EUROPEAN COURT OF HUMAN RIGHTS

Lili Minasyan and Others v. Armenia (Application no. 59180/15)

THIRD PARTY INTERVENTION BY THE HUMAN RIGHTS CENTRE OF GHENT UNIVERSITY[1]

These written comments are submitted by the Human Rights Centre of Ghent University,[2] pursuant to leave granted by the President of the First Section of the European Court of Human Rights in his letter dated 20 June 2018, and in accordance with rule 44 §5 of the Rules of the Court. The Human Rights Centre's experience and expertise were set out in the application for leave to intervene, dated 7 May 2018.

The interveners submit that the case of *Lili Minasyan and Others v. Armenia* raises important issues under the right to respect for private life (Article 8 ECHR), taken alone and in conjunction with the prohibition of discrimination (Article 14 ECHR), and the right to freedom of expression (Article 10 ECHR), alone and in conjunction with the prohibition of discrimination (Article 14 ECHR). We respectfully submit that this case provides an important opportunity for the Court to clarify ECHR standards regarding the positive obligation for the State to combat hate speech based on sexual orientation, gender identity and gender expression. In our scholarly opinion, the positive obligation that is central to this case, touches upon at least three important issues that merit further jurisprudential clarification:

1) The implications of States Parties' obligation to provide **effective human rights protection to LGBTIQ+ persons;**[3]
2) The contours of States Parties' obligation to provide protection against **hate speech**, in general and in the specific case of homophobic and transphobic hate speech;
3) The need for the Court to offer effective protection for the rights of **human rights defenders**, including protection against private actors.

In what follows, these three dimensions will successively be examined. The first section addresses the phenomenon of homophobic and transphobic hate speech in the light of international human rights law and of the Court's commitment to offer effective protection to LGBTIQ+ persons against discrimination. The second section discusses how the positive obligation to provide protection against hate speech (in general and in this specific field) would fit into the Court's existing case law. The third section highlights the importance of robust ECHR protection for human rights defenders, in general as well as in the specific field of LGBTIQ+ rights.

1. Effective human rights protection for LGBTIQ+ persons includes protection against hate speech

As this section will show, international human rights law has recognized the need for protection against hate speech as a necessary part of the measures that are required for effective protection of the human

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[3] Lesbian, Gay, Bisexual, Transgender, Intersex, Queer persons. The '+' refers to the open-endedness of the acronym, in order to include all forms of self-identification.

rights of LGBTIQ+ persons (1.1). Moreover, in light of the developments in the Court's case law toward robust protection for LGBTIQ+ human rights, hate speech protection is a logical fit in the ECHR protective toolkit (1.2)

1.1. Hate speech protection as part of the international human rights protection package for LGBTIQ+ persons

Historically, international human rights law first recognized that effective protection of certain categories of persons against discrimination includes protection against hate speech, with regard to *national, racial and religious hatred.* This was considered so important, that it led to the inclusion in the ICCPR of a – rare – obligation for states to restrict a human right, i.e. the freedom of expression:

Article 20 (2) ICCPR states that '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.

The terminology of Article 20 (2) was clarified as follows by the UN Special Rapporteur on Freedom of Opinion and Expression (following the 'Camden Principles on Freedom of Expression and Equality):

(i) "Hatred" is a state of mind characterized as intense and irrational emotions of opprobrium, enmity and detestation towards the target group;
(ii) "Advocacy" is explicit, intentional, public and active support and promotion of hatred towards the target group;
(iii) "Incitement" refers to statements about national, racial or religious groups that create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.[4]

Both international and European human rights bodies have found that targeted groups of hate speech have *evolved* from racial and ethnic groups to include vulnerable groups in society *such as LGBTIQ+ individuals*. This has been supported by the UN Special Rapporteur on Freedom of Opinion and Expression,[5] as well as by several bodies within the Council of Europe framework.

