

## **The Power of Persistence: How NGOs can Ensure that Judgments Lead to Justice**

**Dr. Alice Donald**

On 17 May 2012, around 30 lesbian, gay, bisexual and transgender (LGBT) activists gathered peacefully in the Georgian capital, Tbilisi, to mark the International Day against Homophobia and Transphobia, or IDAHOT. The organisers had warned the police about violence by groups linked to the Orthodox Church—warnings that materialised when around 100 counter-demonstrators encircled the IDAHOT marchers, grabbed and tore up their banners, and punched and kicked those at the front. As the counter-demonstrators shouted that LGBT people were “perverts” and “sinners” who should be “burnt to death”, police refused to intervene and proceeded to arrest and detain several of the peaceful marchers.

Three years later, in the ground-breaking judgment of *Identoba and Others v Georgia*, the European Court of Human Rights found a violation not only of the right to freedom of peaceful assembly under Article 11 of the European Convention on Human Rights, but also, for the first time in a case of homophobic and transphobic hate crime, a violation of Article 3 (prohibition of inhuman and degrading treatment), in conjunction with Article 14 (prohibition of discrimination). This was due to the authorities’ failure to fulfil their positive obligation both to protect the IDAHOT marchers and launch effective investigations to identify the perpetrators and unmask their discriminatory motives. Aside from monetary compensation, the Court did not identify any specific remedies. Instead, this task fell to the Committee of Ministers (CM), the intergovernmental arm of the Council of Europe, which monitors the implementation of the Court’s judgments.

Five years on from the judgment, *Identoba* (along with a similar group of cases concerning the authorities’ failure to prevent inhuman and degrading violence against Jehovah’s Witnesses; see [here](#), [here](#) and [here](#)) is still being monitored by the CM. This supervision is taking place under its intensive or ‘enhanced’ procedure, reflecting the complexity of the steps needed to tackle the roots of the violations in systemic discrimination. On three occasions, in [2018](#), [2019](#) and [2020](#), the Georgian government claimed that it had done enough to guarantee non-repetition of the violations and called for the cases to be closed. Each time, the CM disagreed.

*Identoba* paints a bleak picture of Georgia’s persistent failure to prevent or adequately investigate homophobic and transphobic hate crimes (unlike some LGBT rights cases against other states, which have yielded more tangible progress). Yet, by another measure, *Identoba* is a success story—success, that is, on the part of NGOs and Georgia’s national human rights institution (NHRI), known as the Public Defender. It is their submissions to the CM—11 in total since 2016—that have helped to ensure that both *Identoba* and the cases concerning religiously-motivated hate crimes remain under the CM’s scrutiny until genuine progress emerges at the national level.

The rest of this post focuses on *Identoba*, and explores the impact of submissions made by NGOs and the Public Defender under Rule 9.2 of the CM’s rules. The so-called ‘Rule 9’ submissions in this case exemplify the potential for NGOs and NHRIs to supplement or correct the ‘official’ record of events and to propose both qualitative and quantitative benchmarks by which the CM can assess implementation—a particularly difficult task where violations are rooted in prejudicial attitudes or other systemic causes.

What, then, are the features of the submissions in *Identoba* that provide lessons for other NGOs or NHRIs that are considering engaging with the CM's monitoring process? Below, I highlight the importance of alliance-building, persistence, and strategy with respect to timing. I also discuss the different ways in which Rule 9 submissions in *Identoba* have supplemented or corrected the official record in a way that the CM could not have achieved alone.

### **Alliance-building**

The seven submissions that focus solely or partly on *Identoba* were made either by the Public Defender or, singly or jointly, by four Georgian NGOs: the Georgian Young Lawyers' Association (GYLA); the Human Rights Education and Monitoring Centre (EMC); *Identoba* (one of the litigants in the case); and the Women's Initiatives Support Group (WISG). In addition, two international NGOs, Amnesty International and ILGA-Europe, joined the NGO submissions (Amnesty once and ILGA-Europe four times). The European Implementation Network (EIN), which supports civil society advocacy the implementation of judgments, highlights the importance of such alliance building both in their domestic advocacy and in exerting impact at the CM level. When NGOs combine, it argues, their message is amplified, resources and expertise are shared, and the evidence-gathering net is widened (see [here](#), pp. 30-32).

