



HATE CRIME LAWS: A PRACTICAL GUIDE

2ND EDITION



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Hate Crime Laws: A Practical Guide, 2nd Edition

Warsaw, 2022
OSCE/ODIHR

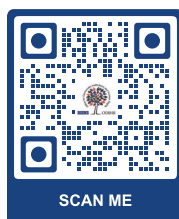
Published by the OSCE
Office for Democratic Institutions and Human Rights (ODIHR)
ul. Miodowa 10, 00–251 Warsaw, Poland
www.osce.org/odihhr

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ISBN 978-83-66690-68-4

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PREFACE

The Organization for Security and Co-operation in Europe (OSCE) has taken a comprehensive approach to security since its inception in 1975 as the Conference on Security and Co-operation in Europe. Thus, the work of the OSCE includes not only the politico-military and economic and environmental aspects of security but also the *human dimension*. As the principal institution of the OSCE responsible for the human dimension, the Office for Democratic Institutions and Human Rights (ODIHR) provides assistance and support to OSCE participating States and civil society in the fields of election observation, democratic development, human rights, tolerance and non-discrimination, and the rule of law. In so doing, ODIHR fulfils an important role in enhancing dialogue among state institutions, governments and civil society.

Hate crimes are criminal offences committed with a bias motivation.¹ In other words, they are crimes motivated by intolerance towards certain groups in society. Such crimes cause significant harm to individuals and their communities. They also have the potential to divide societies and to create cycles of violence and retaliation. For these reasons, a vigorous response to such crimes is necessary.

At the Ministerial Council meeting held at Maastricht in December 2003² the participating States of the OSCE collectively recognized the dangers posed by hate crimes and committed themselves to combating such crimes. Subsequently, OSCE participating States adopted a number of decisions which mandated ODIHR to work in the area of hate crimes.³ Among others, the participating States committed to “consider enacting or strengthening, where appropriate, legislation that prohibits discrimination based on, or incitement to hate crimes ...”⁴ “[e]nact, where appropriate, specific, tailored legislation to combat hate crimes, providing for effective penalties that take into account the gravity of such crimes”.⁵ This Guide has been developed as a tool to assist states in implementing their commitments on hate crime.

Hate crime laws are important. By explicitly condemning bias motives, they send a message to perpetrators that a just and humane society, committed to equality and ensuring the rights of all, will not tolerate such behaviour. By recognizing the harm done to victims, they convey to individual victims and to their communities that the criminal justice system serves to protect them.

1 OSCE Ministerial Council, Decision 9/09, “Combating Hate Crimes”, Athens, 2 December 2009, <https://www.osce.org/cio/40695>.

2 OSCE Ministerial Council, Decision No. 4/03, “Tolerance and Non-Discrimination”, Maastricht, 2 December 2003, <https://www.osce.org/mc/19382>.

3 See the full list of OSCE commitments on hate crime in the Annexe to this Guide.

4 Permanent Council, Decision No. 621, “Tolerance and the Fight Against Racism, Xenophobia and Discrimination”, Vienna, 29 July 2004, <https://www.osce.org/pc/35610>.

5 OSCE Ministerial Council, Decision 9/09, *op. cit.*

Laws — especially criminal laws — are an expression of society’s values. Hate crime laws both express the social values of equality and inclusivity and foster the development of those values. But this process can only happen if laws are actually enforced. If hate crime laws are not used, it diminishes respect for all laws and weakens the rule of law.

An effective criminal law response to hate crimes requires consideration of how a hate crime law will work in practice and whether drafting choices make the law more or less easy to understand and use. This Guide therefore consistently links legislation to implementation.

The development and drafting of this Guide was shaped by the need to ensure its relevance to the many different legal systems in operation in the OSCE region. Prior to the first edition a methodology was developed that drew on the widely varying histories, traditions and legal frameworks in the region and identified their common elements. This was achieved by first creating a Working Group of legal experts from countries both with and without hate crime laws. The Working Group discussed the scope and content of the Guide and provided detailed commentary on draft versions of the publication. Additionally, legal experts from a variety of OSCE countries were invited to provide general feedback on the process, either by participating in roundtables or by reviewing the drafts. These experts, both men and women, were drawn from a variety of disciplines and OSCE participating States and have professional experience of the issue as prosecutors, judges, representatives of civil society organizations (CSOs) and policymakers. Their wide-ranging expertise has helped to ensure that the second edition incorporates different perspectives, including those related to history, legal tradition, diversity and gender.

Since it was first published in 2009, this Guide has served as a practical tool to help shape effective hate crime legislation across the OSCE region. It has been disseminated widely and translated into six languages. However, over the years, some of the laws mentioned in this Guide have been amended and the references to them have become obsolete. ODIHR has also gathered significant insight into national legislative and policymaking practices and developed a wide array of resources to respond to the OSCE participating States’ needs and challenges in addressing hate crime. Some 13 years after its original publication, ODIHR is now issuing a second, revised edition of this Guide, including updated references to legislation and recommendations based on good practices from across the OSCE region. ODIHR continues to offer advice and assistance to states that wish to draft new legislation or are reviewing existing legislation, using this Guide as a benchmark.

ACKNOWLEDGEMENTS

ODIHR is grateful to all those who participated and generously contributed their time to this project. Special thanks are extended to members of the Working Group, listed below.

The publication of the first edition of this Guide was made possible thanks to the generous contributions of the Governments of Austria and Germany.

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PART I
UNDERSTANDING
HATE CRIME LAWS

INTRODUCTION

Hate crimes are criminal offences committed with a bias motivation. As manifestations of intolerance, hate crimes have a deep impact not only on the immediate victim, but also on the group with which the victim identifies. They affect social cohesion and peace and, if unaddressed, can constitute a security threat. A vigorous response is therefore essential.

Hate crimes are distinguished from other types of crime by the motive of the perpetrator; since motive is usually irrelevant in proving the essential elements of a crime, it is rarely investigated in sufficient detail to uncover the real reason for the crime. If a criminal justice system does not recognize the importance of addressing hate crime and mechanisms are not put in place to recognize, record and investigate the bias motive, the existence of hate crimes will remain hidden.

Hate crimes occur, to a greater or lesser extent, in all countries. Available criminal statistics on hate crime do not always reflect the situation on the ground. Data collected as part of ODIHR's annual Hate Crime Report⁶ indicate that states with effective recording and data collection mechanisms will usually report a higher incidence of hate crime than countries without such mechanisms. Civil society and other monitors can complement official data by reporting hate incidents that were not recorded by the authorities, including as a result of ineffective or absent official data collection systems.

Irrespective of whether states have adopted dedicated hate crime laws, these crimes do occur and have a significant impact on the victim and the victim's community. Training police, prosecutors and judges to understand and respond effectively to these crimes can help to mitigate their detrimental effects.

In this Guide, we refer to hate crime laws as legislation that regulates the criminalization and punishment of hate crimes, i.e., legislation falling under the category of retributive justice. It is important to note that, across the OSCE region, there are other types/categories of legislation that also address hate crime, for example laws regulating support to victims of hate crimes or those addressing restorative justice. Despite their importance, such laws are not the subject of this Guide.

While there are many OSCE participating States with laws that could lead to increased penalties for hate crimes, their use is inconsistent. Legislation that is clear, concrete and easy to understand will increase the likelihood that law enforcement officials will use it. Additionally, where effective laws exist, they create a framework within which cases can be identified and relevant data collected. Although legislation is only one part of the answer to the multi-faceted

6 OSCE/ODIHR Hate Crime Reporting website, <https://hatecrime.osce.org/>.

problem of hate crime, in combination with other tools it can be a powerful catalyst for changes in social attitudes.

1. A COMPREHENSIVE APPROACH TO HATE CRIMES

There are many other aspects to a comprehensive national programme to combat bias-motivated crimes.⁷ Specific elements include:

- Training criminal justice personnel, namely police officers and prosecutors, on how to investigate hate crimes, work with victims and prosecute cases;
- Adopting guidance on effective investigation and prosecution of hate crime;
- Putting in place effective mechanisms to record and collect accurate data on crimes committed with a bias motive, regardless of whether such crimes are prosecuted as hate crimes;
- Putting in place victim-friendly mechanisms to report hate crime;
- Putting in place mechanisms to support victims of hate crime;
- Reaching out to communities and fostering relationships between law enforcement and community groups so that victims feel confident to report crimes;
- Mapping the scale of unreported hate crime through victimization surveys;
- Raising awareness among the public on tolerance and non-discrimination and the nature and impact of hate crime;
- Building the capacity of and supporting civil society organizations to address hate crime, including their work to support victims and form coalitions; and
- Establishing co-ordination mechanisms that ensure coherence of hate crime policies adopted by relevant actors.

ODIHR provides training opportunities, tools and resources to support states and civil society in relevant activities and is able to advise on how to make hate crime laws effective.⁸

2. WHY IS THIS GUIDE NECESSARY?

There are many and varied international and regional instruments calling for improved responses to hate crimes. Most OSCE participating States⁹ have some hate crime provisions in their criminal codes, and all have provisions that can be used to address hate crimes, while not directly addressing the question of bias motivation. Regardless, hate crime laws are rarely, if ever,

7 The terms 'bias-motivated crimes' and 'hate crimes' are used interchangeably throughout this publication.

8 For ODIHR's comprehensive tools and resources, see: "ODIHR's Tools", OSCE/ODIHR Hate Crime Reporting website, <https://hatecrime.osce.org/odihr-tools>.

9 As of 2022, 53 of the 57 OSCE participating States have in place some hate crime legislation.

applied or are applied selectively, often because of the limited awareness of their existence among police officers, prosecutors and judges.