Already in 1997, the **Committee of Ministers** (CoM) of the Council of Europe defined hate speech as 'covering all forms of expression which spread, incite, promote or justify racial hatred…*or other forms of hatred based on intolerance'*,[6] hence extending the concept beyond the context of racism in which it originated. More recently, in respect to LGBTIQ+ persons, the CoM has recommended that 'Member states should take appropriate measures to combat all forms of expression, including in the media and on the Internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination…Such "hate speech" should be prohibited and publicly disavowed whenever it occurs'.[7]

The Parliamentary Assembly of the Council of Europe (**PACE**) specifically stated that 'hate speech is not limited to racism and xenophobia: it may also take the form of … *homophobia* and other forms of hate speech directed against specific groups or individuals'.[8] In respect to transgender people in particular, the Parliamentary Assembly stated that '*transgender* people are frequently targeted by hate

[4] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/67/357, 7 September 2012, para 44.
[5] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/67/357, 7 October 2012, para 44.
[6] Committee of Ministers, Recommendation No. R (97) 20 of the Committee of Ministers to members states on "hate speech", adopted 30 October 1997.
[7] Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, para. 6.
[8] Parliamentary Assembly of the Council of Europe, Resolution 2144 (2017) Ending cyber discrimination and online hate, para 2.

speech'.[9] The PACE urges states amongst others to ensure 'that their national law allows for the effective prosecution of online hate speech'.[10]

In its 2015 General Policy Recommendation on combating hate speech, [11] the European Commission against Racism and Intolerance (**ECRI**) defined hate speech as 'the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of "race", colour, descent, national or ethnic origin, age, disability, language, religion or belief, *sex, gender, gender identity, sexual orientation* and other personal characteristics or status'. The recommendation urges states to 'clarify the scope and applicability of responsibility under *civil and administrative law* for the use of hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those who are targeted by it while respecting the right to freedom of expression and opinion', and lists a number of measures that may realize this, in particular regarding hate speech on the internet. In addition, the recommendation wants states to 'take appropriate and effective action against the use, in a public context, of hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it through the use of the *criminal law* provided that no other, less restrictive, measure would be effective and the right to freedom of expression and opinion is respected'.

1.2. Hate speech protection as a logical fit in ECHR protection of LGBTIQ+ persons

Since the 1980's, the Court has gradually developed a robust protection of LGBTIQ+ persons under the ECHR, especially under Articles 8 and 14. It has repeatedly held that the notion of 'private life' (Article 8 ECHR) is a broad term not susceptible to exhaustive definition, which covers the moral integrity of a person and can therefore embrace multiple aspects of a person's identity, such as gender identity and sexual orientation, name or elements relating to a person's right to their image.[12] By way of example, it may be reminded that the Court has outlawed the criminalisation of same-sex relations (*Dudgeon v. United Kingdom),* has found a positive obligation for the State to legally recognize same-sex relations (*Oliari and Others v. Italy)*, as well as a positive obligation to adopt a procedure for the legal recognition of the gender identity of transgender persons *(Christine Goodwin v. United Kingdom; A.P., Garçon, Nicot v. France)*. Progressive rulings on other issues such as adoption rights,[13] parental authority,[14] social protection,[15] residence rights,[16] access to sex reassignment treatment[17] and medical insurance,[18] have also increasingly strengthened the legal position of LGBTIQ+ persons across Europe.

In the recent case of *Bayev and Others v. Russia,* the Court noted the clear European consensus about the recognition of individuals' right to openly identify themselves as gay, lesbian or any other sexual

[9] Parliamentary Assembly of the Council of Europe, Resolution 2048 (2015) Discrimination against transgender people in Europe, para. 1.
[10] Parliamentary Assembly of the Council of Europe, Resolution 2144 (2017) Ending cyber discrimination and online hate, para 7.2.1.
[11] European Commission against Racism and Intolerance, 'General Policy Recommendation No. 15 on Combating Hate Speech' (2015).
[12] ECtHR 22 March 2016, Sousa Goucha v. Portugal, para. 23.
[13] ECtHR (Grand Chamber) 19 February 2013, X and Others v. Austria.
[14] ECtHR 21 December 1999, Salguejro da Silva v. Portugal.
[15] ECtHR 22 July 2010, P.B. and J.S. v. Austria.
[16] ECtHR 23 February 2016, Pajić v. Croatia.
[17] ECtHR 11 September 2007, L. v. Lithuania.
[18] ECtHR 12 June 2003, Van Kück v. Germany.

