COUR EUROPÉENNE DES DROITS DE L'HOMME

EUROPEAN COURT OF HUMAN RIGHTS

Conseil de l'Europe – *Council of Europe*

Strasbourg, France

Identoba and Others

v.

Georgia

Application No. 73235/12

Response to the Observations of the Government of Georgia and Claims for Just Satisfaction

I. Introduction

1. This document offers a response to submissions made by the Government of Georgia (hereinafter 'the Government') regarding the admissibility and merits of the present application. The response is lodged before the European Court of Human Rights (hereinafter 'the Court') on behalf of the Applicants, the NGO Identoba (hereinafter the first applicant), Levan Asatiani (the second applicant), Levan Berianidze (the third applicant), Tina Bilikhodze (the fourth applicant), Beka Buchashvili (the fifth applicant), Guram Demetrashvili (the sixth applicant), Gvantsa Dzerkorashvili (the seventh applicant), Elina Glakhashvili (hereinafter the eighth applicant), Natia Gvianishvili (the ninth applicant), Magda Kalandadze (hereinafter the tenth applicant), Mikheil Khalibegashvili (the eleventh applicant), Tamta Melashvili (hereinafter the twelfth applicant), Ketevan Tsagareishvili (the thirteenth applicant), Mariam Tsutsqiridze (the fourteenth applicant).

II. Response to Preliminary Objections regarding the Victim Status of the First Applicant

2. The Government submits that Identoba, as a legal rather than a natural person, cannot claim to be a victim of several of the violations of the European Convention on Human Rights (hereinafter 'the Convention') alleged in the present case. The position advanced by the Government is at odds with the Convention and the practice of the Court to date. Article 34 of the Convention makes clear that an NGO can be a victim of a human rights violation, while the Court's jurisprudence has developed and clarified the point.[1] Standards relevant to the applicability of Articles 8 and 11 to NGOs are set out below.

(i) Article 8

3. The Government questions the extent to which a legal person can be a victim of an Article 8 violation. It asserts that this is only possible as regards home and

[1] See, for example, *Open Door Counselling and Dublin Well Woman v Ireland*, 29 October 1992 (Nos. 14234/88 and 14235/88) ECHR 68

correspondence, not 'private' life, on the apparent basis that there is no jurisprudence from the Court ruling that legal entities as such *can* have a private life within the meaning of Article 8. It is submitted that this approach to interpretation of the Convention is itself erroneous, and contradicted by the Court's practice. It is well known that the precise meaning and content of the Convention's provisions, and of Article 8 in particular, has developed over time through a case-by-case application in particular circumstances. Just as the jurisprudence has evolved case by case to encompass home and correspondence, it should evolve to cover the private lives of legal persons in circumstances where the private life of the organisation is at stake.

4. The Court has already accepted the essential principle that violations of Article 8 rights may arise in a variety of ways. For example, a search of offices was held to raise an issue under Article 8 as regards private life and correspondence in *Noviflora AB v. Sweden* [2] where the Commission found Noviflora's application regarding Article 8 to be admissible, although a friendly settlement was ultimately reached.

5. In *Association for European Integration and Human Rights & Ekimdzhiev v. Bulgaria*[3], the Court stated that the applicant association was:

'not wholly deprived of the protection of Article 8 by the mere fact that it is a legal person. While it may be open to doubt whether, being s*uch a person, it can h*ave a 'private life' within the meaning of that provision, it can be said that its mail and other communications, which are in issue in the instant case, are covered by the notion of 'correspondence' which applies equally to communications originating from private and business premises.'[4]

It is noted that the Court did not rule out that the term 'private life' may be applicable to legal persons in certain circumstances, though this was an issue it

[2] *Noviflora AB v. Sweden,* 8 July 1993 (No. 14369/88) 15 EHRR CD6
[3] *Association for European Integration and Human Rights & Ekimdzhiev v. Bulgaria*, 28 June 2007, (No. 62540/00)
[4] *Ibid* para. 60

did not need to decide in that particular case. It made clear once again that in any event legal persons may be entitled to the protection of Article 8.