Laws to tackle such crimes must be drafted with an understanding of the practical consequences of such legislation. However, states that wish to review or amend their own legislation in this field will find few resources.

The purpose of this Guide is to provide OSCE participating States with benchmarks for drafting hate crime legislation within a simple, clear and accessible document. While good practices are highlighted and risks identified, a prescriptive approach has been avoided. Hate crimes are specific to their social context, and legislation must recognize this.

The Guide assists states wishing either to enact new legislation, or to review and improve their current legislation by:

- Setting out the major questions to be addressed by legislators;
- Giving examples of drafting choices made by different states;
- Commenting on the implications of different approaches;
- Making recommendations concerning specific aspects of hate crime law; and
- Offering a list of further resources to supplement the information provided.

“Recognizing the importance of legislation to combat hate crimes, participating States will [...] where appropriate, seek ODIHR’s assistance in the drafting and review of such legislation.”

Source: Ministerial Council, Decision No. 4/03, “Tolerance and Non-Discrimination”, Maastricht, 2 December 2003.

3. HOW TO USE THIS GUIDE

Because legal issues are discussed in this Guide, technical legal terminology is unavoidable. However, the Guide has been written to be understood and used not only by lawyers. It is hoped that it reaches a wider audience and will be used as a reference by a range of criminal justice practitioners, including law enforcement officials, prosecutors and judges, but also by policymakers and other interested practitioners.

- Part I sets out the rationale for hate crime legislation and introduces key issues. Many of these are only outlined in brief because they are discussed in detail in Part II.

- Part II focuses on legislative drafting, with examples of state practice. It sets out the key policy questions for drafters, with commentary on the consequences of each decision. A summary of recommendations is given at the end of Part II.

The Guide does not assume any prior knowledge of the issue of hate crimes on the part of the reader and does not aim to provide a comprehensive review of the state of current academic discussion on the issue.

4. LEGISLATION IN CONTEXT

The OSCE area encompasses different national legislative contexts and cultures, including both common law and civil law legal systems. Consequently, variations exist in legal terminology, criminal procedure and criminal justice structures across the 57 participating States. To address these differences, this Guide presents wide-ranging examples of national good practice and offers recommendations applicable across the various legal traditions. It does not, however, provide advice tailored to every OSCE participating State. Upon request, ODIHR can provide a formal opinion containing customized assistance on drafting or reviewing existing hate crime legislation.¹⁰

Furthermore, this Guide emphasizes the need to create legislation that is rooted in national experiences. This is most effective when legislation is developed through inclusive and extensive public consultation. In this context, ‘public’ refers to academic, expert and popular discourse. These consultations can raise the level of the debate, while also contributing to a transformation in attitudes. Furthermore, dialogue and discussion with representatives of civil society and targeted communities and groups can bring a different perspective to practical questions, such as “Who are the victims?”, “What barriers to obtaining justice do victims face?”, and “What is the nature of the offences being committed?” Information like this can enrich the development of legislation by clarifying the social goals being advanced. ODIHR urges legislators to draw upon the knowledge and expertise of civil society when drafting or amending hate crime legislation.¹¹

10 Such a request can be made by a public authority of an OSCE participating State, such as a parliament and its representatives, the government, a ministry, the department of a ministry, or a national human rights institution. For more information, see: *Requesting Legislative Assistance from ODIHR* (Warsaw: ODIHR, 2018), <https://www.osce.org/odihr/407447>. For legal opinions published by ODIHR on OSCE participating States’ hate crime legislation, see: “ODIHR Legal Reviews, Assessments and Guidelines”, <https://www.legislationline.org/odihr-documents/page/legal-reviews/topic/4/Hate%20Crimes/show>.

11 The importance of public consultations, as well as other recommended legislative techniques, is set out in the following: David Beetham, *Parliament And Democracy in the Twenty-First Century: A Guide To Good Practice* (International Parliamentary Union, 2006), <http://www.ipu.org/dem-e/guide/guide-1.htm>; and ‘Law Drafting And Regulatory Management In Central And Eastern Europe’, SIGMA paper No. 18, the Organisation for Economic Co-operation and Development, 1997, <http://www.sigmaweb.org/publicationsdocuments/36953268.pdf>.

Importantly, legislators should take into account the relevant international legal frameworks. In addition to adhering to the international treaties that they have signed and ratified, states should also follow and implement the applicable case law produced by international courts and other relevant international bodies (for more details, see Chapter 5 of Part I below).



1 WHAT IS A HATE CRIME?

In line with Ministerial Council Decision No. 9/09,¹² **hate crimes are criminal acts committed with a bias motive**. It is the motive that makes hate crimes different from other crimes. A hate crime is not one particular type of offence. It could be an act of intimidation, threats, property damage, assault, murder or any other criminal offence.¹³

The term 'hate crime' or 'bias-motivated' or 'bias crime' therefore describes a type of crime, rather than a specific offence within a penal code. A person may commit a hate crime in a country where there is no specific criminal sanction on account of bias or prejudice. The term, then, serves as a concept, rather than a precise legal definition.

1.1 THE TWO ELEMENTS

Hate crimes always comprise two elements: a *criminal offence* committed with a *bias motive*.

The first element of a hate crime is the criminal offence: the act must be an offence under ordinary criminal law. This criminal act is referred to in this Guide as the 'base offence'. Because there are small variations in legal provisions from country to country, there are some divergences in the kind of conduct that amounts to a crime. In general, most countries criminalize the same type of violent acts. Hate crimes always require a base offence to have occurred. **If there is no base offence, there is no hate crime.**

The second element of a hate crime is the motivation: the criminal act must be committed with a particular motive, referred to in this Guide as 'bias'. In order to qualify as such, hate crimes need to target one or more members of, or the property associated with, a group that shares a common characteristic. These are referred to as protected characteristics. A **protected characteristic** is a characteristic shared by a group, such as 'race',¹⁴ language, religion or belief, ethnicity, nationality, sex, gender, sexual orientation, gender identity disability, or other common feature that is fundamental to their identity.

There are two key models of hate crime legislation which address bias motivation:

- The hostility model
- The discriminatory selection model

¹² OSCE Ministerial Council, Decision 9/09, *op. cit.*

¹³ Many countries distinguish between crimes and less serious infractions, such as 'misdemeanours', although they are described in a variety of ways. In this Guide, 'offences' refers to *all* criminal law provisions; administrative infractions are therefore excluded.

¹⁴ The use of the term 'race' in this Guide shall not imply endorsement by OSCE/ODIHR of any theory based on the existence of different races. It is a term widely used in international human rights standards, as well as in national legislation. This Guide uses the term to ensure that people who are misperceived as belonging to another 'race' are protected against hate crimes.

While the hostility model addresses expressions of hostility towards the protected characteristic immediately before, during or immediately after an attack, the discriminatory selection model is based on the legal premise that the perpetrator intentionally chose the target of the crime because of some protected characteristic (see Part II, Section 3 below for details).

Bias motivation can be best identified through the use of '**bias indicators**', i.e., "objective facts, circumstances, or patterns attending a criminal act(s), which, standing alone or in conjunction with other facts or circumstances, suggest that the offender's actions were motivated, in whole or in part, by any form of bias."¹⁵ The existence of bias indicators does not automatically prove that the criminal act was a hate crime, although some may be used in court as evidence. Bias indicators should be analysed and understood in their context and in relation to each other. The existence of bias indicators should prompt investigators to ask the necessary follow-up questions, and investigate potential bias motivation further to enable and support a hate crime prosecution. In addition, investigators should record bias indicators in the case file, as with all evidence.¹⁶

Which characteristics to include in a hate crime law is a complex issue that should take into account the history and socio-political-cultural context of each country. This question is one of the most significant policy decisions for legislators. The criteria for determining which protected groups to include in legislation are discussed in more detail in Part II under "Policy Question Two: Which Characteristics to Include".

What does a hate crime look like? Anti-Roma attack on Lysa Hora

A Roma settlement on Lysa Hora in Kyiv was set alight on 21 April 2018. The incident was preceded by heated debates on social media regarding the arrival of Roma from western Ukraine to the capital for the May holidays. One day before the attack, a far-right group issued an ultimatum to the representatives of the Roma community to leave the settlement. On 21 April, a group in balaclavas dismantled and set light to the tents in the settlement. The following day, S. M. — a representative of the group — posted a photo of burning tents on Facebook with the caption "Gypsies are no longer to be found on Lysa Hora." According to S.M., the residents of the settlement "did not fulfil the requirement" to leave,

15 *Massachusetts Model Protocol for Bias Crime Investigation*; cited in: *Hate Crime Data Collection and Monitoring: A Practical Guide* (Warsaw: OSCE/ODIHR, 2014), p. 15, <https://www.osce.org/odihr/datacollectionguide>.

16 *Using Bias Indicators: A Practical Tool for Police* (Warsaw: OSCE/ODIHR, 2019), p. 4, <https://www.osce.org/odihr/419897>.

and the group took “appropriate” action against them. S.M. threatened “other raids” against Roma in the near future. On 9 May, a Roma camp settlement was burned in a village near Lviv, and on 22 May 2018, a group of people attacked and set light to a Roma settlement near Ternopil. One person was identified in relation to the raid in Kyiv and was charged by the Ukrainian authorities with a hate crime offence (namely, Article 161 (2) of the Criminal Code of Ukraine [at the time of the review of this Guide, the court proceedings were pending]).