minority, and to promote their own rights and freedoms.[19] In the same judgment, the Court also pointed out its refusal to endorse policies and decisions – or a lack thereof – which embody a predisposed bias on the part of a heterosexual majority against a homosexual minority.[20] Although popular sentiment may play an important role in its assessment of cases that relate to morals, the Court held that "there is an important difference between giving way to popular support in favour of extending the scope of the Convention guarantees and a situation where that support is relied on in order to narrow the scope of the substantive protection. […] It would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority". [21]

Over the years, the Court has taken a particular strong stance against intolerance based on a person's sexual identity (homophobia/transphobia) under Article 14 ECHR.[22] According to the Court, differential treatment based on gender or sexual orientation requires particularly serious reasons by way of justification.[23] The Court has moreover recognized that "discrimination based on sexual orientation is as serious as discrimination based on 'race, origin or colour'.[24] In this regard, it may therefore be argued that the Grand Chamber's position concerning racial discrimination in the case of *Aksu v. Turkey* may be applied by analogy to instances of discrimination based on sexual orientation and/or gender (identity/expression). According to the Court, "racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment".[25] Indeed, negative attitudes, references to traditions or general assumptions in a particular country cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment, any more than similar negative attitudes towards those of a different race, origin or colour.[26]

LGBTIQ+ persons are particularly affected in society and law by harmful, negative stereotypes concerning sexual orientation, gender identity and gender expression ('homophobia' and 'transphobia'). In this regard, the Court pointed out in *Aksu v. Turkey* that "any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group".[27] It considers the personal feeling of offence based on harmful stereotypes sufficient to recognise the applicability of Article 8 of the Convention.[28] It may therefore be argued that the obligation for the State to combat negative stereotyping of specific groups in society also includes the obligation to fight against hate speech based on sexual orientation, gender identity and gender expression.[29] Indeed, in *Bayev and Others v. Russia* the Court pointed out that the State may not reinforce stigma and prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society.[30] To the extent that persons are

[19] ECtHR 20 June 2017, Bayev and Others v. Russia, para. 66.
[20] *Ibid*, para. 68.
[21] *Ibid*, para. 70.
[22] See for instance ECtHR 12 May 2015, Identoba and Others v. Georgia, para. 64.
[23] ECtHR 16 July 2014, Hämäläinen v. Finland, para. 109.
[24] ECtHR 9 February 2012, Vejdeland and Others v. Sweden, para. 55.
[25] ECtHR (Grand Chamber) 15 March 2012, Aksu v. Turkey, para. 44.
[26] ECtHR 20 June 2017, Bayev and Others v. Russia, para. 68.
[27] ECtHR (Grand Chamber) 15 March 2012, Aksu v. Turkey, para. 58.
[28] *Ibid*, paras. 60, 81.
[29] *Ibid*, para. 75.
[30] ECtHR 20 June 2017, Bayev and Others v. Russia, para. 83.

exposed to the ideas of diversity, equality and tolerance, the adoption of these views could only be conducive to social cohesion.[31]

What holds for harmful stereotypes, a fortiori holds for hate speech. There are very clear indications in the Court's case law that homophobic and transphobic hate speech raise issues of Article 8 alone and in combination with Article 14 ECHR. Yet until today, the Court has not yet had the opportunity to develop this in terms of positive obligations.

2. Hate speech under the ECHR

The European Court of Human Rights has on numerous occasions addressed the issue of hate speech, on multiple grounds, including sexual orientation. In most cases, the question that was presented to the Court was whether a ban on hate speech is a justifiable restriction of the freedom of expression. According to the Court's case law, certain hate speech bans are indeed justifiable under the Convention (2.1.). In addition, there are indications in the case law that the Convention requires state action against certain types of hate speech. We respectfully argue that it would be useful to clarify the contours of such positive obligation (2.2.).