6. The nature of the Convention as a living instrument that evolves to respond to the demands and realities of contemporary practice is well established. The Court has acknowledged specifically that accepting the applicability of article 8 to legal persons is consistent with an evolutive or 'living instrument' approach to the interpretation of the Convention. In *Société Colas Est and Others v. France*[5] it was held that:

'the Convention is a living instrument which must be interpreted in the light of present-day conditions... Building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises.'[6]

7. In that instance the Court expanded the protection afforded to legal persons as regards Article 8. Therefore, if the Court was willing to extend the term 'home' to legal entities, in light of the living instrument principle it seems reasonable that other aspects of Article 8 should also extend to legal entities.

8. It must be recalled in this context that the concept of private life has consistently been described as broad and incapable of exhaustive definition, comprising individual autonomy and development, as well as the establishment of relationships with others.[7] It is covering wide panoply of rights that enable individuals and entities to function, individually and in connection with others.[8] It is submitted that it is within the essential scope of Article 8 to protect the essential purpose and function of the applicant NGO, and its ability to exist as a Lesbian, Gay, Bisexual and Transgender (hereinafter 'LGBT') organisation and

[5] *Société Colas Est and Others v. France*, 16 April 2002, (No. 37971/97) ECHR 2002-III
[6] *Ibid* para. 41
[7] *Ibid* para. 61
[8] *Pretty v United Kingdom,* 29 April 2002, (No.2346/02), 2002-III

to communicate a positive LGBT message through the development and coordination of members and communication in various ways with the outside world. The Court's approach to Article 8 to date, as broad-reaching in scope and incapable of exhaustive definition, is consistent with the potential applicability of Article 8 to legal persons in a range of ways.

(ii) Article 11

9. As regards the applicability of Article 11 to the first applicant, the Court has consistently held that rights under Article 11 are applicable to those organising as well as participating in a demonstration.

10. Practice specifically supports the view that legal persons organising the peaceful assembly, including any association or corporate body, can be victims of a violation.[9] In *Christians against Racism and Fascism v United Kingdom,* the Commission stated that 'the freedom of peaceful assembly … is a freedom capable of being exercised not only by the individual participants of such demonstration, but also by those organising it, including a corporate body such as the applicant association.'[10]

11. There are clear and direct links between the NGO Identoba and the 2012 IDAHO march. The 2012 IDAHO march was planned and organised by Identoba and a substantial number of its organizers and participants were employees or members of Identoba.[11] The 2012 IDAHO march was also part of Identoba's ongoing project: In 2011-2012 with the financial assistance of Open Society Foundations Identoba was implementing LGBT rights protection and advocacy project, which envisaged a public IDAHO march on May 17 in order to increase awareness of LGBT rights in Georgia.[12] Therefore, the failure of the 2012 IDAHO assembly significantly undermined Identoba's work and it is clear that Identoba can be a victim under Article 11 of the Convention.

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[9] *Christians against Racism and Fascism v UK*, 16 July 1980 (No. 8440/78) DR 21, 138 at p.148
[10] *Ibid*
[11] Applicants' original submission, No. 73235/12, 14 January 2012
[12] Letter sent from Identoba's executive director to the General Prosecutor of Georgia, 29 June 2012, submitted along with the original submission on 14 January 2012

