty to protect (e.g. *Identoba v Georgia* (above), §§ 73-74).

### **(c) Duty to investigate and prosecute**

29. It is well established that the authorities are required to conduct an “effective official investigation” into alleged ill-treatment, including where such ill-treatment is inflicted by private

---

<sup>40</sup> Communication No. 161/2000, *Dzemajl et al. v. Yugoslavia*, 21 November 2002, § 9.2 and Annex. See also the comments of the Special Rapporteur on torture: “In cases where States are or ought to be aware of patterns of continuous and serious abuse in a particular region or community, due diligence obligations require taking reasonable measures to alter outcomes and mitigate harms” (Human Rights Council (see above, note 10), § 56).

<sup>41</sup> *Ibid.*, Human Rights Council, § 11.

<sup>42</sup> *Ibid.*, § 12.

<sup>43</sup> *Ibid.*, §68.

<sup>44</sup> CEDAW Committee (see above, note 39), § 4(b).



actors (e.g. *Eremia v Moldova* (above), § 51). However, the principle of non-discrimination under Article 14 entails specific obligations in respect of the investigation of alleged *discriminatory* ill-treatment, including where it is motivated by bias against sexual or gender minorities as in the present case (see *M.C. and A.C. v Romania* (above), § 113; *Ciorcan and others v Romania* (above), § 141; *Abdu v Bulgaria* (above), § 29; *Identoba v Georgia* (above), § 67). As explained by the Court in *M.C. and A.C. v Romania* in its discussion regarding the state's duty to investigate violent incidents:

*without such a rigorous approach from the law-enforcement authorities, prejudice-motivated crimes would inevitably be treated on an equal footing with cases involving no such overtones, and the resultant indifference would be tantamount to official acquiescence to, or even connivance with, hate crimes (M.C. and A.C. v Romania (above), § 124)*

The Yogyakarta Principles have also stressed the need for states to ensure that violence related to sexual orientation and gender identity is “vigorously investigated”.<sup>45</sup>

30. Where discriminatory ill-treatment is alleged, a key aspect of the obligation to investigate is the duty to investigate the existence of any possible discriminatory motive (*M.C. and A.C. v Romania* (above), § 105). The Court has indicated that a “meaningful inquiry” into the possibility of a discriminatory motive will be “indispensable” in circumstances where the alleged ill-treatment occurred in a context of broader hostility against the vulnerable group in question (such as the LGBT community) and where there is an allegation that discriminatory and/or hate speech occurred (such as where “clearly homophobic hate speech” was used by the alleged perpetrator(s): *M.C. and A.C. v Romania* (above) § 124, and *Identoba v Georgia* (above), § 77). In *Ciorcan and others v Romania*, the Court emphasised the importance of the broader context of hostility and/or discrimination in triggering the duty to investigate discriminatory motives, noting that the authorities “were under the obligation to investigate a possible causal link between the alleged racist attitudes and the abuse suffered by [the applicant] at the hands of the police”, particularly when considering “the background of the many published accounts of the existence in Romania of general prejudice and hostility against Roma and of continuing incidents of police abuse against members of this community” (*Ciorcan and others v Romania* (above), § 164).
31. The Court has emphasised that the duty to investigate the existence of discriminatory motive is “an obligation of means rather than an obligation to achieve a specific result” (*Abdu v Bulgaria* (above), § 30), with the authorities obliged to “take all reasonable steps to unmask discriminatory motives” (*Identoba v Georgia* (above), § 67). In considering what will constitute “all reasonable steps”, and thus render the investigation of discriminatory motive effective, the Court has emphasised that the authorities “must do whatever 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 induced by, for instance, racial or religious intolerance, or violence motivated by gender-based discrimination” (*Identoba v Georgia* (above), § 67; see also *M.C. and A.C. v Romania* (above), § 113; *Ciorcan and others v Romania* (above), § 159).<sup>46</sup> A failure to make proper use of relevant evidence adduced by the victims – such as statements, photographs, and videos – may contribute to a finding that the investigative steps taken were not effective (e.g. *M.C. and A.C. v Romania* (above), § 121). The Court has also noted the importance of ensuring that eyewitnesses are questioned in relation to the alleged exchanges between the victim and perpetrator, and that the perpetrators themselves are questioned regarding their possible discriminatory motivation (*Abdu v Bulgaria* (above), § 34).