2.1. The ECHR accommodates hate speech bans

The Court has consistently held that the freedom of expression (Article 10 ECHR) constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every person. Subject to paragraph 2 of Article 10, protection is given not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any part of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.[32]

However, the Court has also specified that this tolerance towards shocking or disturbing opinions is not unlimited. Indeed, the opinion may unjustifiably interfere with one of the other fundamental rights that are protected under the ECHR, notably the right to respect for private and family life (Article 8) and the protection against discrimination (Article 14). In this regard, the Court has stated that "[t]olerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance".[33] The hatred based on intolerance to which the Court refers, can take on different forms. In its case law, the Court has accepted the legitimacy of State action against hate speech based on multiple grounds such as ethnic hatred,[34] condonement of terrorism,[35] racial discrimination,[36] religious intolerance,[37] and sexual orientation.[38] Nevertheless, it has also stressed the vital importance of domestic authorities adopting a cautious approach in determining the scope of hate speech crimes and strictly construing the relevant legal provisions in order to avoid excessive interference under the guise

[31] *Ibid*, para. 82.
[32] ECtHR 7 December 1976, Handyside v. United Kingdom, para. 49.
[33] ECtHR 6 July 2006, Erbakan v. Turkey, para. 56.
[34] ECtHR 4 November 2008, Balsytė-Lideikienė v. Lithuania.
[35] ECtHR 2 October 2008, Leroy v. France.
[36] ECtHR 10 July 2008, Soulas and Others v. France; 16 July 2009, Féret v. Belgium.
[37] ECtHR 13 September 2005, I.A. v. Turkey.
[38] ECtHR 9 February 2012, Vejdeland v. Sweden.

of action taken against hate speech, where such charges are brought for a mere criticism of the Government, State institutions and their policies and practices.[39] In this regard, the Court takes into account, *inter alia*, whether the prohibited statements relate to a matter of public interest, call for hatred or intolerance, are part of a context of special historical overtones, affect the dignity of the individuals concerned, whether there exists a consensus among the Council of Europe member States to prohibit such statements and the severity of the interference.[40] According to its own words, the Court's approach to hate speech cases can be described as "highly context-specific".[41]

The Court has also paid attention to the manner in which the statements were made, and their capacity – direct or indirect – to lead to harmful consequences.[42] In this regard, the Court has pointed out that incitement to hatred does not necessarily (have to) entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population are considered to be sufficient for the authorities to favour combating hate speech in the face of freedom of expression exercised in an irresponsible manner.[43] In *Identoba and Others v. Georgia*, the Court attached particular importance to the feelings of fear, anguish and insecurity that may result from exposure to verbal abuse aimed evidently to frighten persons so that they would desist from their public expression of support for the LGBTIQ+ community.[44]

2.2. The ECHR mandates hate speech bans under Article 8 and 8 jo. 14

The Court has considered that – while the essential object of Article 8 is to protect individuals against arbitrary interference by public authorities –, it may also impose on a State certain positive obligations to ensure effective respect for the rights protected by Article 8; these obligations may involve the adoption of measures designed to secure respect for private or family life even in the sphere of the relations of individuals between themselves.[45] In what follows, it will be argued that Article 8, alone or in combination with Article 14, imposes a positive obligation on the State to have an adequate legal framework protecting LGBTIQ+ persons against hate speech (2.2.1.). Subsequently, the Court will be invited to reflect on the question whether such legal framework should provide for mandatory criminal-law protection (2.2.2.).

2.2.1. The obligation to have an adequate legal framework in place

In the *Söderman* case, the Court has recognized in general terms that Article 8 imposes a positive obligation on the State "to maintain and apply in practice an adequate legal framework affording protection."[46] In the context of the present case, the Court is kindly invited to recognize that Article 8, alone or in combination with Article 14, similarly imposes a primary positive obligation on the State to establish an effective legal framework protecting LGBTIQ+ persons against hate speech. Under Article 8, in order to be considered adequate, the legal framework must afford "an acceptable level of protection to the applicant in the circumstances."[47] In *Aksu*, the Court has clarified that where speech affects a group's sense of identity and feelings of self-worth and self-confidence, the State must at least ensure that "an effective legal system [is] operating for the protection of the rights falling within the notion of

