

**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**A. *against* Azerbaijan and 24 other applications**

(Application no. 17184/18)

**WRITTEN COMMENTS**

Submitted jointly by

ILGA-Europe (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association)

Civil Rights Defenders

**REDRESS**

15 July 2019

By mail and fax

## Introduction

1. These written comments are submitted jointly by the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), Civil Rights Defenders and REDRESS, hereinafter the “Interveners”.
2. The present case involves a wave of police raids in Baku, Azerbaijan in September 2017, ostensibly as part of a crackdown on prostitution, which led to the arrest, ill-treatment and forced medical examinations in detention of members of the LGBTI community. According to reports, the targeted individuals had been identified on the basis of their actual or perceived sexual orientation and gender identity. The incident was decried by the international human rights community. The Commissioner for Human Rights of the Council of Europe demanded formal explanations from the Azeri Minister of Internal Affairs,<sup>1</sup> and UN human rights experts urged Azerbaijan to take concrete steps to combat “*deeply entrenched negative social perceptions, misconceptions and prejudice against people based on their sexual orientation or gender identity, in order to tackle the root causes of violence and discrimination perpetrated against them.*”<sup>2</sup>
3. As set out in the application to intervene dated 21 May 2019, this submission discusses the following:
  - (a) International jurisprudence on how the victim’s status as a sexual or gender minority impacts the assessment of whether the threshold for torture and ill-treatment under Article 3 of the European Convention of Human Rights (“ECHR”) has been met.
  - (b) An analysis of the extent to which forced medical examinations constitute a violation of Articles 8 and 3 of the Convention.
  - (c) An analysis of the positive obligation of the States to afford an adequate investigation of torture and ill-treatment with discriminatory elements.
  - (d) Information concerning widespread discriminatory laws and practices against LGBTI persons in Azerbaijan, which underlines their vulnerability to discriminatory torture and ill-treatment.
4. This intervention draws upon the Court’s case-law, and other authoritative sources of international law, jurisprudence and guidance.

### **I. The status of victim of violence as a sexual or gender minority should be taken into account in the assessment of Article 3 violations**

#### **A. International law and practice**

##### ***Discriminatory elements and the vulnerability of the victim play a role in the assessment of torture and ill-treatment***

5. UN bodies have acknowledged the need to take into account discriminatory elements and vulnerabilities when assessing whether the minimum thresholds of torture or inhuman and degrading treatment have been met.
6. Indeed, the UN Committee Against Torture (“Committee Against Torture”) has emphasized that the discriminatory use of mental or physical violence or abuse is an important factor in determining whether an act constitutes torture, which the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment (“UN Convention against Torture”) defines 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.*”<sup>3</sup> As a result, States have a heightened obligation to protect from abuse

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<sup>1</sup> Commissioner urges Azerbaijan to investigate allegations of human rights violations of LGBT persons recently arrested and detained in Baku, Strasbourg 9 October 2017, available at <https://rm.coe.int/letter-to-the-minister-of-interior-of-azerbaijan-concerning-recent-arr/168075de36>

<sup>2</sup> Azerbaijan: UN rights experts alarmed by reports of persecution of people perceived to be gay or trans, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22230&LangID=E>

<sup>3</sup> 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). 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, judgement of 2 September 1998.

vulnerable persons<sup>4</sup> and certain minority or marginalized individuals or populations especially at risk of torture.<sup>5</sup> According to the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (“the UN Special Rapporteur”), 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.<sup>6</sup>

7. In line with this approach, in *L.N.P. v. Argentina*, the UN Human Rights Committee found a violation of Article 7 of the International Covenant on Civil and Political Rights<sup>7</sup> in light of the discriminatory treatment against an indigenous girl. Immediately after having been sexually assaulted by three men, the victim reported the attack to the police. However, she was kept waiting for hours at the police station and a medical center before being performed unnecessary anal and vaginal palpations. During the court proceedings against the assailants, many discriminatory statements were made against her, and the judge placed emphasis on her sexual history. The Committee found that these events constituted inhumane or degrading treatment and contributed to the complainant’s re-victimization, which was aggravated by the fact that she was a minor.<sup>8</sup> Similarly, the Inter-American Court of Human Rights (IACtHR) took into account the vulnerability of the victim, an indigenous Mexican girl, in its conclusion that her rape constituted torture.<sup>9</sup>