Source: ODIHR’s 2019 Hate Crime Report; “Attacks on Roma in Ukraine”, Commission on Security & Cooperation in Europe: U.S. Helsinki Commission, briefing with witnesses and human rights activists from Ukraine held on 25 July 2018; transcript and other information available at: <https://www.csce.gov/international-impact/events/attacks-roma-ukraine>.

1.2 BIAS OR HATE?

Taken literally, the phrases ‘hate crimes’ or ‘hate motive’ can be misleading. Many crimes which are motivated by hatred are not categorized as hate crimes. Murders, for instance, are often motivated by hatred, but these are not ‘hate crimes’ unless the victim’s protected characteristics were targeted.

Conversely, a crime where the perpetrator does not feel ‘hate’ towards the particular victim can still be considered a hate crime. Hate is a very specific and intense emotional state, which may not properly describe most hate crimes. In many hate crime cases, the perpetrator neither feels ‘hate’ towards their target nor is driven by their experience with the victim. Rather, the perpetrator is motivated by their stereotypes, preconceived ideas or intolerance towards a particular group of people and the protected characteristic(s) they share.

Hate crimes can be committed for a number of reasons:

- The perpetrator may act out of resentment, jealousy, peer pressure, or to seek a thrill;
- The perpetrator may have no feelings about the individual target of the crime, but may have hostile thoughts or feelings about the group to which the target belongs;
- The perpetrator may feel hostility to all persons who are outside the group to which they identify themselves;
- At an even more abstract level, the target may simply represent an idea or principle, such as immigration, multiculturalism or diversity, or gender equality, to which the perpetrator is hostile; or
- A combination of the above.

Despite the absence of hate towards the target, any one of these motivations would be sufficient to classify a case as a hate crime if both elements described in section 1.1 above are present.

Case Highlight:

Attack on a mosque after the 9/11 events (United States)

Mosque symbolizes Al-Qaeda

On 13 September 2001, in Seattle, the United States, M. C. drove 25 miles from their home to a mosque, doused two vehicles parked outside with petrol and attempted to ignite them in an effort to destroy the mosque. Upon being discovered by worshippers, the perpetrator pulled out a pistol and shot at them, although none were harmed.

Police discovered that the perpetrator acted out of anger at the terrorist attacks on 11 September 2001.

While the term ‘hate crimes’ has become common, its use can lead to misunderstandings of the concept. For this reason, in this Guide the word ‘bias’ is generally used in preference to ‘hate’. Bias has a broader meaning than hate, and a bias motive only requires some form of prejudice on account of a personal characteristic. Bias can be felt in relation to a person, a characteristic or an idea (where the victim symbolizes that characteristic or idea).

Case Highlight:

Two people attacked for how they were dressed (France)

Perpetrator alleges acting out of revenge and denies being racist

On 24 August 2018, two men were attacked by another man with a metal chain. The perpetrator was later found to be also carrying two knives. During the attack, the victims were subjected to racist insults, and the perpetrator referenced one victim’s attire (an outfit worn during Muslim prayer). During the investigation, the perpetrator stated that he had not been racist, but had acted out of revenge, having himself previously been the victim of violence committed by people of the same ‘type’. He confirmed that the attire of one of the complainants had determined the assault. On 26 September 2018, the Criminal Court of Bethune found the defendant guilty of armed violence committed with a racist motive, for which the sentence included 15 months in prison.

Source: France’s Contribution to ODIHR’s 2018 Hate Crime Report.

When preparing hate crime laws, the drafting choices of legislators will determine whether the law uses the terms ‘bias’ or ‘hate’, or whether they adopt other approaches and available terminology. Part II contains a detailed discussion of the consequences of different drafting choices relating to motive under “Policy Question Three: Defining Motive — Hostility or Discriminatory Selection?”

2 WHAT SETS HATE CRIMES APART?

Hate crimes differ from ordinary crimes not only because of the motivation of the perpetrator, but also because of the impact on the victim, the community and society as a whole. They can also raise serious security concerns. This Chapter elaborates on the consequences of hate crimes, and why a specific legal approach is necessary.

Hate crimes send a message that the victim does not belong to the society. This message is intended not only for the immediate victim, but also for the victim’s community and society more broadly. Hate crimes also encourage potential perpetrators to turn their hostility into violent acts. Thus, hate crimes are sometimes described as symbolic or message crimes.

Hate crimes can ultimately damage the fabric of society and cause communities to fragment. These are some of the consequences that set them apart from other crimes. Below are four reasons that justify taking a different legal approach to hate crimes.

2.1 HUMAN RIGHTS AND EQUALITY

Hate crimes violate the ideal of equality among and between the members of a society. Equality is a universal value that seeks to safeguard the dignity of *all* human beings, and to give them the opportunity to realize their full potential. The status of the equality norm is evidenced by its constant reiteration in human rights documents. For example, the Universal Declaration of Human Rights refers to the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family”. Equality underpins all international human rights instruments and the core constitutional documents of almost every state.

The Ministerial Council reaffirms “that respect for human rights and fundamental freedoms, democracy and the rule of law is at the core of the OSCE comprehensive concept of security, and that tolerance and non-discrimination are important elements in the promotion of human rights and democratic values”.

Source: OSCE Ministerial Council, Decision 9/09, “Combating Hate Crimes”, Athens, 2 December 2009, <https://www.osce.org/cio/40695>.

2.2 EFFECT ON THE VICTIM

By targeting a person’s identity, hate crimes cause greater harm than ordinary crimes. Unlike the victims of other criminal acts, hate crime victims are targeted for who they are. The perpetrator’s actions can therefore be experienced as an attack on the very core of a person’s identity, which is devalued and denigrated. As a result, the immediate victim may experience greater psychological harm and increased feelings of vulnerability because they are unable to change the characteristic that made them a victim.

In addition to the potential physical and emotional harm experienced immediately after an attack, many hate crime victims suffer from post-victimization socio-emotional and psychological distress. Higher levels of depression and withdrawal, vulnerability, anxiety and nervousness, an extreme sense of isolation, longer lasting fear and protracted psychosomatic symptoms are among the most common psychological consequences of hate crimes for their victims.¹⁷

Case Highlight: Gay men severely beaten and threatened with death (Netherlands)

Court recognizes individual harm caused by hate crime

On 18 June 2017, four gay men were approached at the Dam Square in Amsterdam, questioned about their sexual orientation and threatened with death by three other men. Two victims were severely beaten, while the other two escaped. Immediately after the attack, the perpetrators

17 *Understanding the Needs of Hate Crime Victims* (Warsaw: OSCE/ODIHR, 2020), p. 11-12, <https://www.osce.org/odihr/463011>; for information and resources on ODIHR’s activities to strengthen hate crime victim support through its two-year ESTAR project, see: “ESTAR: Enhancing hate crime victim support”, OSCE/ODIHR website, <https://www.osce.org/odihr/hate-crime-victim-support>. For further research on the harm caused to hate crime victims, see, among others: Paul Iganski, “Hate Hurts More”, *American Behavioral Scientist*, Vol. 45, 2001; Frederick M. Lawrence, *Punishing Hate: Bias Crimes under American Law* (Cambridge, MA: Harvard University Press, 1999), p. 75; Paul Iganski and Spiridoula Lagou, “The Personal Injuries of ‘Hate Crime’”, in Nathan Hall, Abbee Corb, Paul Giannasi and John G. D. Grieve (eds.), *The Routledge International Handbook on Hate Crime* (Abingdon: Routledge, 2014), pp. 34-46.

filmed themselves laughing, with one saying: “I have to be honest; I really hit that damn’d gay hard”.

The public prosecutor argued that bias motive was involved in the offences of attempted manslaughter, attempted severe abuse and overt use of force, and demanded a 100 per cent additional sentence. The court ruled that the offences included a bias motive: “There is no doubt that the reason for the violence was related to the fact that the men were homosexual. [...] The freedom to be who you are is seriously limited by incidents such as these. This is also clear from the statement of [...], who says that he ‘will need to think twice about going out into the streets dressed up’. People come to the Netherlands because of their tolerance with regard to race, descent and sexuality. [Victim1] stated that he fled from Jamaica to the Netherlands to escape violence against homosexuals. It is of the utmost importance for the state to guarantee this open attitude and to combat people who attack this attitude.” The court sentenced the perpetrators to 40, 28 and 4 months of imprisonment and ordered them to pay damages.

Source: The Netherlands’ Contribution to ODIHR’s 2017 Hate Crime Report.

The overall impact may be compounded when victims are targeted based on more than one protected characteristic, such as gender and ‘race’, in intersectional hate crimes.¹⁸

2.3 COMMUNITY IMPACT

The community or group that shares the characteristic of the victim may also feel threatened and intimidated. In addition to fearing future attacks, other members of the targeted group may feel directly targeted. These effects can be multiplied where a community has historically been the victim of discrimination or marginalization.

Social acceptance of discrimination against particular groups is an important factor in increasing the incidence of hate crimes. Failing to address

18 *Hate Crime Victims in the Criminal Justice System: A Practical Guide* (Warsaw: OSCE/ODIHR, 2020), <https://www.osce.org/odihr/447028>. The term ‘intersectional hate crime’ refers to hate crimes in which a victim is targeted based on several protected grounds, resulting in a specific impact on the victim. According to the Center for Intersectional Justice, the concept of intersectionality describes the ways in which systems of inequality based on gender, ‘race’, ethnicity, sexual orientation, gender identity, disability, class and other forms of discrimination ‘intersect’ to create unique dynamics and effects. For example, when a Muslim woman wearing the Hijab is being discriminated against, it would be impossible to dissociate her gender identity from her Muslim identity and to isolate the dimension(s) causing her discrimination. All forms of inequality are mutually reinforcing and must therefore be analysed and addressed simultaneously to prevent one form of inequality from reinforcing another. See: “What is intersectionality”, Center for Intersectional Justice, <https://www.intersectionaljustice.org/what-is-intersectionality>.

hate crimes can encourage other 'hesitant' perpetrators to commit such crimes, as they may expect their actions to be tolerated. Hence, although hate crimes can be committed against members of the majority population, it is individuals within marginalized, stigmatized or minority communities who are disproportionately the victims of hate crimes. Thus, in the case of such groups there is a particularly significant value in adopting and enforcing robust hate crime laws.