[39] ECtHR 9 May 2018, Stomakhin v. Russia, para. 117. Arguably, legal provisions prohibiting hate speech based on sexual orientation, gender identity and gender expression would not be used by the State to interfere with the freedom of political speech of government opponents in the same way as in the *Stomakhin* case.
[40] See ECtHR 15 October 2015, Perinçek v. Switzerland, paras. 226-289.
[41] ECtHR (Grand Chamber) 15 October 2015, Perinçek v. Switzerland, para. 208.
[42] *Ibid*, para. 207.
[43] ECtHR 9 February 2012, Vejdeland v. Sweden, para. 55.
[44] ECtHR 12 May 2015, Identoba and Others v. Georgia, paras. 70-71.
[45] ECtHR 21 October 2015, Oliari and Others v. Italy, para. 159.
[46] ECtHR (Grand Chamber), 12 November 2013, Söderman v. Sweden, para. 85.
[47] *Ibid*, para. 91.

'private life' and was available to the applicant in the present case."[48] It is respectfully submitted that Article 8, alone or in combination with Article 14, equally requires the legal framework to provide LGBTIQ+ victims of hate speech with access to effective remedies allowing a judicial assessment of how to balance the conflicting fundamental rights under Articles 8 and 10 of the Convention.[49]

The Court has already pointed out the importance of a legal framework that explicitly qualifies discrimination based on sexual orientation and gender identity as a bias motive and an aggravating circumstance in the commission of a criminal offence. Indeed, it held that " hostility against the LGBT community and […] clearly homophobic hate speech […] without such strict approach […] 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".[50]

The positive obligation to provide an adequate legal framework is all the more pressing given the fact that the LGBTIQ+ community constitutes "a particularly vulnerable group in society, who have suffered considerable discrimination in the past",[51] in particular by way of homophobia and transphobia. As the Court has indicated in *Aksu*, "special consideration" should be given to the position of vulnerable groups "both in the relevant regulatory framework and in reaching decisions in particular cases."[52]

2.2.2. Is there a need for criminal-law protection in this area?

According to the Court's case law, "while the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against serious acts, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection".[53] As the argument can be made that in cases of hate speech, such "fundamental values and essential aspects of private life" in the sense of the Court's Article 8 case law are indeed "at stake",[54] the Court is respectfully invited to reflect on the question whether the legal framework to protect LGBTIQ+ people against hate speech should consist of criminal-law remedies or whether civil-law remedies are sufficient.[55] While, under Article 10, the Court has accepted that a criminal-law response against hate speech, including even the imposition of a prison sentence, is allowed under the Convention,[56] the question arises whether there may not be circumstances in which it may even be mandated under the Convention.

In the context of racist hate speech, in the case of *R.B* , by scrutinizing "whether the manner in which the criminal-law mechanisms were implemented in the instant case were defective to the point of constituting a violation of the respondent State's positive obligations under Article 8 of the Convention"[57], the Court has suggested that a criminal-law response may be required in this area. If this is a correct interpretation of the Court's case law, the question arises whether this only applies to racist hate speech or also to other instances of hate speech such as hate speech against LGBTIQ+ people, as the Court has recognized that "discrimination based on sexual orientation is as serious as discrimination

[48] ECtHR (Grand Chamber), 15 March 2012, Aksu v. Turkey, para. 73.
[49] Mutatis mutandis ECtHR (Grand Chamber) 15 March 2012, Aksu v. Turkey, para. 74.
[50] ECtHR 12 May 2015, Identoba and Others v. Georgia, para. 77.
[51] ECtHR 20 May 2010, Alajos Kiss v. Hungary, para. 42.
[52] ECtHR (Grand Chamber) 15 March 2012, Aksu v. Turkey, para. 75.
[53] ECtHR 12 April 2016, M.C. and A.C. v. Romania, para. 114.
[54] ECtHR 26 March 1985, X and Y v. the Netherlands, para. 27.
[55] Mutatis mutandis, ECtHR (Grand Chamber) 12 November 2013, Söderman v. Sweden, paras. 82-85.
[56] ECtHR (Grand Chamber) 17 December 2004, Cumpana and Mazare v. Romania, para. 115.
[57] ECtHR 12 April 2016, R.B. v. Hungary, para. 85. Similarly ECtHR 5 December 2017, Alković v. Montenegro, para. 73; and ECtHR 17 January 2017, Király and Dömötör v. Hungary, para. 80.