***Ill-treatment against LGBTI persons may attain the requisite level of severity under Article 3 in light of their vulnerability to discriminatory violence***

8. International and regional human rights bodies have stressed the precarious position of LGBTI persons and their vulnerability to discriminatory violence perpetrated both by State and private actors, because they fail to conform to socially constructed gender expectations. That vulnerability is particularly pronounced in States in which persons are criminalized, stigmatized, persecuted or harassed for their actual or perceived sex, gender identity or expression, sexual orientation or non-adherence to dominant social norms regarding gender and sexuality.<sup>10</sup>
9. 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.”<sup>11</sup>
10. On that basis, UN bodies have noted that violence against LGBTI persons may constitute torture or other cruel, inhuman or degrading treatment or punishment in situations where a State official is involved, in light of the pain and suffering caused and the implicit discriminatory purpose and intent.<sup>12</sup> According to the UN Special Rapporteur:<sup>13</sup>

*“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 recognized, 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.”*

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<sup>4</sup> Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/73/207), 20 July 2018, § 64.

<sup>5</sup> 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> [accessed 28 June 2019].

<sup>6</sup> A/73/207, as cited above, § 64.

<sup>7</sup> Under Article 7 of the International Covenant on Civil and Political Rights, no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

<sup>8</sup> Human Rights Committee, Communication No. 1610/2007, *L.N.P. v. Argentina*, 16 August 2011, § 13.6.

<sup>9</sup> IACtHR, *Rosendo Cantú et al. v. Mexico*, 31 August 2010, §§ 93-95 and 115.

<sup>10</sup> 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.

<sup>11</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/31/57), 5 January 2016, § 68.

<sup>12</sup> 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.

<sup>13</sup> A/HRC/31/57, as cited above, §§ 6 and 8.

11. Discrimination on grounds of sexual orientation or gender identity may contribute to the dehumanization of the victim, which is often a necessary condition for torture and ill-treatment to take place.<sup>14</sup> The intentional infliction of severe pain and suffering “*for any reason based on discrimination of any kind*” also constitutes a distinct form of torture.<sup>15</sup>
12. Similar observations have been made at the regional level. In Europe, the Committee of Ministers of the Council of Europe has stressed that sexual orientation and gender identity are factors which, in combination with one or more others such as race or sex, will increase the vulnerability of the persons concerned.<sup>16</sup>
13. The Inter-American Commission on Human Rights (IACHR) approaches violence committed against LGBTI persons through the lens of prejudice, a concept which contextualizes violence ‘*as a social phenomenon, as opposed to violence being understood as taking place in isolation.*’<sup>17</sup> In two cases concerning attacks against sexual and transgender minorities before the IACtHR, the IACHR emphasized the link between discrimination and violence against LGBTI persons. Its report in *Azul Rojas Marin v. Peru* classified as torture the detention and rape by police staff of the victim, who at the time identified as a gay man, given that the violence was purely based on “subjective appreciations” and was caused by prejudice. The IACHR stressed that sexual violence against LGBTI people can acquire a particular meaning, since it can be used to punish and degrade victims for being who they are.<sup>18</sup>
14. In *Vicky Hernández and Family v. Honduras*, which concerned an alleged extrajudicial killing of a transgender woman,<sup>19</sup> the IACHR framed its findings in the context of heightened violence and discrimination against the LGBTI community in Honduras. In light of that context, as well as the nature and manner of the violence, it concluded that the murder of Vicky Hernandez was based on prejudice against her gender identity and expression. It further noted that such violence, “*also 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.*”<sup>20</sup>

#### **B. The Court’s case-law**

15. The international law and practice described above provides the appropriate framework for the Court’s assessment of torture and ill-treatment in circumstances where prejudice and discrimination underpins the violence against sexual or gender minorities. In such a context, acts that in isolation would not have reached the minimum level of severity for an Article 3 violation, can qualify as torture and ill-treatment when viewed through the prism of sexual or gender-based discrimination.
16. This approach is not inconsistent with the Court’s case-law to-date. The Court has acknowledged that **the threshold for an Article 3 violation is relative:**<sup>21</sup> it depends on all the circumstances of the case, *inter alia* the personal circumstances of the victim, such as sex, age and state of health and whether the victim was in a vulnerable situation.<sup>22</sup> The severity of ill-treatment also depends on the nature and context of the treatment or punishment, such as an atmosphere of heightened tension and emotions,<sup>23</sup>

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<sup>14</sup> 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.