2.4 SECURITY ISSUES

Hate crimes represent potentially serious security and public order problems. Hate crimes affect a far wider circle of people than ordinary crimes and have the potential to cause social division and civil unrest. By creating or emphasizing existing social tensions, these crimes can cause division between the victim group and society at large. Hate crimes can exacerbate existing intergroup tensions and play a part in interethnic or social unrest. In internal conflicts, widespread hate crimes usually accompany the escalation phase. Where relations among ethnic, national or religious groups are already sensitive, hate crimes can have a powerful impact. Ultimately, they can lead to mass atrocities.¹⁹ According to the United Nations Office on Genocide Prevention and the Responsibility to Protect, the path to atrocity crimes²⁰ can be determined by 'risk factors' and 'indicators'. Some of these include acts which could otherwise be classified as bias-motivated incidents or crimes.²¹

Case Highlight: Kondopoga riots (Russia)

From bar fight to ethnic riots

In the town of Kondopoga in the Republic of Karelia, Russia, during the night of 29 to 30 August 2006, a minor fight in a café was followed by an attack carried out by people of Chechen ethnicity, during which two ethnic Russians were murdered. Three days of rioting followed, resulting in the destruction of a café, a street market and several shops owned by people of Chechen and Azerbaijani origin. Thousands took to the streets demanding the expulsion of all non-Russians. Some far-right activists from other cities travelled to the town to join in these events.

19 To understand how the concepts of hate crime and mass atrocity crimes interrelate, see: Gordon W. Allport, *The Nature of Prejudice* (Cambridge, MA: Addison-Wesley Publishing Company, 1954); and "Pyramid of Hate", Anti-Defamation League (ADL), <https://www.adl.org/sites/default/files/documents/pyramid-of-hate.pdf>.

20 According to the United Nations, atrocity crimes include genocide, war crimes, crimes against humanity and ethnic cleansing, although the latter has not been recognized as an independent crime under international law. See: "Defining the Four Mass Atrocity Crimes", Global Centre for the Responsibility to Protect, 15 August 2018, <https://www.globalr2p.org/publications/defining-the-four-mass-atrocity-crimes/>.

21 See: *Framework of Analysis for Atrocity Crimes*, United Nations Office on Genocide Prevention and the Responsibility to Protect, 2014, pp. 5-6, 13, 16 and 18, https://www.un.org/en/genocideprevention/documents/publications-and-resources/Genocide_Framework%20of%20Analysis-English.pdf.

Chechen families fled or were evacuated as the violence continued unabated. The State Duma called for a formal investigation into the events, while the local mayor agreed to protesters' demands to check the identity documents of all ethnic Chechens in the town and to expel any whose papers were not in order.

Twelve Russians involved in the riots were found guilty of damaging private and municipal property and received three-year suspended sentences.

Source: "Hate Crimes in the OSCE Region: Incidents and Responses", Annual Report for 2006, OSCE ODIHR p. 20, <https://www.osce.org/odihr/26759>; Claire Bigg, "Russia: Kondopoga Violence Continues Unabated", Radio Free Europe Radio Liberty, 6 September 2006, <http://www.rferl.org/content/article/1071116.html>, "Mass riots in a Karelian town of Kondopoga", SOVA Center For Information And Analysis, 4 September 2006, <https://www.sova-center.ru/en/xenophobia/news-releases/2006/09/d8979/>.

Case Highlight: Unrest against Roma in the village of Jabuka (Serbia) *From online dispute to ethnic unrest*

On 10 June 2010, in the village of Jabuka, Serbia, a 17-year-old boy was murdered, allegedly by a Roma teenager following an argument and threats on Facebook related to a theft. Hundreds of non-Roma residents gathered in front of the village school and stoned the houses of Roma people. As the protests continued over a number of days, groups of non-Roma residents began threatening and verbally abusing the local Roma population. Fearing for their safety, Roma in Jabuka did not leave their homes for three days. In an effort to prevent further escalation, authorities organized police patrols of the village and offered to protect every Roma household. The local population were warned that the police would investigate the incident. In the end, the authorities arrested five people suspected of spreading racial, religious and ethnic hatred. High-level state representatives condemned the unrest and called on the criminal justice authorities to punish those responsible.

This case demonstrates how a dispute between two individuals can escalate into a conflict between ethnic groups by exacerbating pre-existing intergroup tensions. Non-Roma residents used the horrific murder of a non-Roma boy to express their hatred towards and attack the Roma residents of Jabuka. The prompt reaction of the authorities helped to prevent further escalations.

Source: Bojana Barlovac, "Threats Against Roma Continue in Serbian Village", BalkanInsight, 16 June 2010, <https://balkaninsight.com/2010/06/16/threats-against-roma-continue-in-serbian-village/>; Radovan Borović, "Ubistvo mladića povod etničkom maltretiranju Roma", Radio Slobodna Evropa, 15 June 2010, https://www.slobodnaevropa.org/a/selo_jabuka_romi/2072393.html.

3 RELATED CONCEPTS

There are a number of concepts that are closely related to hate crime. Nevertheless, these are distinct concepts, and legislation or policies related to these concepts should not be confused with hate crime laws.

3.1 GENOCIDE

The international crime of genocide is sometimes included within discussions of hate crime laws. Although national law may prohibit genocide and other related crimes, such as crimes against humanity, they are not, in this context, described as hate crime laws. Genocide requires an intention to destroy — in whole or in part — a national, ethnic, racial or religious group.²² This is qualitatively and quantitatively different from hate crimes, as are all crimes under international law that describe widespread, systematic acts of violence. Indeed, hate crimes can pave the way to such large-scale atrocity crimes (see above in Chapter 2.4). However, the legislative, investigative and prosecutorial issues arising from such international crimes are very different from those arising in hate crimes. All such international crimes are therefore outside the scope of this Guide.

3.2 TERRORISM AND VIOLENT EXTREMISM

There is no universally recognized definition of ‘terrorism’ and, even less so, a definition of what constitutes ‘violent extremism’. With the expansion of counter-terrorism efforts over the past 20 years, measures to prevent and counter violent extremism (PVE/CVE) or violent extremism and radicalization leading to terrorism (P/C VERLT, as it is commonly referred to in the OSCE) have gained increasing attention. Whereas terrorism offences need to be clearly and narrowly defined in domestic legislation, violent extremism is primarily a policy term and should not be used to define criminal offences due to inherent human rights risks.²³

22 See: UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, Article 2.

23 ODIHR and other international bodies have consistently raised concerns pertaining to ‘extremism’/‘extremist’ as a legal concept and the vagueness of such terms, particularly in the context of criminal legislation. See, for example, OSCE/ODIHR, “Note on the Shanghai Convention on Combating Terrorism, Separatism and Extremism”, 21 September 2020, para. 54, <https://www.osce.org/odihr/467697>.

Terrorism²⁴ occurs in many different contexts and takes different forms. Terrorist acts are criminal acts and, therefore, subject to criminal law.²⁵ While their intrinsic quality requires that they be considered ‘terrorist’ by domestic law, they might be also motivated by bias. However, this is not true of all terrorist acts; take, for instance, a terrorist attack proclaimed to be motivated by a government’s foreign policy. In fact, terrorist crimes are usually aimed at exerting pressure on governments and achieving political goals, while most hate crimes lack such objectives.²⁶ The criminal responses can also vary; the primary focus of addressing hate crimes is to uncover and reflect the bias motivation in the course of criminal proceedings, as well as to provide adequate victim protection and support.

‘Violent extremism’ is an elusive concept.²⁷ The term is rarely defined but generally refers to acts of violence that are justified by, or associated with an ‘extremist’ religious, social or political ideology.²⁸ Some acts related to manifestations of **violent extremism** can be motivated by bias and thus classified as hate crimes. Both hate crimes and manifestations of violent extremism are rooted in real or perceived conflicts between various groups or communities. Thus, both violent extremism and hate crimes threaten societal cohesion. Violent extremism can be seen as an assault on human dignity and constitutional principles that lie at the heart of modern democratic societies. The values that the hate crime model seeks to protect are clearly a part of such constitutional core principles (including the protection of human rights, the protection of minorities and equal treatment). Ultimately, if not addressed, both hate crimes and manifestations of violent extremism may spread, escalate and lead to violence on a wider scale.

However, not all hate crime perpetrators can be labelled as ‘violent extremists’. In fact, hate crimes are most often committed by individuals who have no affiliation with any violent extremist groups or ideologies.²⁹ Furthermore, not all violent extremists necessarily commit hate crimes, as manifestations of violent extremism may also include acts falling outside the OSCE definition

24 While there is no universally accepted definition in international law, United Nations Security Council Resolution 1566, adopted in 2004, provides some parameters that states should be guided by in elaborating clear definitions in national laws and regulations. See *Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework* (OSCE/ODIHR, 2018), p.23, <https://www.osce.org/odihr/393503>.