III. Response to Preliminary Objections regarding Victim Status of the Applicants besides the First Applicant

12. The Government's submission questioned whether all of the applicants attended the demonstration.[13] All of the applicants appear in the video footage that was submitted to the Court: (video, duration 1:21): 0:01 - Magda Kalandadze (tenth applicant); (video, duration 7:44): 0:04 - Mariam Tsutskiridze (fourteenth applicant); 0:16 Ketevan Tsagareishvili (thirteenth applicant); 0:18 Natia Gvianishvili (ninth applicant); 0:30 - Elina Glakhashvili (eighth applicant); 1:17 Mikheil Khalibegashvili (eleventh applicant); 5:28 Levan Berianidze (third applicant); 5:44 Tina Bilikhodze (fourth applicant); 6:05 - Levan Asatiani (second applicant); 6:27 -Tamta Melashvili (twelfth applicant); 6:40 - Gvanca Dzerkorashvili (seventh applicant); 6:45 - Guram Demetrashvili (sixth applicant); (video, duration 2:44): 0:24 - Beka Buchashvili (fifth applicant). Statements from each of the applicants that describe violations are also attached to the original submission sent to the Court on 14 January 2012. Therefore, Government's preliminary objections regarding the victim status of the applicants should be dismissed.

IV. Response to the Government Submissions regarding Exhaustion of Domestic Remedies

13. An applicant must only exhaust remedies which are available and effective and it has been held in *Akdivar and Others v Turkey*[14] that the requirement for the exhaustion of domestic remedies will be applied with 'some degree of flexibility and without excessive formalism.'[15] It was also held that:

'the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case. This means

[13] Government's submission, para. 47
[14] *Akdivar and Others v Turkey*, 16 September 1996, (No. 21893/93) 1996-IV
[15] *Ibid* para. 69

amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants.'[16]

Consideration must therefore be given to the nature of the case, and the operation of remedies in practice.

14. The Government argues that as a civil remedy is available, and the applicants have not availed themselves of this remedy, the applicants have failed to exhaust domestic remedies. However, consistent with the Court's approach in numerous cases to date, it is submitted that the nature and seriousness of the wrongs at issue in this case require a criminal law response, not merely civil redress. In *X and Y v the Netherlands*[17] in relation to Article 13 it was held that 'there are different ways of ensuring 'respect for private life' and the nature of the State's obligation will depend on the particular aspect of private life that is at issue. Recourse to the criminal law is not necessarily the only answer.'[18] Nevertheless, the Court went on to hold that 'This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions.'[19] The instant case is such a case concerning 'essential aspects of private life,' and it is submitted that homophobic crimes of violence undoubtedly deserve and require the opprobrium of the criminal law.

15. *Furthermore, in Beganovic v Croatia*[20], which concerned physical violence against the applicant, it was held in relation to admissibility and the exhaustion of domestic remedies that:

'the Court is inclined to believe that effective deterrence against grave acts such as attacks on the physical integrity of a person, where fundamental values and

[16] *Ibid*
[17] *X and Y v the Netherlands,* 26 March 1985, (No.8978/80) A 91
[18] *Ibid* para. 24
[19] *Ibid* para. 27
[20] *Beganovic v Croatia,* 25 September 2009, (No.46423/06)

essential aspects of private life are at stake, requires efficient criminal-law provisions. The civil remedies relied on by the Government cannot be regarded as sufficient for the fulfilment of a Contracting State's obligations under Article 3 of the Convention in cases such as the present one, as they are aimed at awarding damages rather than identifying and punishing those responsible.'[21]

16. Equally, in *Jankovic v Croatia*[22] it was held that:

'Even assuming that the applicant could have obtained damages in civil proceedings, the Court is inclined to believe that effective deterrence against attacks on the physical integrity of a person requires efficient criminal-law mechanisms that would ensure adequate protection in that respect.'[23]

17. Where the fundamental issues of sexuality and LGBT rights are at play, and resort to discriminatory violence, only criminal prosecution is an effective remedy, and one which the applicant must take all reasonable measures to cooperate with and to exhaust. Thus, the applicants do not need to exhaust civil remedies, contrary to the Government's submissions.

18. It is further submitted, that in case the Applicants should have pursued civil remedies, the Georgian civil law would not have given them a practical and effective possibility to remedy all of their violations, since majority of the harm included non-pecuniary damage. The concept of moral damage and its reimbursement is not broadly defined in the Civil Code of Georgia[24] and is not often employed by the Courts in practise. Article 1005.1 of the Civil Code of Georgia, suggested by the Government, does not clarify whether it includes compensation of non-pecuniary harm.