<sup>15</sup> A/73/207, as cited above, § 74; UN Convention against Torture, Article 1.

<sup>16</sup> 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.

<sup>17</sup> 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.

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

<sup>19</sup> IACHR Report No. 157/18, Case 13.051 Report on Merits Vicky Hernández and Family v. Honduras, 7 December 2018, §§ 56 et seq.

<sup>20</sup> *Ibid.*, § 62 and 66, further citing IACtHR, Case of Atala Riffo and Girls. v. Chile, Merits, Reparations and Costs, Judgment of February 24, 2012, Series C. No. 239, § 136.

<sup>21</sup> *Ireland v. United Kingdom*, no. 5310/71, 18 January 1978, Series A no. 25.

<sup>22</sup> *Khlaifia and Others v. Italy*, no. 16483/12, §160, with further references.

<sup>23</sup> *Soering v. the United Kingdom*, no. 14038/88, § 100.

the manner and method of its execution,<sup>24</sup> its purpose and the underlying intention or motivation.<sup>25</sup> Each of these factors is capable of carrying significant weight.<sup>26</sup>

17. On that basis, personal circumstances which may lead to a particular vulnerability can transform otherwise acceptable treatment into treatment attaining a minimum level of severity. For example, in *Milanović v. Serbia*, the Court found a violation of Article 3 (in conjunction with Article 14) taking into account *inter alia* that the applicant was a “member of a vulnerable religious minority” and was being systematically targeted.<sup>27</sup> According to the Court, measures against torture and ill-treatment should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.<sup>28</sup>
18. In the case of *Selmouni v. France*, the Court effectively lowered the threshold necessary to qualify certain treatments as ‘torture’. Certain acts which were classified in the past as ‘inhuman and degrading treatment’ as opposed to ‘torture’ could be classified differently in future. This is 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.”<sup>29</sup>
19. Accordingly, **the Court has lowered the threshold** for a finding of an Article 3 violation in cases of **ill-treatment with racist or discriminatory undertones against ethnic<sup>30</sup> or other minorities**. For example, in the *East African Asians* case, the former 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.<sup>31</sup> It stressed that special importance should be attached to such discrimination as an affront to human dignity.<sup>32</sup> 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, was degrading treatment which attained the level of severity for an Article 3 violation.<sup>33</sup> In a more recent case, the Court found an Article 3 infringement, in particular because of “the infringement of human dignity constituted by the presumed racial motive for the violence.”<sup>34</sup> Discriminatory remarks and racist insults at the very least must be considered as an aggravating factor when considering a given instance of ill-treatment in the light of Article 3.<sup>35</sup>
20. The same principles should guide the Court in the assessment of prejudicial ill-treatment perpetrated against sexual or gender minorities given that gender identity and sexual orientation are one of the most basic essentials of self-determination and a fundamental facet of an individual’s identity and awareness.<sup>36</sup>
21. In fact, the Court has acknowledged that LGBTI minorities may constitute vulnerable groups<sup>37</sup> and has not excluded the possibility that treatment which is grounded upon a predisposed bias on the part of a

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<sup>24</sup> *Ibid.*

<sup>25</sup> However, the absence of an intention to humiliate or debase the victim cannot conclusively rule out a finding of a violation of Article 3, *El Masri v. “the former Yugoslav Republic of Macedonia”* [GC], no. 39630/09, § 196, *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 117, *Abdu v. Bulgaria*, no. 26827/08, § 36.

<sup>26</sup> *Nicolae Virgiliu Tănase v. Romania* [GC], § 121. It may well 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.

<sup>27</sup> *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.

<sup>28</sup> *Z. and Others v. the United Kingdom* [GC], no. 29392/95, § 73, further citing *Osman v. the United Kingdom*, no. 23452/94, § 116.

<sup>29</sup> *Selmouni v. France* [GC], no. 25803/94, § 101.