25 *Countering Terrorism, Protecting Human Rights. A Manual* (Warsaw: ODIHR, 2007), <https://www.osce.org/odihr/29103>; *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community Policing Approach* (Warsaw: OSCE/ODIHR, 2014), p. 23, <https://www.osce.org/secretariat/111438>.

26 See: *Prosecuting Hate Crimes: A Practical Guide* (Warsaw: OSCE/ODIHR, 2014), p. 31, <https://www.osce.org/odihr/prosecutorsguide>.

27 See, for example, OSCE/ODIHR and Penal Reform International (PRI), *Protecting Human Rights in Prisons while Preventing Radicalization Leading to Terrorism or Violence: A Guide for Detention Monitors*, 15 July 2021, pp. 16-19, <https://www.osce.org/odihr/492934>; and *Preventing Terrorism and Countering Violent Extremism* (ODIHR, 2014), *op. cit.*, pp. 34-39 and 40-43.

28 See: *A Whole-of-Society Approach to Preventing and Countering Violent Extremism and Radicalization That Lead to Terrorism: A Guidebook for Central Asia* (OSCE/ODIHR, 2020), p. 19, <https://www.osce.org/secretariat/444340>.

29 See: *Prosecuting Hate Crimes* (OSCE/ODIHR, 2014), *op. cit.*, p. 22.

of hate crime (such as hate speech offences, elaborated on in Chapter 4.4 of this Guide).

In situations where hate crimes are addressed within a policy framework targeting violent extremism, there may be a tendency to overlook hate crimes committed by ‘ordinary’ citizens (i.e., those not affiliated with any violent extremist ideology or movement).³⁰ This situation can leave the perpetrators unpunished and the hate crime victims without adequate redress, protection and support. Irrespective of whether hate crimes are committed by someone affiliated with violent extremist groups, organizations or movements, perpetrators should be investigated and charged, first and foremost, with committing hate crimes.

3.3 ANTI-DISCRIMINATION LAWS

Anti-discrimination laws are not hate crime laws. Discrimination can be either direct or indirect. Direct discrimination occurs when a person is treated less favourably on the basis of a prohibited consideration, such as racial or ethnic origin, disability, gender or sexual orientation. Indirect discrimination refers to law or policy that is presented in neutral terms but in fact has a prejudicial effect on a particular group defined by an identity marker, or a member of such a group. Anti-discrimination laws have the same basis in international law as hate crime laws³¹ and exist in many but not all OSCE participating States. They usually relate to workplace discrimination or discrimination in the provision of goods and services. An act of discrimination — such as paying one worker less than another for the same work — is unlawful if it is based on discriminatory grounds. Without the discriminatory element the same act would not be unlawful.

While in most jurisdictions discrimination is a matter of civil or administrative law, in some it carries criminal penalties. Regardless, hate crime laws do not include laws punishing discrimination as there is no criminal base offence. The first essential element of a hate crime is therefore missing.

3.4 HATE SPEECH

There are laws that criminalize ‘hate speech’³² based on the particular content of that speech. The prohibited content differs widely: in some jurisdictions

³⁰ *Ibid.*

³¹ See: UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Articles 1 and 2.

³² There is no internationally agreed definition of hate speech. However, the term was defined by the Council of Europe Committee of Ministers in a Recommendation adopted in May 2022 (Council of Europe: Committee of Ministers, *Recommendation CM/Rec(2022)16 of the Committee of Ministers on Combating Hate Speech*, 20 May 2022, CM/Rec(2022)16). The Recommendation distinguishes between (i) hate speech that is prohibited under criminal law; (ii) hate speech that is subject to civil or administrative law; and (iii) other offensive or

speech that incites hatred or is insulting about certain groups is penalized. Other common prohibitions include speech that denigrates a person's or a nation's 'honour' or 'dignity'. There may also be restrictions on specific historical subjects, the most notable being laws that prohibit Holocaust denial or the glorification of Nazi ideology. In all these cases, the speech itself would not be a crime if it did not contain the specific prohibited content. Therefore, hate speech lacks the first essential element of hate crimes; if the bias motive or content were removed, there would be no criminal offence or act. For example, a rock concert featuring songs glorifying fascism, neo-Nazism or the Holocaust would be a crime in some states — but not a hate crime, because of the absence of a criminal base offence.

Direct and immediate incitement to criminal acts is criminalized across the OSCE region. Where such incitement occurs with a bias motive, it should be categorized as a hate crime given the existence of the criminal base offence. The same applies to bias-motivated direct threats committed with the use of words or speech, which may constitute hate crimes and need to be addressed as such.³³ In particular, their bias motivation must be investigated.

Case Highlight: Online threats against a city council candidate (United States)

Bias-motivated online threats constitute hate crime

On 31 August 2020, D. M. was sentenced to 41 months of imprisonment in Virginia for threatening a Black Charlottesville City Council candidate because of his 'race' and his candidacy for public office. The perpetrator was also sentenced for cyberstalking a separate victim through Facebook messenger.

The United States Attorney for the Middle District of Florida, Maria Chapa Lopez, said that “[t]he hallmark of [United States’] democracy is the right to peacefully protest and engage in an effective exchange of ideas via the political process”, and that if “either of these rights are infringed, and individuals are targeted, intimidated, or threatened because of their ‘race’/ethnicity or beliefs, the cornerstone of [the] system is put at risk.”

harmful types of expression requiring alternative responses (in the same vein, see also: UN Office of the High Commissioner for Human Rights (OHCHR), *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence* (2012), <https://www.ohchr.org/en/documents/outcome-documents/rabat-plan-action>. The United Nations Strategy and Plan of Action on Hate Speech, launched by the UN Secretary-General in May 2019, also provides a definition of hate speech; it should be noted, however, that the latter document addresses United Nations' institutions, and not states.

33 For a case analysis related to the concept of 'verbal hate crimes' committed online, see: Viktor Kundrak, "Beizaras and Levickas v. Lithuania: Recognizing Individual Harm Caused by Cyber Hate?", *East European Yearbook on Human Rights*, 2020/1, Eleven Publishing, <https://eejhr.eu/issue/issue-nr-1-2020/>.

The defendant pleaded guilty to one count of racially-motivated threats to interfere with an election and one count of cyberstalking. At the plea hearing, he admitted having used online pseudonyms with racist meaning and connotations to promote white supremacy and white nationalist ideology and to express support for racially-motivated violence.

Source: "Florida Man Sentenced for Racially-Motivated Interference with Election in Charlottesville, Virginia and for Cyberstalking in Florida", the United States Department of Justice, 31 August 2020, <https://www.justice.gov/opa/pr/florida-man-sentenced-racially-motivated-interference-election-charlottesville-virginia-and>, and "White supremacist's threats led black Charlottesville candidate to drop out of race, feds say", The Washington Post, 19 September 2019, <https://www.washingtonpost.com/nation/2019/09/19/daniel-mcmahon-white-supremacist-charlottesville-threats/>.

Intolerant, racist or biased speech and public discourse may, of course, create a climate conducive to committing hate crimes. It is therefore unsurprising that hate speech is an issue which attracts a great deal of public attention. Nevertheless, hate speech has been excluded from the scope of this Guide, as not only does it lack the element of a base offence, but there are also considerable variations in hate speech laws among OSCE participating States. The different constitutional, legal and philosophical approaches to hate speech in the OSCE region mean that there is insufficient common ground for this Guide to provide useful commentary.³⁴

However, racist or biased speech before, during or after a crime, may constitute evidence of motive and should form part of any criminal investigation. Similarly, if the perpetrator has items in their possession, such as books, music or posters that suggest a bias or prejudice, this could constitute part of the evidence of a motive.

4 WHY HAVE HATE CRIME LAWS?

OSCE participating States have committed to enact specific, tailored legislation to combat hate crimes, providing for effective penalties that take into account the gravity of such crimes.³⁵ When hate crimes are treated like other crimes and not recognized as a special category of crime, they are often not dealt with properly. This can lead to investigators disbelieving the victim or failing properly to investigate allegations of bias motive, prosecutors minimizing

³⁴ The OSCE has addressed hate speech, intolerant discourse or cyber hate through a series of documents. See, for example: OSCE Ministerial Council, Decision 6/02, "Tolerance and Non-Discrimination", Porto, 7 December 2002, <https://www.osce.org/mc/40521>; OSCE Ministerial Council, Decision No. 4/03, *op. cit.*; OSCE Permanent Council, Decision No. 621, *op. cit.*; OSCE Ministerial Council, Decision No. 10/05, "Tolerance and Non-Discrimination: Promoting Mutual Respect and Understanding", Ljubljana, 6 December 2005, <https://www.osce.org/mc/17462>; OSCE Ministerial Council, Decision No. 13/06, "Combating Intolerance and Discrimination and Promoting Mutual Respect and Understanding", Brussels, 5 December 2006; and OSCE Ministerial Council, Decision 9/09, *op. cit.*

³⁵ *Ibid.*

the offence when choosing charges, and courts failing to apply their powers to increase sentences to reflect the motives of the perpetrator.

Hate crimes do not occur in a vacuum; they are criminal acts, often of a particularly violent nature, motivated by prejudices that can be pervasive in society. Such prejudices can prevent criminal justice authorities from effectively investigating, prosecuting and punishing hate crimes. For example, when police and prosecutors share widely held stereotypes about a group targeted in a hate crime (such as associating the group with criminal activity), this can negatively affect the investigation by creating the assumption that the victim is somehow at fault.

It takes very few cases of unaddressed hate crimes for affected communities to become disillusioned with the response of law enforcement officials. By contrast, where the prosecution and sentence take account of the bias motive, this can help to reassure the victim that their experience has been fully recognized. This in turn can inspire trust among other members of the community that hate crimes will not go unpunished. Codifying the social condemnation of hate crimes into law is important for affected communities, can help build trust in the criminal justice system, and can help repair social fissures between various groups and communities.