based on 'race, origin or colour.'"[58] Alternatively, the question arises whether it is justifiable for a State that has opted to provide criminal-law protection against certain instances of hate speech (e.g. racist hate speech) to not similarly do so with respect to other instances (e.g. hate speech against LGBTIQ+ people), as the Court has in the past taken into account whether protection "is normally regulated" by the criminal-law when determining whether a criminal-law response is mandated under Article 8.[59]

Especially if it considers a criminal-law response to be mandatory, the Court is invited to identify the relevant factors that ought to be taken into account by domestic authorities when balancing Articles 8 and 10 in cases involving alleged hate speech against LGBTIQ+ people.[60] In this respect, it is recalled, as already mentioned above, that the Court has stressed in the *Stomakhin* case that "it is vitally important that the domestic authorities adopt a cautious approach in determining the scope of "hate speech" crimes and strictly construe the relevant legal provisions in order to avoid excessive interference under the guise of action taken against 'hate speech' […]."[61]

3. Safeguarding the vital role of human rights defenders

The case of *Lili Minasyan and Others* touches upon the vital issue of the rights of human rights defenders, in at least two ways. While the Court has a strong line of case law offering robust protection against state harassment of human rights defenders, this case allows the Court to address harassment of human rights defenders by private actors. We respectfully argue that it is important for the Court to do so (3.1). As a second point, it is very relevant to emphasize that the fight against homophobia and transphobia requires, in addition to measures of a legal nature, the government's commitment to the promotion of a culture of tolerance and respect. Under international human rights law, this is a state obligation. When a state allows private harassment of civil society actors working toward this culture of tolerance and respect, it manifestly breaches this obligation (3.2.).

3.1. Combating hate speech as an Article 10 (jo. 14) ECHR matter

In addition to the main argument under Articles 8 and 14 ECHR, developed above, we respectfully submit that it is useful to consider the Article 10 implications of hate speech that specifically targets persons exercising their Article 10 rights. Indeed, the case of *Lili Minasyan and Others* concerns a particularly intimidating campaign of hate speech, including multiple articles and the publication of a black list, that targets individuals *on account of their expressions in support of LGBTIQ+ rights*. This is clear from the fact that the hate speech reacted specifically to expressions made during a press conference on Facebook, and from the frequent use of terms such as 'gay lobbyists'. Although the applicants did not invoke Article 10 in their application to the Court, it needs to be reminded that the Court has consistently held that it is the master of the characterization to be given in law to the facts of a case.[62]

The Court has in its case law developed the crucial concept of the *'chilling effect'* of measures that restrict freedom of expression.[63] That is to say, one of the fundamental reasons why the Court has held States to high standards of negative obligations under Article 10 ECHR, is the need to prevent self-

[58] ECtHR 9 February 2012, Vejdeland and Others v. Sweden, para. 55.
[59] ECtHR 26 March 1985, X and Y v. the Netherlands, para. 27.
[60] As the Court has done in the context of racist hate speech in the case of ECtHR 17 January 2017, Király and Dömötör v. Hungary, paras. 73-78.
[61] ECtHR 9 May 2018, Stomakhin v. Russia, para. 117.
[62] ECtHR (Grand Chamber) 12 November 2013, Söderman v. Sweden, para. 57.
[63] See amongst others ECtHR (Grand Chamber) 12 February 2008, Guja v. Moldova, para. 95; (Grand Chamber) 23 April 2015, Morice v France, paras. 127 and 176; (Grand Chamber) 23 June 2016, Baka v. Hungary, paras. 160, 167 and 173.

censorship caused by fear of government interference, that would reduce the flow of information and impoverish debate on issues of general interest. In other words, the Court has recognized that the harm of a restriction of freedom of expression regards not only the specific expression it affects, but also the inhibitive effect on future expressions of the same and other authors.