<sup>30</sup> 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.

<sup>31</sup> *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.

<sup>32</sup> *East African Asians v. United Kingdom*, as cited above, §§ 196 and 207

<sup>33</sup> *Cyprus v. Turkey*, no. 25781/94, §§ 309-310, ECHR 2001-IV.

<sup>34</sup> *Abdu v. Bulgaria* [Extracts], as cited above, § 39, *B.S. v. Spain*, no. 47159/08, § 41.

<sup>35</sup> *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.

<sup>36</sup> *Y.Y. v Turkey*, no. 14793/08, §102.

<sup>37</sup> See also Judge Saló’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

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heterosexual majority against a homosexual minority could, in principle, fall within the scope of Article 3.<sup>38</sup> In *X v Turkey*, the Court essentially found that the applicant had suffered discrimination on the basis of sexual orientation, which had been the main reason for keeping him in solitary confinement.<sup>39</sup> 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 persons.<sup>40</sup>

## II. Forced medical examinations directed to LGBTI members constitute a breach of Article 3 and Article 8 of the Convention

### A. International law and practice

22. International human rights bodies denounce cases of forced medical examinations, describing them as torture and ill-treatment. The UN High Commissioner to the Human Rights Council has condemned State-sponsored forced anal and genital examinations to determine homosexuality.<sup>41</sup> This view is echoed by the Committee Against Torture,<sup>42</sup> the UN Special Rapporteur and the Working Group on Arbitrary Detention.<sup>43</sup> The UN Special Rapporteur has noted that:

*“[h]umiliating and invasive body searches may constitute torture or ill-treatment, particularly for transgender detainees. In States where homosexuality is criminalized, men suspected of same-sex conduct are subject to non-consensual anal examinations intended to obtain physical evidence of homosexuality, a practice that is medically worthless and amounts to torture or ill-treatment.”*<sup>44</sup>

23. Similarly, the UN Special Rapporteur has considered that forcible HIV testing performed on a discriminatory basis without respecting consent and necessity requirements may constitute degrading treatment, especially in a detention setting.<sup>45</sup>

24. Further, reports of alleged humiliating circumstances during medical examinations have noted that “acts aimed at humiliating the victim, regardless of whether severe pain has been inflicted, may constitute degrading treatment or punishment because of the incumbent mental suffering”.<sup>46</sup> The Yogyakarta Principles equally condemn involuntary medical examinations and interventions on members of the LGBTI community (see Principle 18).<sup>47</sup>

25. At the regional level, a Kenyan appellate court recently ruled that HIV tests and anal examinations of two gay men under arrest were “not only unconstitutional, but also unreasonable and totally unnecessary.”<sup>48</sup> The tests were performed under a magistrate’s order to determine if they had engaged in private consensual sexual acts. The judgment noted that the consent given by the arrested men was

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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)

<sup>38</sup> *Smith and Grady v. United Kingdom*, nos. 33985/96 and 33986/96, paragraph 121, ECHR 1999-VI.

<sup>39</sup> *X v Turkey*, no. 24626/09, 27 May 2013, § 57.

<sup>40</sup> *O.M. v. Hungary*, no. 9912/15, 5 July 2016, § 53.

<sup>41</sup> 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” (A/HRC/29/23), 4 May 2015, § 37.

<sup>42</sup> For example, in its 2016 evaluation of Tunisia, the Committee voiced concern that “persons suspected of being homosexual are forced to undergo an anal examination, ordered by a judge and carried out by a forensic doctor, intended to prove their homosexuality.” The Committee noted that while suspects can in theory refuse to undergo the exams, many consent only “under threat from the police, who argue...that refusing consent will be interpreted as a sign of guilt.” See Committee Against Torture, Concluding observations on the third periodic report of Tunisia (CAT/C/TUN/CO/3), 10 June 2016, § 41.

<sup>43</sup> A/HRC/29/23, as cited above, § 36, further citing Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez (A/HRC/22/53), §§ 76 and 78.

<sup>44</sup> A/HRC/31/57, as cited above, § 36.

<sup>45</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/10/44), 14 January 2009, § 65.