4.1 THEORETICAL ARGUMENTS

There are three main theoretical arguments to justify additional punishment for hate crimes.

First, the law plays a role in demonstrating society's rejection of particularly serious crimes, including those based on bias. The enactment of hate crime laws is a powerful expression of society's condemnation of certain offences as especially reprehensible and deserving of greater punishment. Further, such laws also serve to recognize the experiences of individuals and groups at risk of hate crimes. By enacting hate crime laws, the state sends a message to the vulnerable that their security is taken seriously and that they deserve greater protection.

Second, criminal law penalizes the multifaceted harm caused by such crimes. As noted previously, hate crimes have a greater impact on the victim than other types of crime and also affect other members of the targeted group. The additional harm caused both to the individual and the community is therefore a justification for increased sentences.³⁶

36 See: Jennifer Schweppe and Mark Austin Walters, *Hate Crimes: Legislating to Enhance Punishment*, Oxford Handbooks Online, Criminology and Criminal Justice (Oxford: Oxford University Press, 2015), p. 5-8.

Third, hate crime laws punish the greater culpability of the perpetrator.³⁷ Bias-motivated crimes undermine the principles of fundamental rights, including dignity and equality, thus making the crime more serious than if the offence had been committed without such motives. Criminal law frequently imposes increased penalties for crimes based not only on their outcome, but also on the intent of the perpetrator. In hate crime cases, the perpetrator's intent is not only to cause physical injury or damage to property, but also to send a message to the victim, their community and society at large that particular individuals and groups are not welcome. Thus, the perpetrator intends to cause disproportionate harm, and it is this harm that hate crime laws recognize and seek to address.³⁸

4.2 PRACTICAL ARGUMENTS

The practical impact of passing hate crime legislation can be significant. Ideally, legislation is adopted following consultations within government, law enforcement authorities and the public. This serves to focus attention on and raise awareness of the nature and extent of such crimes. The legislative process itself can thereby improve awareness of and responses to hate crime.

While it is possible to address some hate crimes without specific hate crime laws, the absence of such laws impedes the effective investigation, prosecution and sentencing of hate crimes. Comprehensive and clear hate crime legislation helps to ensure that the responsible authorities take a consistent approach to tackling hate crimes. Furthermore, hate crime legislation also prioritizes the identification of the bias element during investigation, thus producing evidence that can lead to the successful prosecution and sentencing of a hate crime.³⁹

Once enacted, the implementation of hate crime legislation requires professional guidance and training, further strengthening the skills and knowledge of police, prosecutors and judges.⁴⁰ This results in improved criminal justice responses to hate crimes.

Moreover, the existence of hate crime laws makes recording and data collection more effective. This allows for improved intelligence and policing information, enabling resources to be properly allocated.⁴¹ When hate crime

37 See: Frederick M. Lawrence, "The Hate Crime Project and Its Limitations: Evaluating the Societal Gains and Risk in Bias Crime Law Enforcement", *Legal Decision Making in Everyday Life: Controversies in Social Consciousness* (Springer, 2007).

38 *Ibid.*

39 See: Council of Europe: European Commission against Racism and Intolerance (ECRI), "Explanatory Memorandum to ECRI General Policy Recommendation N°7 on national legislation to combat racism and racial discrimination", 2018, <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/recommendation-no.7>.

40 See: *Prosecuting Hate Crimes* (OSCE/ODIHR, 2014), *op. cit.*

41 See: *Hate Crime Data Collection* (OSCE/ODIHR, 2014), *op. cit.*

cases are identified, the nature of the problem and the response become clearer, allowing training and resources to be allocated to those areas most in need.

An improved criminal justice response strengthens the confidence of affected communities in the criminal justice system. Public trust is a prerequisite for the exchange of information between the police and the public; without trust, the public may be reluctant to report crimes, cooperate with the police or provide them with the information needed to prevent and investigate crimes successfully.⁴² Public confidence leads to more investigations being successfully concluded, not only in relation to hate crime but also into other matters in which police require community assistance.

Thus, hate crime legislation increases awareness and enables better scrutiny, which in turn leads to more effective responses to hate crimes and improved police-community relations.

4.3 ARE HATE CRIME LAWS DISCRIMINATORY?

Some critics of hate crime laws claim that they protect some groups more than others and are therefore discriminatory. This is not the case. Although hate crimes are most often committed against members of minority communities,⁴³ they can also occur against majority communities too. For example, data provided by the London Metropolitan Police covering the period from August 2014 to May 2016 showed that 14 per cent of all hate crime victims targeted in racist incidents identified as ‘white British’.⁴⁴

In this connection, it should be noted that:

- Perpetrators may come from a minority group;
- The target may be selected because they are part of a majority group; and
- Both perpetrator and target may be members of different minority groups.⁴⁵

42 See, for example: “Second European Union Minorities and Discrimination Survey - Main results”, Fundamental Rights Agency (FRA), 2017, <https://fra.europa.eu/en/publication/2017/second-european-union-minorities-and-discrimination-survey-main-results>. According to this survey, the reporting rate of cases of bias-motivated violence and bias-motivated harassment to the police is noticeably low. See also: *Encouraging hate crime reporting - The role of law enforcement and other authorities*, 2021, FRA, <https://fra.europa.eu/en/publication/2021/hate-crime-reporting>.

43 The minority-majority perspective becomes irrelevant in the case of gender-based hate crimes, which disproportionately affect women and girls. See: *Gender-Based Hate Crime* (Warsaw: OSCE/ODIHR, 2021), <https://www.osce.org/odihr/480847>.

44 See: Mark Austin Walters and Alex Krasodonski-Jones, “Patterns of Hate Crime: Who, What, When and Where?” (2018), Project Report, DEMOS, pp. 42-43, <https://ssrn.com/abstract=3427985>. See also similar findings from the United Kingdom, published in 2013, in Mark Walters, “Why the Rochdale Gang should have been sentenced as ‘hate crime’ offenders”, *Criminal Law Review*, 2013/2, pp. 3-4, https://www.academia.edu/4948148/Why_the_Rochdale_Gang_should_have_been_sentenced_as_hate_crime_offenders?email_work_card=title.

45 Regarding some of the conundrums, see: Mark Austin Walters, Susann Wiedlitzka, Abenaa Owusu-Bempah and Kay E. Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017), pp. 134-136, <https://ssrn.com/abstract=3427984> or <http://dx.doi.org/10.2139/ssrn.3427984>.

The common denominator underlying all hate crimes is not the identity of the victim, but rather the perpetrator's bias towards an identity that the victim is perceived as sharing; in other words, the actual identity of a hate crime victim is not pertinent, including whether they belong to a minority or majority community.⁴⁶

The principle of equality before the law means that hate crime laws do not and should not protect one group over another. For instance, if a hate crime law includes ethnicity as a characteristic, it should not specify a particular ethnicity; under such a law a victim could be of any ethnicity, including a majority one.

Case Highlight: Murder of Kriss Donald (United Kingdom)

Hate crime laws apply to everyone

On 15 March 2004, a British man of Asian origin was attacked by a group of white youths. The next day the man and his friends went looking for 'white boys' from that area. They found Kriss Donald, a 15-year old boy. They abducted him and drove him around for two hours, before stabbing him 13 times, setting him on fire and leaving him to die.

After a two-year investigation, a total of five men of Asian origin were convicted of racially aggravated offences, abduction and murder. The judge, when sentencing them to long prison terms, stated "the savage and barbaric nature of this crime has rightly shocked the public [...] Racially aggravated violence from whatever quarter will not be tolerated".

Source: "Trio Jailed for Kriss Race Murder", BBC News, 8 November 2006, http://news.bbc.co.uk/2/hi/uk_news/scotland/glasgow_and_west/6123014.stm.

5 THE INTERNATIONAL AND REGIONAL FRAMEWORK

A number of human rights treaties make general statements relating to discrimination. Both the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) require states to refrain from 'race' discrimination (including discrimination based on ethnicity or national origin) and to provide their residents with equal protection of all laws. In addition, Article 4 of the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief requires states to "prevent and eliminate discrimination on the grounds of religions" and to "take all appropriate measures to combat intolerance on the grounds of religion".

⁴⁶ See Part II, Section 4.2, below, which discusses hate crimes committed due to the perpetrator's misperception about the victim's (actual) identity.

Some instruments specifically call on states to criminalize acts constituting hate crimes. Article 4 of CERD imposes an obligation on states to take “immediate and positive measures” in this regard; paragraph (a) goes on to require that states should make an offence “all acts of violence or incitement to such acts against any [‘race’] or group of persons of another colour or ethnic origin”. The Committee on the Elimination of Racial Discrimination has called upon states to define offences with bias motives as specific offences and to enact legislation that enables the bias motives of perpetrators to be taken into account.⁴⁷ The Council of Europe’s European Commission on Racism and Intolerance (ECRI) has also called for the criminalization of such acts in its General Policy Recommendations.⁴⁸

The European Union Framework Decision on Racist and Xenophobic Crime was adopted on 28 November 2008.⁴⁹ The Framework Decision recognizes the differences across the laws of European Union (EU) Member States dealing with racist and xenophobic behaviour, and the different approaches to restrictions on speech. It aims to establish a common criminal law approach, punishable in the same way in all the EU Member States, and requires states to ensure conformity of their existing legislation with the Framework Decision.⁵⁰

Since the landmark judgment of *Nachova and Others v. Bulgaria*, the European Court of Human Rights has held that states have positive obligations under the European Convention on Human Rights and Fundamental Freedoms to investigate the potential racial motivation of crimes. In particular, they have a duty to investigate possible bias motivation behind acts of violence committed by state authorities, as well as by private individuals.⁵¹

47 See, for example: Committee on the Elimination of Racial Discrimination (CERD), *Concluding observations on the combined twentieth and twenty-first periodic reports of Poland*, 19 March 2014, CERD/C/POL/CO/20-21, point 8; and CERD, *Concluding observations* on the combined fourteenth to seventeenth periodic reports of Luxembourg*, 13 March 2014, CERD/C/LUX/CO/14-17, point 11.