19. The Government also stated that two counter demonstrators were prescribed administrative penalties for verbal and physical abuse of the IDAHO march

[21] *Ibid* para. 56
[22] *Jankovic v Croatia,* 5 March 2009, (No.38478/05)
[23] *Ibid* para. 36
[24] E.g. see Article 18 of the Civil Code of Georgia

participants. The applicants submit that this cannot be considered as an effective remedy in the present case. As noted above, the appropriate response from the Government would have been criminal punishment, especially when taking into consideration the scale and the circumstances of the attack and the subsequent violation of human rights. In any event, using administrative penalties against only two counter-demonstrations is not sufficient, as it is clear from the videos that the number of perpetrators that committed multiple violations against the applicants was much higher. Finally, the administrative penalties were issued against the perpetrators only and did not include any of the law enforcement authorities which had failed to exercise their positive obligations.

V. Response to the Government Submissions regarding the Merits of the Case

(i) Violation of Article 3

20. The Government asserts that the third and fourteenth applicants did not suffer severe physical injuries, and consequently that the applicants were not subject to ill-treatment in violation of Article 3.[25] However, the Court's assessment 'depends on all the circumstances of the case', including 'the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim'[26]. A combination of the victim's physical pain and suffering and fear arising from the unknown or threats of violence may meet the minimum threshold of Article 3[27].

21. The applicants submit that the combination of physical and mental abuse, with discriminatory intent based on sexual orientation or gender identity as a significant aggravating factor, brings this case within the ambit of Article 3. This context was described at length in the applicant's original submission, paras. 37 – 39.

[25] Government's submission, para. 105
[26] *Kudła v. Poland [GC], no. 30210/96, § 91, ECHR 2000-XI*
[27] *Ilaşcu and Others v. Moldova and Russia [GC], no. 48787/99, § 443-444, ECHR 2004-VII*

22. Prior to their attack, the third and fourteenth applicants describe feeling trapped by the counter-demonstrators and afraid that the counter-demonstrators would follow through with their threats to attack. The lack of a police presence heightened the applicants' sense of vulnerability and fear. As explained in the original submission, the police was absent for a significant period of time and intervened only after the applicants were attacked[28]. The pain resulting from the applicants' injuries, in conjunction with the fear and insecurity they experienced before the attacks and the degrading context in which the attacks occurred, constitutes inhuman and degrading treatment under Article 3.

23. The Government submitted that a criminal investigation has been initiated regarding the physical attacks against the eighth and fourteenth applicants. However, the above-mentioned criminal investigation cannot be considered as a discharge of Government's procedural obligations under Article 3 as it has been ineffective. Namely, the criminal investigation regarding the physical attacks against the eighth and fourteenth applicants has been ongoing since 2012 without any results and not a single perpetrator has been charged, despite the fact, that it is easily possible to identify the assailants in the videos. Therefore, it is submitted that the Government violated Article 3 of the Convention, including its procedural obligations.

(ii) Violation of Article 5

24. The Government's submission asserts that the duration of the detention was too brief to violate Article 5.[29] However, 'where the facts indicate a deprivation of liberty within the meaning of Article 5.1, the relatively short duration of the detention does not affect this conclusion.'[30] Indeed, the Court has found that a less than a 30-minute detention violated Article 5 when 'the applicants were

[28] Applicants' original submission, No. 73235/12, 14 January 2012, paras. 14 and 16.
[29] *Rantsev v. Cyprus and Russia*, no. 25965/04, § 317, ECHR 2010.
[30] *Gillan and Quinton v. the United Kingdom*, no. 4158/05, § 57, ECHR 2010

entirely deprived of any freedom of movement' and were 'obliged to remain where they were.'[31]

25. The Government asserts that the third, sixth, seventh, and tenth applicants were free to leave the patrol cars.[32] The applicants, however, reasonably believed that they were under arrest during this time. Each of the applicants was physically removed from the scene by several policemen, placed in a police car, and was not free to leave the vehicle.