The case of *Lili Minasyan and Others* provides an opportunity for the Court to consider extending this doctrine to positive State obligations, where a similar chilling effect is caused by private actors.

In addition, the case reveals the *intention* of the hate campaigners to remove pro-LGBTIQ+ expressions from the public debate, as is made clear in the call for a boycott by media companies and educational institutions of the blacklisted persons.

Finally, we respectfully submit that the Court may wish to exercise particular vigilance when the expressions that are thus targeted by a hate speech campaign, are expressions in defense of Convention rights. The hate speech campaigners were specifically targeting *human rights defenders*, with the aim of silencing them. It is submitted that the protection of human rights defenders is a core task for the European Court of Human Rights. Indeed, the principle of subsidiarity relies on well-functioning human rights protection mechanisms at the domestic level. This in turn requires vigorous protection of the work of human rights defenders, without whose work many such mechanisms would be empty boxes. It is therefore not despite subsidiarity, but because of subsidiarity, that the Court should offer the strongest protection to the work of domestic human rights defenders.

The principle of *effective protection*, which is central to the Court's interpretation of the Convention, rejects the idea that measures directly inflicted by State agents would merit stricter scrutiny than measures inflicted by private actors and tolerated by the State. The reality on the ground is such that in many cases, those defending the human rights of groups that are the focus of hatred and intolerance in society, are in need of robust State protection. It would be problematic to allow States to circumvent their Article 10 obligations by giving free reign to private actors to repress expressions in support of LGBTIQ+ rights.

For all these reasons, it is submitted that in cases such as that of *Lili Minasyan and Others*, the state obligation to offer protection against hate speech results not only from Articles 8 and 8 *jo.* 14, but also from Articles 10 and 10 *jo.* 14.

3.2. The promotion of a culture of tolerance

International human rights law is strongly committed to the promotion and protection of the rights of members of groups that have been subjected to structural discrimination and/or marginalization in the past, such as women, children, ethnic minorities, and persons with disabilities. The realization of the rights of these individuals requires a change of the way society at large views members of those groups, and international texts impose state obligations to help realize that change. Specific state obligations to this effect are included amongst others in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[64] the Convention on the Rights of Persons with Disabilities (CRPD),[65] and the Yogyakarta Principles (+10) on LGBTIQ+ rights. It is important to recognize this dimension of LGBTIQ+ rights.[66] Like all emancipation struggles, it requires adjustment of deeply and

[64] See Article 5 (a) CEDAW.
[65] See Article 8 CRPD.
[66] Principle 2, sub (f) (Principle 2: The rights to equality and non-discrimination): "States Parties shall (…) [t]ake all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression."

sincerely held beliefs. Cultural resistance to rights that challenge beliefs with strong cultural roots, is not necessarily an expression of bad faith; it is deeply human. The role of the state in this process has been clearly set out in international human rights law. The Armenian government cannot be held fully responsible for the fact that segments of Armenian society do not embrace equality on grounds of sexual orientation, gender identity and gender expression. But the Armenian government can be held responsible for failing to show evidence of working toward the realization of such cultural change. One way for a government to fulfil its international human rights obligations toward the realization of cultural change for equality, is by supporting the work of civil society actors who combat discrimination and prejudice. One way for a government to violate such human rights obligations, is by failing to offer robust protection for the work of such actors. We submit that it would be valuable for the Court to recognize this dimension of the case.

4. Conclusion

We conclude by reiterating that the present case raises important legal questions concerning the protection of LGBTIQ+ persons against hate speech under the Convention. The Court is invited to oblige States to provide effective protection in this area, including by requiring an adequate legal framework to be in place to protect against homophobic and transphobic hate speech (2.2.1.), if considered necessary in the form of mandatory criminal-law protection (2.2.2.). Moreover, the Court should require States to provide robust protection to human rights defenders, including those striving for the protection and promotion of LGBTIQ+ rights, as they are the Court's natural domestic allies in scrutinizing the human rights record of member States (3.1.). Specifically in the context of the present case, such protection is related to the broader positive obligation to promote a culture of tolerance vis-à-vis LGBTIQ+ persons (3.2.).