48 See: ECRI, *General Policy Recommendation No. 7 on National Legislation To Combat Racism And Racial Discrimination*, adopted on 13 December 2002 and revised on 7 December 2017, CRI(2003)8, <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/recommendation-no.7>.

49 See: European Union: Council of the European Union, *Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law*, 28 November 2008, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A133178>; see also Guidance Note on the Practical Application of Council Framework Decision 2008/913/JHA, which endorsed the OSCE definition and concept of hate crimes: https://ec.europa.eu/newsroom/just/document.cfm?doc_id=55607.

50 In December 2021, the European Commission presented an initiative to extend the list of “EU crimes” – i.e., crimes governed by Article 83 (1) of the Treaty on the Functioning of the European Union (TFEU) – to include hate speech and hate crime. The EU could thus directly establish minimum rules and definitions that would be binding for the EU Member States. For more information, see: “The Commission proposes to extend the list of ‘EU crimes’ to hate speech and hate crime”, European Commission website, 9 December 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6561.

51 *Nachova and Others v. Bulgaria*, application nos. 43577/98 and 43579/98, Council of Europe: European Court of Human Rights (ECtHR), 6 July 2005, §§ 160-168. For racist motivation, involving acts committed by private individuals, see also: *Abdu v. Bulgaria*, application no. 26827/08, ECtHR, 11 March 2014. For bias based on religion or belief, see: *Milanović v. Serbia*, application no. 44614/07, ECtHR, 14 December 2010, §§ 96-101. For bias based on sexual orientation, see: *Identoba and Others v. Georgia*, application no. 73235/12, ECtHR, 12 May 2015; and *M.C. and A.C. v. Romania*, application no. 12060/12, ECtHR, 12 April 2016.

While the Court has not demanded the introduction of specific legislation against hate crime, it has explicitly recognized that hate crimes require a criminal justice response proportionate to the harm caused. The Court applied these principles in *Šečić v. Croatia*, a case involving an attack by skinheads on a Roma man, reiterating that,

“[...] when investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.”⁵²

In the case of *R.B. v. Hungary*, the Court later extended the same principles, applicable to acts of physical violence,⁵³ to cases of direct threats.⁵⁴ Elsewhere, it elaborated on the need to use bias indicators (see above in Section 1.1) to “unmask racist motives”,⁵⁵ and indicated the possible application of these principles in the online space, especially on social media.⁵⁶

6 CONCLUSION

The essential issue is that when criminal cases are prosecuted, the bias motivation should be explicitly considered and punished. Sometimes, when cases of hate crime are prosecuted, the motivation behind the attack (such as the victim’s perceived ‘race’, nationality, ethnic origin, religion or belief, sex, gender, sexual orientation or gender identity) is not mentioned. This can happen due to a lack of understanding among criminal justice professionals about hate crimes and their significance. At times, the hate crime charges are dropped owing to difficulties in gathering evidence to prove the bias motive.

When the bias motive is disregarded, the opportunity to deter potential perpetrators through a harsher punishment is lost. Furthermore, failing to prosecute hate crimes sends a signal that the state does not take seriously the bias motive underlying the crime. This can be particularly harmful for the victims and communities whose identities were targeted in the crime and who, as a result, may be reluctant to co-operate with the investigation and report hate crimes in the future.

⁵² *Šečić v. Croatia*, application no. 40116/02, ECtHR, 31 May 2007, § 66.

⁵³ Such acts fall under Articles 2 (right to life) and 3 (prohibition of ill-treatment), in combination with Article 14 (prohibition of discrimination) of the Convention.

⁵⁴ See, for example: *R.B. v. Hungary*, application no. 64602/12, ECtHR, 12 April 2016, §§ 53-102.

⁵⁵ *Balázs v. Hungary*, application no. 15529/12, ECtHR, 20 October 2015, §§ 21 and 75.

⁵⁶ See *Beizaras and Levickas v. Lithuania*, application no. 41288/15, ECtHR, 14 January 2020, § 155.

Hate crime laws should provide a clear and predictable legal framework for addressing hate crime and its bias element. Such laws impose legal obligations on criminal justice professionals to consider the bias motive. However, the law also needs to be applied in practice. Addressing hate crimes systematically requires a comprehensive approach on the part of the state, including enacting effective recording and data collection mechanisms, training police and prosecutors and adopting guidance on investigating and prosecuting hate crime. Community outreach and effective protection and support for hate crime victims can help build their trust in state authorities and contribute to their effective participation in criminal proceedings.

Victims' Perspective: the "Halle Trial" (Germany, 2020)

Statement by the co-plaintiffs Rebecca Blady and Jeremy Borovitz (excerpts):

"On July 21st, 2020, a new path toward justice should open in Germany. This country is putting a white supremacist on trial. A man who has clearly demonstrated antisemitism, racism, and misogyny. A man who tried to kill Jews, on their holiest day, Yom Kippur; who tried to kill me and my family; who tried to kill members of my community and other minority communities. This is a man who intentionally attacked the people in a synagogue and a döner restaurant, motivated by pure hatred against minorities — and who failed in his mission but succeeded in his quest for murder and killed two people, Jana L. and Kevin S."

Testimony by Ismail T. (excerpts):

"We stand here, breathing and our hearts beat as always. Our bodies are intact, but not our souls. We have been struggling with the mental consequences of the attack ever since. My brother Rifat used to be cheerful and made us laugh. It is different now. Since then we have not had a carefree day or a quiet night. The fear of death, the concern for each other, the anxious hours of uncertainty and the great sadness about the loss of two innocent people accompany us every second. There was a life before the attack and now there is another life. [...] This trial is very important to us. We want to know where the offender's hatred and cold-heartedness come from. We want to know how he became what he became and why society did not prevent him from following this unfortunate path. We want to know whether he had supporters and accomplices or just like-minded people."

On 9 October 2019, the Jewish holiday of Yom Kippur, a gunman attacked a synagogue in the Paulusviertel neighbourhood of Halle, Germany. After unsuccessful attempts to enter the synagogue, the attacker shot dead a female passer-by, Jana L., near the entrance to the Jewish cemetery

next to the synagogue. The gunman then drove to a nearby Turkish kebab restaurant, where he opened fire through the front window with a shotgun. A customer in the restaurant, Kevin S., was injured and later killed when the attacker re-entered the building. Two restaurant employees, Ismail T. and Rifat T., were present but survived the attack. Two more people, a 40-year-old woman and a 41-year-old man, were injured in the fight with the attacker. On 21 July 2020, the trial began. The presiding judge at the Naumburg Higher Regional Court, Ursula Mertens, opened the main hearing against the perpetrator. In her speech, she said that the trial was an opportunity to expound the defendant's hatred for Jews, Muslims, women and others, whom he viewed as a threat. The perpetrator confessed to the crime and also confirmed the anti-Semitic motive. The co-plaintiffs largely agreed with the plea of the federal prosecutor's office. Prosecutors said that the perpetrator made a "very comprehensive" confession, confirming "far-right and anti-Semitic motives" and that the attack was one of the most repulsive anti-Semitic acts since World War II. The trial lasted 26 days, during which more than 80 witnesses and experts were heard and more than 40 joint plaintiffs were involved. On 21 December 2020, the perpetrator was sentenced to life imprisonment with subsequent preventive detention, the highest possible sentence under German law. The defendant was deemed to have a severe gravity of guilt, which effectively ruled out a release after 15 years in prison.

Sources: Prozess Report Halle, 18.12.2020 Closing Statements of the Survivors at the Halle Trial, <https://www.halle-prozess-report.de/>; Democ. e. V., "Halle Trial", <https://democ.de/en/halle-trial/>



PART II
DRAFTING
LEGISLATION: KEY
POLICY QUESTIONS

INTRODUCTION

Part I discussed the concept of hate crimes and the rationale for hate crime legislation. Part II explores the ways in which the concept of hate crime is translated into law. Specifically, this section analyses how hate crime laws are drafted and the consequences of specific legislative choices, drawing on examples from across the OSCE region.

Most of the legislation cited here can be found in ODIHR's online legislative database.⁵⁷ Although the most recent published versions of legislation are used, and were accurate at the time of writing, readers should be aware that legislation, and its interpretation by courts, changes over time. Furthermore, not all the legislation referred to in this Guide is available in an official English translation.

Drafting a hate crime law or revising an existing one involves a series of choices on the part of legislators and policymakers. Starting with the factors common to all hate crime laws, this section of the Guide deals with all the constituent elements of such a law, presenting key choices in the form of "Policy Questions". Each policy question consists of an overview of the issue accompanied by a commentary. Examples of actual legislation and real cases are used to illustrate the issues. The key conclusions arising from the policy questions are listed at the end of Part II.