26. When the third applicant was detained, he asked the police officers why he had been arrested and where they were taking him. The police officer responded, 'You'll see' and confiscated the applicant's mobile phone, refusing to return it. The officers did not respond to his requests to speak to a lawyer, and brought the applicant to a police station. During this period, police officers used homophobic language towards the applicant and told him not to participate in IDAHO demonstrations again.[33]

27. When the sixth applicant was detained, he asked police officers why he had been arrested and where they were taking him. The police officers responded, 'The judge will determine that,' suggesting that the applicant was in fact under arrest. The sixth applicant did not receive replies to his request to see a lawyer. When the sixth applicant was released, he was told not to participate in future demonstrations.[34]

28. Video footage shows police using force to put the seventh and tenth applicants into a patrol car.[35] The applicants did not receive replies to their questions about why they had been arrested, and where they were being taken.

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[31] Applicants' original submission, No. 73235/12, 14 January 2012, para. 104
[32] Government's submission, para. 104
[33] Letter from the third Applicant to the General Prosecutor of Georgia, submitted along with the original application on 14 January 2012
[34] Letter from the sixth Applicant to the General Prosecutor of Georgia, submitted along with the original application on 14 January 2012
[35] Video, duration 2:44, submitted along with the original application on 14 January 2012

29. Police officers questioned seventh applicant about her sexual orientation, and told her that she should stay home and not participate in IDAHO demonstrations.[36]

30. When the tenth applicant was detained, police officers seized her phone, and made offensive and inappropriate comments about the applicant's fitness to be a mother due to her association with the LGBT community. The officers also told the applicant not to 'impose [her] sickness on them.' When the police officers released her, she was told that she should not participate in future IDAHO demonstrations. Police officers confiscated the tenth applicant's mobile phone, and did not respond to her request to call her family or a lawyer.[37]

31. Each of these applicants reasonably believed, on the basis of their treatment, that they were under arrest and not free to leave the patrol cars. The applicants submit that they were subject to a detention within the meaning of Article 5.1.

32. The Government response asserts that even if the Court finds that the applicants had been detained, the purpose of the applicants' detention was lawful. The Government contends that the third, sixth, seventh, and tenth applicants were detained to protect their safety. In the alternative, the Government asserts that the sixth, seventh, and tenth applicants were lawfully detained for impeding traffic, an offense under the Administrative Code.

33. Even if a detention conforms with domestic law, a deprivation of liberty must not be arbitrary. A detention is arbitrary if it is not 'carried out in good faith' or is not 'closely connected to the ground of detention relied on by the Government.'[38]

34. The manner of the detention of the third, sixth, seventh, and tenth applicants described above in the paragraphs 24-28 indicates that the detention of the

[36] Letter from the seventh Applicant to the General Prosecutor of Georgia, submitted along with the original application on 14 January 2012
[37] Letter from the tenth Applicant to the General Prosecutor of Georgia, submitted along with the original application on 14 January 2012
[38] *A. and Others v. the United Kingdom*, no. 3455/05, para. 164, 19 February 2009

applicants was not carried out in good faith, and was not motivated by the Government's stated purposes. The applicants submit that the actual purpose for the detention was to harass and intimidate the applicants because they were members and/or supporters of the LGBT community in Georgia.

35. Furthermore, charges for impeding traffic have never been filed against any of the applicants and neither detention reports have been issued. According to Article 245 of the Administrative Penalties Code of Georgia a detention report should be issued whenever a person is detained for violation of administrative law.

36. Therefore, these facts indicate that the Government was motivated neither by a purpose to protect the applicants, nor a purpose to hold the applicants accountable for impeding traffic in violation of the Administrative Code. The applicants submit that they were deprived of their liberty in an arbitrary fashion[39] in violation of Article 5.1.