The respective submissions certainly show evidence of coordination; for example, all have united around the demand for the creation of a specialised police unit to deal with racist, homophobic and transphobic hate crime in Georgia—a move first proposed by the European Commission against Racism and Intolerance (a Council of Europe body) in 2016. This measure was endorsed by the CM in [2019](#) and again in its most recent examination of the case in [September 2020](#). Thus far, the Georgian government has rejected the idea (see [here](#), paras 42-45); yet it remains to be seen whether the combined pressure of the CM and domestic advocacy will prompt a rethink on this matter by the time of the next examination by the CM in December 2021.

### **Timing and persistence**

The timing of submissions is critically important, too. As [EIN argues](#), in order to have maximum impact, Rule 9 submissions should be made at the right time to influence the quarterly CM meeting at which a case is listed for consideration. In practice, this means making a submission several weeks ahead, so that it can inform the documentation (known as 'notes on the agenda') relied upon by government delegates who will scrutinise the state's action, or inaction, in the particular case. In the case of *Identoba*, EIN has also [briefed](#) members of the CM.

The submissions made by NGOs and the Public Defender in *Identoba* succeeded in this objective: the CM has debated the implementation of the case at four separate meetings and each time, the notes on the agenda show the visible imprint of evidence and arguments submitted under Rule 9 (in [2016](#), [2018](#), [2019](#) and [2020](#))—including the recommendation for a specialised hate crimes unit noted above. The Georgian government has a 'right of reply' to Rule 9 submissions, but has not exercised it in this case, suggesting that it has been unable to refute the evidence presented by NGOs and the Public Defender. By contrast, the Rule 9 submissions *do* address directly points made in the government submissions, enabling the CM to hone in on inconsistencies and omissions in the official account.

The sheer persistence of those making Rule 9 submissions in this case must also be applauded. The organisations making submissions have not missed a single opportunity to inform and influence the CM's deliberations and have doggedly tracked different types of data that evince the state's failure to implement the judgment fully to date.

### **Setting the record straight**

The Rule 9 submissions in *Identoba* have shone a spotlight on evidence that has been glaringly absent from Georgian government submissions. Take, for example, evidence of whether the authorities have guaranteed non-repetition of the violation in respect of how IDAHOT or other LGBT events have been marked since 2012—an obvious measure of implementation. The Rule 9 submissions demonstrate that only twice has IDAHOT been celebrated in relative safety in Tbilisi (in 2015 and 2017)—and even then, only briefly and behind police cordons that rendered the gathering invisible to the public, thus defeating its purpose. In 2013, IDAHOT marchers suffered egregious violence, as 20,000 counter-demonstrators armed with iron batons attacked them with the apparent collusion of the police, leading to a [fresh complaint](#) to the Court. In every other year, the march has been cancelled due to vigilante threats and the failure of the police to guarantee protection (see [here](#), paras 32-39; [here](#), paras 17-19; and [here](#), paras 28-33; note that in 2020, events were online due to COVID-19). Not only that, but Tbilisi Pride in June 2019 and an LGBT film showing in November 2019 were also violently disrupted by far right groups—events which are not referred to in any government submission.

In some instances, Rule 9 submissions have generated and interpreted evidence that corrects or refutes the official account—and that would have been difficult, if not impossible, for the CM itself to ascertain. Three such examples are presented below:

#### ***Statistical Data***

Statistical data provides a 'hard-edged' measure of implementation. The onus on government agencies to provide reliable, disaggregated data for criminal proceedings initiated on grounds linked to sexual orientation and gender identity has been a primary focus for advocacy by NGOs and the Public Defender—and progress has been made in this regard. In its [latest submission](#) (para 35), the Georgian government presents disaggregated figures for prosecutions initiated for hate crimes in 2019: there were 187 in total (four times more than in 2016), of which 32 were homophobic and/or transphobic. While welcoming this apparent progress, a [joint submission](#) by EMC, WISG and ILGA-Europe (para 13) notes that many victims of homophobic or transphobic hate crimes do not report to the authorities for fear of forcible 'outing', re-victimisation and ill-treatment by the police. Original research conducted by three NGOs found 257 unreported cases between 2016 and 2020. While these figures cannot be verified, the NGOs venture—and the government does not refute—that the true number of such hate crimes is 'far higher than the official statistics.'