<sup>46</sup> A/HRC/22/53, as cited above, § 75, further citing Committee Against Torture, Consideration of reports submitted by States parties under article 19 of the Convention, Concluding observations of the Committee against Torture (CAT/C/AUT/CO/4-5), 20 May 2014, § 22.

<sup>47</sup> Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 2006.

<sup>48</sup> Court of appeal at Mombasa, Civil Appeal No. 56 of 2016, Judgment of 22 March 2018, § 32 available at <https://static1.squarespace.com/static/581a19852994ca08211faca4/t/5b3bcdbe950b7a92bca4db5/1530645994570/COI+Judgment.pdf>

not sufficient to remedy the illegality of the act. In its judgment, the Court referred to the fundamental right of inherent dignity enshrined in the Kenyan Constitution, as well as a number of international treaties.

## **B. The Court's case-law**

26. There is no European Court of Human Rights case-law specifically addressing forced medical examinations in the context of LGBTI rights abuses. However, the same legal principles set out in Section I of this Intervention are applicable in a set of circumstances where the alleged ill-treatment consists of a forced medical examination of LGBTI persons with discriminatory elements. In particular, relevant for the Court's finding of an Article 3 violation should be (i) the context of detention and environment of negative attitudes against LGBTI minorities (as described in detail in Section IV), and, consequently their vulnerability to torture and ill-treatment, as well as (ii) the discriminatory motives of the medical examinations, to the extent they were performed in order to diagnose whether the targeted sexual minorities were HIV carriers and thus had no link with the criminal offences investigated.
27. The Court has, however, dealt with the broader issue of medical examinations/interventions, which, while in principle justifiable, must be subjected to rigorous scrutiny under Article 3 and a medical necessity needs to be demonstrated.<sup>49</sup> In assessing whether the forced examination is justifiable the Court takes into account (i) the extent to which forcible medical intervention was necessary to obtain evidence, (ii) the health risks for the suspect, (iii) the manner in which the procedure was carried out and the physical pain and mental suffering caused, and (iv) the degree of medical supervision available and the effects on the suspect's health.<sup>50</sup> The Court has also examined, among other relevant factors, whether the preceding decision-making process afforded sufficient procedural guarantees to the applicant.
28. Similarly, in its Article 8 case law, the Court has considered that taking of a blood and saliva sample from the applicant constitutes a compulsory medical intervention which, even if it is of minor importance, must consequently be considered as an interference with his right to privacy.<sup>51</sup> Forced medical examinations that are not motivated by reasons of medical necessity<sup>52</sup> or not required to obtain evidence of a person's involvement in a criminal offence<sup>53</sup> may constitute a violation of Article 8.
29. The Court has shown sensitivity to forced medical examinations performed on detainees or people in confinement, as they are in particularly vulnerable position due to the deprivation of their liberty. The Court has concluded that a forced medical examination constituted degrading treatment under Article 3, having regard *inter alia* to the gravity of the interference with the applicant's "*personal inviolability inherent in his confinement to the psychiatric clinic.*"<sup>54</sup>
30. Further, in *Y.F. v Turkey*, the Court found that forced gynaecological examinations performed during confinement violated Article 8, because the woman could not have been expected to resist submitting to such an examination in view of her vulnerability at the hands of the authorities who exercised complete control over her throughout her detention. In the Court's view, although medical examination of detainees by a forensic doctor can prove to be a significant safeguard against false accusations of sexual molestation or ill-treatment, any interference with a person's physical integrity must be prescribed by law and requires the consent of that person. Otherwise, a person in a vulnerable situation, such as a detainee, would be deprived of legal guarantees against arbitrary acts.<sup>55</sup>

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

### **A. International law and practice**

31. Human rights bodies have stressed the States' special responsibility to investigate discriminatory violence directed against vulnerable groups. For example, in *Rosendo Cantú et al. v. Mexico*, which

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<sup>49</sup> *Jalloh v. Germany*, no. 54810/00, §69. See also *Nevmerzhtsky v Ukraine*, no. 54825/00, § 94 and *Ciorap v. Moldova*, § 77 (both concerning forced-feeding).

<sup>50</sup> *Jalloh v. Germany*, as cited above, § 76 et seq.

<sup>51</sup> *Schmidt v. Germany*, no. 32352/02, decision as to the admissibility. See also *X v. the Netherlands*, no. 8239/78, *X v. Austria*, no. 8278/78.