(iii) Violation of Article 8

37. In response to the Government's submission that the State's positive obligation under Article 8 has been discharged, it is submitted that the State failed to take all reasonable measures to protect the private lives of the applicants and equally failed to subsequently investigate police behaviour, thus also violating the procedural aspect of Article 8.

38. Private life clearly includes the right to establish relationships with other people and the outside world.[40] In *X and Y v the Netherlands*[41] it was held that private life is a concept which covers physical and moral integrity, including the sexual life of the individual. The homophobic attacks were attacks on every individual present and violated their right to privacy, in relation to establishing

[39] *Baisuev and Anzorov v. Georgia*, no. 39804/04, § 50, 18 December 2012
[40] *Niemietz v Germany*, 16 December 1992, (No. 13710/88) A 251-B
[41] *X and Y v the Netherlands*, 26 March 1985, (No. 8978/80) A 91

relationships with the outside world and others, as well as harming their physical and moral integrity.

39. The State was under a positive duty by virtue of Article 8 to take reasonable steps to protect the applicants from homophobic attacks. Such positive obligations in respect of Article 8 were recognised in, for example, *Storck v Germany*[42] where it was noted that:

'The Court has expressly found that Article 2…Article 3…and Article 8 of the Convention…require the State not only to refrain *from an activ*e infringement by its representatives of the rights in question, but also to take appropriate steps to provide protection against an interference with those rights either by State agents or by private parties.'[43]

40. While the court recognises a margin of appreciation in determining how to fulfil this positive obligation, where there is an emerging international consensus on an issue, the margin of appreciation is less.[44] It is submitted that there is now a clear European consensus that persons must be protected from physical violence on discriminatory grounds[45], which includes sexuality.[46] This is reflected in many forms, including the number of states now treating homophobic violence as a hate crime.

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[42] *Storck v Germany,* 16 June 2005, (No.61603/00) 2005-V

[43] *Ibid* para. 101

[44] *Christine Goodwin v UK*, 11 July 2002, (No. 28957/95) 2002-VI

[45] See *Nachova and others v Bulgaria,* 6 July 2005, (Nos. 43577/98 and 43579/98) 2005-VII
See also *Abdu v Bulgaria,* 11 March 2014, (No. 26827/08) where the Court held that the failure to investigate a potentially racist attack against a Sudanese national violated Articles 3 and 14 while noting that discriminatory remarks or insults with racist overtones were to be regarded as an aggravating factor (para. 38)

[46] In *Kozak v Poland*, 2 March 2010, (No. 13102/02) § 92 it was noted that 'sexual orientation is a concept covered by Article 14. Furthermore, when the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of. Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow.' Other cases clearly highlighting sexuality as prohibited grounds of discrimination include *Sutherland v UK,* 1 July 1997, (No.25186/94) and *Salguiero da Silva Mouta v Portugal,* 21 December 1999 (No. 33290/96) 1999-IX

41. As set out in the original submission, the police had clear warning that there may be violent protest and should have been aware, considering the attitude towards LGBT rights activists in Georgia, that there was a risk of violence. The failure of the police to stop the counter-protestors' homophobic behaviour resulted in the violation of the physical and moral integrity of the protestors. The police did not take adequate steps to prevent the violence (see paragraphs 42-50 below). They did not disperse the counter-protestors nor ensure that the applicants could continue their march. They therefore did not take all reasonable measures to discharge their positive obligation under Article 8.

42. Article 8 may also contain a procedural aspect to carry out an effective investigation. In *HM v Turkey*[47] it was held that Article 8 could also imply an obligation to conduct an investigation where that was the only way to shed light on the events in question, to maintain public confidence and to prevent any appearance of collusion in or tolerance of unlawful acts by the public authorities. The Court has also noted the duty to investigate discriminatory motives in resort to violence.[48] In the instant case no such effective investigation into police behaviour has taken place, which also amounts to a violation of the procedural aspect of Article 8.