#### ***Tracking domestic case law***

It is not only statistics that are potentially misleading, but also the interpretation of domestic court decisions. Again, NGO evidence acts as a corrective to the official account. For example, a Supreme Court decision presented in the government's [2018 submission](#) (para 45) as illustrating the effectiveness of hate crime investigations—and [cited approvingly](#) by the CM—was not all that it seemed. The relevant NGO submission explains that in this case—in

which a transgender woman was murdered and set alight by an assailant with a history of transphobia—the Prosecutor’s Office had failed to identify a transphobic motive. This meant that the Supreme Court was unable to use the ‘aggravated circumstances’ provision of Article 53 of the Georgian Criminal Code, adopted in 2012, which would have permitted the imposition of a higher sentence (see [here](#), para 20). NGOs have consistently deplored the under-use of Article 53, which was not applied in any case concerning homophobia or transphobia until 2016. This case exemplifies the difficulty for supranational bodies of monitoring changes in case law, especially where, as in Georgia, decisions are not always published. In such instances, NGO evidence can ensure that isolated domestic rulings are not misrepresented as a trend and that changes to bring domestic case law into conformity with Convention requirements are truly embedded, especially in the absence of a unifying opinion by an apex court.

### ***Assessing measures to combat discriminatory attitudes***

*Identoba* epitomises the difficulty of assessing guarantees of non-repetition which require changes to discriminatory attitudes and behaviour through measures such as training of law enforcement officers, judges and prosecutors. Here, both qualitative and quantitative indicators are needed. For example, the government presented an impressive figure of 2,300 prosecutors who were trained in 2017 on discrimination and investigation of hate crimes (see [here](#), para 49). This development was welcomed by NGOs; yet, organisations involved in delivering such training raised doubts as to its efficacy, since its content was largely perfunctory (see [here](#), paras 32-35). These limitations suggest that supranational bodies like the CM should insist that governments provide not only statistics for numbers trained, but also qualitative data about curricula and measures of impact.

### **Lessons for the future—and for other human rights systems**

The implementation of *Identoba* is a story half told. There is a year to go until the CM will turn its spotlight back on the case. So far, it is a story of disappointing progress by the Georgian government, whose submissions to the CM have been partial and sometimes inaccurate. In this respect, *Identoba* is not an isolated example. Research undertaken for the [Human Rights Law Implementation Project](#) shows that supranational bodies may often need to detect distortion or incompleteness in the official narrative: the authorities may portray a violation as an isolated event; downplay the need for a holistic response to prevent recurrence; exaggerate the scope or effects of reform; or conceal negative side effects. Accordingly, there is an onus on supranational bodies like the CM, given their limited fact-finding capacity, to elicit information from diverse sources, including NGOs and NHRIs—and, as the CM has in the case of *Identoba*, to give it visible, probative value, since NGOs are unlikely to invest resources in the monitoring process if their submissions are disregarded.

It is in this sense that *Identoba* reveals success, even amid the slow progress made by the Georgian authorities. Persistent and meticulous submission of evidence by NGOs and the Public Defender, and coordination in their recommendations, have demonstrably influenced the CM’s negotiation with the Georgian authorities and helped to set the benchmarks for what successful implementation would look like. This includes the establishment of a specialised police hate crimes unit as, in effect, a prerequisite for closure of the case. Thus, NGOs have successfully used Strasbourg as a channel to exert influence.

Rule 9 submissions are made in only a small minority of cases in Europe: 133 in 2019, out of more than 5,000 cases pending before the CM (see [here](#), p. 70). The [HRLIP research](#) suggests that NGO submissions are starting to increase from a low base in the inter-American human rights system, but feature little in the African system. Across these three regions, NGOs—including those engaged in litigation—cite the same reasons for their limited involvement in the monitoring of implementation: lack of resources and lack of knowledge as to *how* to engage with processes at the supranational level.

This suggests that funding bodies should support work by civil society to promote implementation as well as litigation. For their part, monitoring bodies (the CM in Europe, and human rights Courts and Commissions in the Americas and Africa) should do more to incentivise and facilitate civil society engagement. The CM has commendably created a [website](#) providing guidance to that end. It has every reason to do so. As *Identoba* demonstrates, NGOs and NHRIs can be the ‘eyes and ears’ on the ground that the CM lacks, and preserve the possibility that justice will be done for victims—and potential victims—of grievous human rights abuses.

*Dr. Alice Donald is Senior Lecturer in the Department of Law and Politics at Middlesex University. Thanks to Anne-Katrin Speck for their helpful comments.*