<sup>52</sup> *Jalloh v. Germany*, as cited above, §70.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Fyodorov and Fyodorova v. Ukraine*, no. 39229/03, § 64

<sup>55</sup> *Y.F. v Turkey*, no. 24209/94, § 43, <http://hudoc.echr.coe.int/eng?i=001-61247>.

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.*”<sup>56</sup> (emphasis added)

32. In the area of LGBTI rights, the States’ positive obligation to duly investigate allegations of ill-treatment and torture with discriminatory elements against the LGTBI community is widely recognised by current 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 the States to do more to “*protect LGBTI 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 [...]*”<sup>57</sup> (emphasis added) 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.<sup>58</sup>
33. 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. As discriminatory motives “*are tricky to prove*”, the “*quality of investigations are all the more important*”;<sup>59</sup>
  - (b) ensure that all acts of brutality by law enforcement officers and other agents are independently, promptly and thoroughly investigated, and that those responsible are brought to justice;<sup>60</sup>
  - (c) as regards detention of LGBTI persons, ensure that law enforcement officers and other individuals and groups are held accountable for any act of violence, intimidation or abuse based on the criminalisation of sexual orientation, gender identity, gender expression and sex characteristics (Yogyakarta Principle 33);
  - (d) establish judicial procedures responsive to the needs of victims;<sup>61</sup>
  - (e) offer appropriate remedies including redress and reparation and, where appropriate, medical and psychological support (Yogyakarta Principle 3);
  - (f) 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. For example, State programs should ensure that victims and witnesses are not subjected to attacks by non-State parties and that the State institutions that investigate and prosecute crimes do not victimize them. Law enforcement officials should be trained to avoid derogatory language related to sexual orientation, gender identity, or gender expression. Protocols in this regard need to explicitly indicate that State agents should refrain from making biased assumptions in their receipt, processing, and investigation of complaints.<sup>62</sup>
34. Overall, States must exercise due diligence in investigating violence that is based on prejudice, since impunity for human rights violations fosters their repetition.<sup>63</sup> Deficiencies in the investigation and prosecution include (i) prejudice in the conduct of investigations, (ii) lack of a differentiated approach that often leads to violence against LGBTI persons not being “categorized 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”.<sup>64</sup>

## B. The Court’s practice

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<sup>56</sup> IACtHR, Rosendo Cantú et al. v. Mexico, 31 August 2010, § 103.

<sup>57</sup> Available at: <https://www.ohchr.org/EN/Issues/Discrimination/Pages/JointLGBTIstatement.aspx>.

<sup>58</sup> A/HRC/29/23, as cited above, §24.

<sup>59</sup> 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, p. 23.

<sup>60</sup> See OHCHR report “Born Free and Equal - Sexual Orientation and Gender Identity in International Human Rights Law”, p. 29.

<sup>61</sup> 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.

<sup>62</sup> IACHR, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, as cited above, §§ 464-465.

<sup>63</sup> *Ibid.*, § 438.

<sup>64</sup> *Ibid.*, § 490 et seq.

35. The Court's case-law supports the Interveners' position that Contracting States are under a positive obligation under the Convention to conduct an adequate investigation into allegations of discriminatory ill-treatment.
36. As regards violence with homophobic or transphobic overtones, the obligation to conduct an effective investigation entails the requirement to take the reasonable measures available to the authorities to *collect and secure evidence*, to explore all practical means of discovering the truth concerning the incident at issue, *ascertain whether there were discriminatory motives* and establish whether feelings of hatred or prejudices based on a person's played a role in the events,<sup>65</sup> and to deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of violence induced by violence motivated by gender-based discrimination.<sup>66</sup> *Promptness and reasonable expedition* are also essential elements of the obligation to conduct an effective investigation in this context.
37. On that basis, in *Identoba and Others v Georgia*,<sup>67</sup> the Court found that failure of the relevant domestic authorities to take "all reasonable steps" to unmask the role of possible homophobic motives for the violent events in question constituted an infringement of Article 3 in its procedural element in conjunction with Article 14 of the Convention. The Court noted that it was essential for the relevant domestic authorities to conduct a "meaningful inquiry" into the discrimination behind the attack "given, on the one hand, the hostility against the LGBT community and, on the other, in the light of the clearly homophobic hate speech uttered by the assailants during the incident".<sup>68</sup> The Court held the same position a year later in *M.C. & A.C. v Romania*<sup>69</sup> where it concluded that the investigations into the allegations of ill-treatment (homophobic attack by private individuals) were ineffective as they lasted too long, were marred by serious shortcomings, and failed to take into account possible discriminatory motives.
38. The Court added that treating violence and brutality with a discriminatory intent on an equal footing with cases that have no such overtones "would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. Without such a strict 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."<sup>70</sup>