(i) Violation of Article 11

43. The Government does not appear to refute the failure of its authorities to respond to the situation in which the applicants' freedom of assembly was completely blocked by counter-protesters. Instead it simply calls for a wide margin of appreciation to allow it to fail to take such steps. If accepted, this argument would allow the margin of appreciation to be misapplied to entirely undercut the nature of states positive obligations to protect the right to assembly under Article 11.

[47] *HM Turkey*, 8 August 2006, (No. 34494/97)
[48] See *Nachova and others v Bulgaria,* 6 July 2005, (Nos. 43577/98 and 43579/98) 2005-VII

44. The Court clearly elucidated the positive obligation placed on the domestic authorities in *Plattform 'Artze fur das Leben' v Austria*[49] case cited by the Government. It states that:

'A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate. Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11. Like Article 8, Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be.'[50]

45. The Government relied on paragraph 34 of the *Plattform* case to suggest that where a serious threat of violent counter-demonstration exists the Court affords the domestic authorities a wide discretion in the choice of how to enable a march to take place without disturbance. They argue that the police took reasonable measures by standing between protestors and offering verbal warnings.

46. However, the facts of the case are clearly different to those present in the *Plattform* case and fall far short of fulfilling the positive obligation incumbent on the State. In *Plattform,* the police actively took measures to protect one march when it seemed likely that physical violence would break out, including deploying special riot-control units which enabled the procession to return to safety. Significantly, in another march discussed in *Plattform* no damage was done nor were there any serious clashes such that the counter-protest did not

[49] *Plattform 'Artze fur das Leben' v Austria,* 21 June 1988, (No.10126/82) A 139
[50] *Ibid* para. 32

prevent the procession and the open-air religious service from proceeding to their conclusion. Therefore, the Court held that there was no arguable claim that Article 11 had been violated in that case.

47. A clear distinction can be drawn between the *Plattform* case and the instant case. In the present case, there were serious clashes between the counter-demonstrators and the applicants and the IDAHO march did not reach its completion. The Government concedes that the police did refrain from taking active measures at the outset and that their actions largely consisted of separating the parties by standing between them and verbally warning both sides to behave in accordance with the law. Therefore, as the police did not take measures which could have reasonably be expected from them under the circumstances, they failed to discharge their positive obligations under Article 11. Moreover, as the video footages shows the maximum number of the counter-demonstrations on Rustaveli Avenue could have only been a couple of hundred, therefore, it should not have been hard for the law enforcement authorities to guarantee freedom of assembly of the applicants, had they wished so.[51]

48. A more comparable case is that of *United Macedonian Organisation Ilinden and Ivanov v Bulgaria*[52] where there was a violation of Article 11 as a result of failure to discharge positive obligations by the police. Counter-protesters attacked individual members and followers of Ilinden, broke the flagstaff one of them was carrying, tried to take another flag, tore a poster and took the ribbon from a wreath carried by one of the members of Ilinden. The police did create a cordon between the parties but did not prevent the aforementioned violence.

49. In *Ilinden*, the Court held that:

'the authorities appeared somewhat reluctant to protect the members and followers of Ilinden from a group of counter-demonstrators. As a result, some of the participants in Ilinden's rally were subjected to physical violence from their opponents … it seems that [the authorities], while embarking on certain steps to

[51] Videos submitted along with the original application on 14 January 2012
[52] *United Macedonian Organisation Ilinden and Ivanov v Bulgaria*, 20 October 2005, (No.44079/98)

enable the organisation's commemorative event to proceed peacefully, did not take all the appropriate measures which could have reasonably be expected from them under the circumstances, and thus failed to discharge their positive obligations under Article 11.'[53]

50. In the instant case, the Government's response effectively acknowledges that the police likewise failed to take all the appropriate measures that could have reasonably been expected of them and therefore did not discharge their positive obligations. It accepts that it 'evaded from the scene' the applicants to avoid a situation caused by counter-demonstrators. In short, they punished the applicants for the threat presented by others. This falls far short of their obligation to take positive measures to protect the rights at stake, including the right to demonstrate as set out above.