---

<sup>45</sup> Yogyakarta Principles, (see above, note 4), Principle 5D.

<sup>46</sup> See Inter-American Commission on Human Rights (see above, note 25), § 504 for a list of criteria that may be indicative of a crime being bias-motivated, and which would assist police officers, prosecutors and other investigators in determining whether a particular crime was committed based on prejudice against the victim's actual or perceived sexual orientation and/or gender identity.

32. A key corollary of the above is the fact that, in the absence of an effective investigation into any potential discriminatory motives, any charges brought will not be “assigned a legal classification that would have allowed the proper administration of justice” (*M.C. and A.C. v Romania* (above), § 124).<sup>47</sup> The Human Rights Committee in its 2015 Concluding Obligations on the seventh periodic report of the Russian Federation expressly stated that the state should “ensure the investigation, prosecution and punishment of any act of violence motivated by the victim’s sexual orientation or gender identity and apply [the provisions of the Criminal Code which treat this as an aggravating circumstances] to such acts”.<sup>48</sup>

#### **(d) Reparations**

33. The Committee against Torture has emphasised that states must ensure that victims of ill-treatment obtain “full and effective redress and reparation”,<sup>49</sup> as far as sexual and gender minorities are concerned, the Committee has noted that reparative measures should “respond to their specific needs”,<sup>50</sup> with the Yogyakarta Principles also providing that victims of ill-treatment perpetrated for reasons relating to sexual orientation or gender identity should be offered “appropriate remedies”.<sup>51</sup> When considering whether any compensation awarded in the present cases was “prompt, fair and adequate”,<sup>52</sup> it is submitted that the Court should take into account the fact that compensation should be sufficient to compensate for both pecuniary and non-pecuniary damage resulting from the physical and mental harm caused,<sup>53</sup> and the level of the award should therefore be reflective of and attentive to the particular harm arising from the discriminatory ill-treatment of sexual and gender minorities.
34. It is also important that reparations for discriminatory ill-treatment “address the context of structural discrimination in which violations occurred” and thus have a transformative effect in addressing the underlying causes and consequences of the violations.<sup>54</sup> As noted by the Special Rapporteur on violence against women, reparations “should aspire, to the extent possible, to subvert instead of reinforce” existing systemic and structural inequalities and marginalisation.<sup>55</sup> This is also essential to the state’s duty to prevent discriminatory ill-treatment.

#### **Conclusion**

35. Recognition of bias-motivated violence as *discriminatory* ill-treatment is essential to understanding its causes, consequences, impact and solutions. It is further submitted that if states are to be encouraged to respond appropriately to bias-motivated violence, by implementing holistic and coordinated systems covering prevention, protection, investigation, prosecution, punishment and reparation, a failure to tackle and respond to bias-motivated violence should be assessed against the positive obligations under Article 14.

**EQUAL RIGHTS TRUST  
9 MARCH 2018**

---

<sup>47</sup> See also the comments of the Inter-American Commission on Human Rights regarding the impact of failing to classify crimes motivated by prejudice as such: *Ibid.*, § 485.

<sup>48</sup> UN Human Rights Council, *Concluding Observations on the seventh periodic report of the Russian Federation*, UN Doc. CCPR/C/RUS/CO/7, 2015, § 10.

<sup>49</sup> Committee against Torture (see above, note 17), §§ 2 and 5.

<sup>50</sup> *Ibid.*, § 39; see also Inter-American Commission on Human Rights (see above, note 25), § 516.

<sup>51</sup> Yogyakarta Principles (see above, note 4), Principle 10(B).

<sup>52</sup> Committee against Torture (see above, note 17), §§ 9-10.

<sup>53</sup> *Ibid.*, §§ 9-10.

<sup>54</sup> Human Rights Council (see above, note 10), § 66.

<sup>55</sup> Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. A/HRC/14/22, 2010, § 85. The need for transformative remedies addressing structural discrimination has been noted in relation to other protected characteristics, e.g. in *Gonzales et al v Mexico* (IACtHR Case No. 281/02, § 451) in relation to gender discrimination; and *European Roma Rights Centre v Bulgaria* (ECSR, Complaint No. 31/2005) in relation to race discrimination.