#### IV. Discriminatory laws and practices against LGBTI people in Azerbaijan

39. Azerbaijan is a party to key international and regional human rights treaties, but does not have corresponding anti-discrimination legislation or protections for LGBTI people.<sup>71</sup> Azerbaijan's criminal code provides for hate crime penalties, however sexual orientation and gender identity are not mentioned as protected grounds, and the State neither pursues LGBTI cases nor provides data to international observers.<sup>72</sup>
40. In addition to this legislative gap, various reports of leading international human rights organizations, States as well as civil society groups and activists in Azerbaijan repeatedly have stressed that the LGBTI community represents one of the most marginalized, least visible and discriminated against groups in the country.<sup>73</sup>

<sup>65</sup> In *Abdu v. Bulgaria*, the Court noted that the ineffectiveness of the State's investigation stemmed precisely from the failure of the authorities to investigate the racist aspects of the violence perpetrated against the applicant. On that basis, the Court examined the complaint not only from the angle of Article 3 and 14 taken together, but also Article 3 taken separately.

<sup>66</sup> *Identoba and Others v. Georgia*, no. 73235/12, § 67.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Identoba and Others v. Georgia*, as cited above, § 77.

<sup>69</sup> *M.C. and A.C. v. Romania*, no. 12060/12.

<sup>70</sup> *Ibid.*

<sup>71</sup> The general non-discrimination clause (Article 25) of the Constitution of Azerbaijan guarantees "equality of rights and freedoms to everyone, irrespective of race, ethnicity, religion, language, sex, origin, property status, occupation, beliefs or affiliation with political parties, trade union organisations or other public associations. Restrictions of rights and freedoms on the grounds of race, ethnicity, religion, language, sex, origin, beliefs, or political or social affiliation are prohibited".

<sup>72</sup> OSCE OHIDR Hate Crime Reporting <http://hatecrime.osce.org/azerbaijan>

<sup>73</sup> United States Department of State Country Reports on Human Rights Practices, 2018: <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/azerbaijan/>; Henrich Boell Foundation, "Live as you wish, but make sure others do not know", by Edita Badasyan: <https://www.boell.de/en/2016/12/08/situation-lgbti-individuals-soth-caucasus>, last visited 27 June 2019.

41. State-sanctioned hostility towards LGBTI people and their allies based on their actual or perceived sexual orientation or gender identity is widespread. In the two years since the mass arrests of LGBTI people in Baku in 2017, Baku police have repeatedly exploited the vulnerable status of LGBTI people and sex workers by arresting them at random and pressuring them to provide details on other potential targets for blackmail or bribery.<sup>74</sup>
42. These type of police raids have become a regular exercise for continuous intimidation against the members of the LGBTI community, particularly targeted at gay men and transgender people. The victims usually face detention, inhuman treatment, in some instances torture and rape, forced medical examinations and threat to expose their sexual orientation and/or gender identity. These incidents heighten sense of fear and stigmatisation among the victims and have a chilling effect on the community in general.<sup>75</sup>
43. The level of prejudice against LGBTI people in Azerbaijan is high, and it regularly ranks last on ILGA Europe's Rainbow Index measuring the rights of LGBT people in Europe.<sup>76</sup>
44. With homophobia and transphobia are widespread, LGBTI persons are often at risk of violence, including from their own family members. According to the research conducted among the members of the LGBTI community in Azerbaijan by Gender and Development and "LGBT Ganja" Initiative Group, 77% of the respondents (205 out of 266) replied they had been subjected to physical violence in the past (116 by police and 46 by family members), and all 266 confirmed undergoing psychological pressure and discrimination based on their sexual orientation or gender identity (167 by police, 145 by third parties, and 121 by family members).<sup>77</sup>
45. As a rule, these incidents are not reported to the police due to distrust in the authorities and because of fear of being exposed, as many individuals hide their sexual orientation or gender identity to avoid further victimisation, violence and discrimination.<sup>78</sup>
46. Those who fail to keep their sexual identity a secret can expect to be fired from their jobs, removed from university, or evicted from their apartment.<sup>79</sup> Teenagers whose sexual identity becomes known to their families are at high-risk of becoming homeless and relying on sex work for income.
47. Among the recommendations in the 2016 report of monitoring the situation in Azerbaijan, the European Commission on Racism and Intolerance (ECRI) stressed that: "Azerbaijan should enact basic legislation to protect LGBT persons and to regulate a number of specific LGBT issues. The first step is to extend the criminal law provisions to combat racism and intolerance and the civil and administrative law provisions on equality and anti-discrimination so that they protect LGBT persons".<sup>80</sup>