51. The Court has consistently noted that where demonstrators experience violent counter-demonstration, the impact can be profound, both on the individuals who are deterred from expressing their opinions on often controversial issues, which in turn negatively impacts upon democracy.[54] While a margin of appreciation undoubtedly exists in allowing the authorities discretion in deciding how best to address threats and protect rights,[55] it cannot be relied upon to opt out of the positive obligations of the State to safeguard the rights at stake. To accept otherwise would be a serious setback for the Court's jurisprudence, significantly weakening the positive obligation imposed in the *Plattform* case.

VI. Significance of the Issues Raised

52. The facts of this case concern interference with multiple rights of the applicants in their attempt to celebrate and promote equality. As noted above the case concerns matters that not only have a profound impact on the individuals directly affected, but on the quality of rights protection and of democracy more broadly.

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[53] *Ibid* para. 115
[54] *Plattform 'Artze fur das Leben' v Austria,* 21 June 1988, (No.10126/82) A 139, para. 32
[55] See *Handyside v United Kingdom*, 7 December 1976, (No. 5493/72) A 24 para. 49

53. The instant case also raises a pressing and widespread contemporary threat to LGBT rights in Europe. The fact that it deals with a recurring problem is reflected in very similar cases pending before the Court, including *M.C. and C.A. v. Romania*[56] communicated to the Romanian Government on 30 January 2013. The present case provides an important opportunity for the Court to address this issue and to ensure its jurisprudence is protective of, and sensitive to, the fundamental rights at stake.

54. It should also be noted, that since the 2012 attack on the IDAHO march in Tbilisi, the Georgian LGBT community has not been given a possibility to peacefully demonstrate in public in support of LGBT rights. In 2013, the IDAHO event organized by Identoba was again attacked by the counter-demonstrators[57], while in 2014 the Georgian LGBT community did not attempt to hold a public event at all due to a lack of security guarantees and threats of violence.[58] Therefore, failure of the Georgia to protect the 2012 IDAHO event has had a continuous freezing effect on the rights of LGBT individuals in the country.

VII. Claims for Just Satisfaction

55. The applicants submit that along with the Court's finding of violations, the Government should compensate non-pecuniary damage as just satisfaction under Article 41 of the Convention:

> The Government should pay the first applicant 5,000 Euros on account of violations of Articles 8, 10, 11 and Articles 13 and 14 in conjunction with Articles 8, 10 and 11 of the Convention;

[56] No. 12060/12. In that case, the applicants participated in an annual gay pride parade organised by an NGO. Following the parade they were attacked and homophobic insults were made. The applicants complain, inter alia, that there was a failure to investigate their criminal complaints adequately and that there is a lack of adequate legislative and other measures to combat LGBT hate-crimes.

[57] Identoba and participants of the 2013 IDAHO assembly launched the application against Georgia to the European Court of Human Rights on 27 January 2014

[58] Identoba's statement on the 2014 IDAHO http://identoba.com/2014/05/15/idaho/

The Government should pay the third and sixth applicants 5,000 Euros each on account of violations of Articles 3, 5.1, 8, 10, 11 and Articles 13 and 14 in conjunction with Articles 3, 5.1, 8, 10 and 11 of the Convention;

The Government should pay the seventh and tenth applicants 3,000 Euros each on account of violations of Articles 5.1, 8, 10 and 11 and Articles 13 and 14 in conjunction with Articles 5.1, 8, 10 and 11 of the Convention;

The Government should pay the second, fourth, fifth, eighth, ninth, eleventh, twelfth, thirteenth, fourteenth and fifteenth applicants 2,000 Euros each on account of violations of Articles 8, 10 and 11 and Articles 13 and 14 in conjunction with Articles 8, 10 and 11 of the Convention.

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