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<sup>74</sup> European Parliament resolution on Azerbaijan, notably the case of Mehman Huseynov (2019/2511(RSP)) [http://www.europarl.europa.eu/doceo/document/B-8-2019-0064\\_EN.html](http://www.europarl.europa.eu/doceo/document/B-8-2019-0064_EN.html). Council of Europe European Commission Against Racism and Intolerance (ECRI) Report on Azerbaijan, Fifth cycle, 2016: <https://rm.coe.int/fourth-report-on-azerbaijan/16808b5581>, p. 30, para 80.

<sup>75</sup> ILGA-Europe Annual Review 2016: [https://www.ilga-europe.org/sites/default/files/Attachments/annual\\_review\\_2017\\_online.pdf](https://www.ilga-europe.org/sites/default/files/Attachments/annual_review_2017_online.pdf); Eurasianet, Azerbaijan: Scale of LGBT Persecution Is Rising – Lawyer: <https://eurasianet.org/azerbaijan-scale-of-lgbt-persecution-is-rising-lawyer>; Monitoring aimed at identifying human rights violations based on sexual orientation and gender identity, 2016-2017, Qualitative research report by Gender and Development NGO and LGBT Ganja Initiative group, pp. 10-12.

<sup>76</sup> ILGA-Europe Rainbow Europe Index: <https://www.ilga-europe.org/rainboweurope>; latest update 13 May 2019: [https://www.ilga-europe.org/sites/default/files/Attachments/rainbowindex2019online\\_0\\_0.pdf](https://www.ilga-europe.org/sites/default/files/Attachments/rainbowindex2019online_0_0.pdf)

<sup>77</sup> Monitoring aimed at identifying human rights violations based on sexual orientation and gender identity, 2016-2017, Qualitative research report by Gender and Development NGO and LGBT Ganja Initiative group, pp. 7-8. supra note 43, Commission Against Racism and Intolerance (ECRI) Report on Azerbaijan, Fifth cycle, 2016, p. 30, para 81.

<sup>78</sup> Ibid, p. 8., also supra note 42, United States Department of State Country Reports on Human Rights Practices, 2018.

<sup>79</sup> Eurasianet, Azerbaijan: Detentions End but Pressure on LGBT Community Continues:

<https://eurasianet.org/azerbaijan-detentions-end-but-pressure-on-lgbt-community-continues>

<sup>80</sup> Council of Europe European Commission Against Racism and Intolerance (ECRI) Report on Azerbaijan, Fifth cycle, 2016: <https://rm.coe.int/fourth-report-on-azerbaijan/16808b5581>.

## 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 Court has the opportunity to ensure that the European Convention is practical and effective in protecting this vulnerable group, and reflects the latest international standards.
49. While recognising that the LGBTI community are a particularly vulnerable group requiring special protection the Court should establish that:
  - (a) where the use of force against a group is connected to actual or perceived sexuality or gender identity, the discriminatory purpose is then fulfilled; and
  - (b) the context of discrimination is relevant to that test.
50. At the same time, the Court should acknowledge that forced medical examinations that serve no purpose are always a discriminatory violation of Article 3, and that the authorities are under a heightened duty to effectively investigate the discriminatory element of torture and ill-treatment faced by LGBTI people.