The questions posed are:

- **Policy Question One:** *Should the law create a new substantive offence or only contain a penalty enhancement for existing crimes?*
- **Policy Question Two:** *Which protected characteristics should be included in the law?*
- **Policy Question Three:** *How should motive be defined in the law?*
- **Policy Question Four:** *How should association, affiliation and mistakes in perception be dealt with?*
- **Policy Question Five:** *What evidence is needed and what degree of motive is required?*

While each policy question needs to be addressed separately, their cumulative effect or impact should also be considered. Individual policy decisions that are justifiable and reasonable by themselves could, in combination, produce laws that are unworkable if the overall effect is to create laws that are either too narrow or too broad in scope.

⁵⁷ See: OSCE/ODIHR, Legislationline website, <http://www.legislationline.org>.

All hate crime laws share the two essential elements described in Part I: they require a base offence to be committed with a bias motive. In addition, there are two other features that characterize all hate crime laws:

- *Victims can be people or property.* Hate crime laws should apply not only to crimes committed against people. They should also apply to crimes against property associated with people who share a particular characteristic — such as a place of worship or religious site, business or residence.
- *Laws protect all people equally.* Although hate crime laws must specify which group characteristics are protected by law, such laws are usually drafted with reference to, or in terms of, a general group, such as religion or ethnicity. These laws protect all individuals who share such protected characteristics. For example, ‘religion’ is a broadly protected category, but hate crime laws do not single out specific religions for protection. Laws prohibit crimes motivated by ethnicity but do not identify particular racial or ethnic groups for protection. Violence against Christians, for example, can be prosecuted under a hate crime law in the same manner as violence against Muslims; crimes against members of majority communities can be prosecuted in the same way as those against minority communities. Thus, no particular group has special protection; all people and all groups are equal under the law.

1 POLICY QUESTION ONE: SUBSTANTIVE OFFENCE OR PENALTY ENHANCEMENT?

As indicated above, hate crime laws are referred to as any legislation that regulates the criminalization and punishment of hate crimes. In particular, they are provisions that provide for the appropriate punishment of hate crime perpetrators by taking into consideration the bias motivation underlying the offences. In this Section, we will discuss three main types of provisions. Substantive offences, addressed in Section 1.1, are stand-alone offences encompassing bias motivation. Penalty enhancement provisions, which are sometimes referred to as “aggravating sentencing clauses” or “aggravating circumstances clauses”,⁵⁸ allow for increasing the penalty for a base offence when it is committed with a bias motive. Sections 1.2 and 1.3 deal with general penalty enhancements and specific penalty enhancements, respectively.

1.1 SUBSTANTIVE OFFENCES

A ‘substantive offence’ is a separate offence that includes the bias motive as an integral element of the legal definition of the offence. Within the OSCE region, this kind of hate crime law is the least represented type of hate crime provision.

⁵⁸ Not to be confused with ‘racially aggravated’ or ‘religiously-aggravated’ offences in the United Kingdom, mentioned below, which fall under the category of substantive offences.

The Czech Republic, the United Kingdom and the United States (both at the federal and state level) have created specific offences that incorporate a bias motive. Most other countries have not.

Examples of Substantive Offences – the Czech Republic, Poland and the United Kingdom

Article 352(2) of the **Czech Republic**'s Criminal Code provides for punishments ranging from six months to three years' imprisonment for "Whoever uses violence against a group of inhabitants or an individual, or threatens them with killing, bodily harm or causing large-scale damage, for their real or perceived ['race'], ethnic affiliation, nationality, political opinion, religion or belief or real or perceived lack thereof, shall be punished by imprisonment for six months to three years."

According to Article 119 (1) of the Criminal Code of the **Republic of Poland**, the perpetrator is subjected to "the penalty of the deprivation of liberty for a term of between 3 months and 5 years" if they use "violence or [make] unlawful threat towards a group of persons or a particular individual because of their national, ethnic, racial, political or religious affiliation, or because of their lack of religious beliefs".

Sections 29-32 of the **United Kingdom**'s Crime and Disorder Act 1998 provides for offences of 'racially-aggravated' and 'religiously-aggravated' assault, criminal damage, harassment and public order offences.

1.2 GENERAL PENALTY ENHANCEMENTS

When general penalty enhancements are used to punish hate crimes, the question of bias motive is usually considered when the perpetrator is sentenced. In other words, a perpetrator must first be found guilty of the base offence, and then the court considers whether there is sufficient evidence of bias to apply a penalty enhancement. In common law jurisdictions, this will be at the sentencing phase. In civil law jurisdictions, determination of guilt and sentencing are not separate phases, and the judge will consider evidence of motive affecting sentence as part of the same process.

In principle, general penalty enhancements apply to all criminal offences which do not already encompass bias as one of the constitutive elements. Within the OSCE region, 38 countries include some form of bias motive as a factor that can lead to a penalty enhancement for all crimes.⁵⁹

59 At the time of the publication of this Guide (2022).

Examples of General Penalty Enhancements – Andorra, Sweden and Tajikistan

Article 30.6 of **Andorra's** Criminal Code provides for penalty enhancements if crimes are committed with “a discriminatory motivation”. “A discriminatory motivation towards a person means taking into consideration [their] birth, origin, nationality or ethnic group, colour, sex, religion, political, philosophical or union opinion, or any other personal or social condition, like [their] physical or mental disability, [their] lifestyle, habits, language, age or [their] sexual orientation or identity.”

Chapter 29, Section 2 (7), of the Criminal Code of **Sweden** provides that aggravating circumstances should be considered when “a motive for the offence was to insult a person or a population group on grounds of [‘race’], colour, national or ethnic origin, religious belief, sexual orientation or transgender identity or expression, or another similar circumstance”.

Article 62(1)(e) of **Tajikistan's** Criminal Code provides for penalty enhancements, including “crimes with a motive of national or religious hostility.”

1.3 SPECIFIC PENALTY ENHANCEMENTS

Specific penalty enhancements are provisions attached to particular base offences, usually those of the most severe nature. These would typically be serious offences against the person, such as murder or bodily harm. In criminal codes, specific penalty enhancements are often construed as sub-sections to provisions relating to such base offences and require the imposition of a more severe punishment — for example, by directly increasing the range of sentence for committing the base offence with a bias motivation. As such, specific penalty enhancement provisions usually establish so-called qualified forms of the relevant base offences and resemble the substantive offence provisions in that the bias motivation is a constitutive element of the offence.

In the OSCE region, there are 30 countries that have adopted specific penalty enhancement provisions to address bias motive as a factor that can lead to a penalty enhancement for specific crimes.⁶⁰

⁶⁰ At the time of the publication of this Guide (2022).

Examples of Specific Penalty Enhancements — Bosnia and Herzegovina, France and Turkmenistan

Article 166(2 (c)) of **the Federation of Bosnia and Herzegovina's** Criminal Code provides that murder committed “out of hatred” is punishable by a minimum term of ten years' imprisonment; without the penalty enhancement the minimum prison sentence is five years.

In **France**, Article 222-13 of the Criminal Code (as amended by Law n°2018-703 of 3 August 2018) provides that “[a]cts of violence causing an incapacity to work of eight days or less or causing no incapacity to work are punished by three years' imprisonment and a fine of €45,000 where they are committed: [...] [5°bis] because of the victim's actual or supposed membership or non-membership of an ethnic group, nation, alleged race or particular religion; [or, 5°ter] because of the sex, sexual orientation or actual or supposed membership of an ethnic group, nation, gender identity of the victim”.

Articles 101(2)(m), 107(2)(h); 108 (2)(h) and 113(2)(e) of **Turkmenistan's** Criminal Code provide for increased penalties in cases of intentional murder, serious injury, or beating causing less serious physical or psychological injury if these are committed “on account of social, national, racial or religious hatred or hostility”.

1.4 COMMENTARY

There are indisputable advantages to enacting a law making hate crime a substantive offence. Because part of the importance of hate crime law — both for the individual victim and society at large — is the symbolic value of labelling the offence, a substantive hate crime law explicitly condemns the prohibited bias motive. When hate crimes are framed in law as substantive offences or through specific penalty enhancement type provisions, the crime usually has greater visibility and hate crime data is easier to collect. Thus, a substantive hate crime law or certain specific penalty enhancements better fulfil the expressive function of criminal law.

Designating hate crimes as substantive offences also poses challenges. A substantive hate crime offence requires motive to be proved in order for the accused to be convicted. Prosecutors may be reluctant to press charges relating to a substantive offence if they believe it will be harder to prove on the evidence. In some jurisdictions, there is the additional problem that courts can only consider the offence with which the accused is indicted. Hence, a substantive hate crime indictment may not allow the court to convict of the base offence if the bias element is not proved. This is a disadvantage of substantive offences and the specific penalty enhancement type of provision, and can lead

prosecutors either to avoid using the hate crime laws available to them or to accept a guilty plea to the base offence in order to secure the perpetrator's conviction. Training and guidance for prosecutors and investigators are key to overcoming such problems.

Potential problems with alternative charges?

A 2002 study of racially-aggravated offences in the UK⁶¹ found that perpetrators often plead guilty to the base offence to avoid being found guilty of the racially aggravated offence. The study found that the structure of the legislation encouraged “pleas of not guilty to the aggravated version of offences; and the offer of a guilty plea to the underlying substantive offence.” Prosecutors were sometimes “blamed for accepting these offers too easily.” In response to the practice identified by the 2002 study, the Crown Prosecution Service (CPS) adopted the policy not to accept pleas to lesser offences, or a lesser basis of plea, or omit or minimize admissible evidence of racial or religious aggravation for the sake of expediency.⁶² The subsequent practices were examined in a 2017 study aimed at assessing the application of criminal laws and sentencing provisions for hate crime in England and Wales.⁶³ The study concluded that “while *attempts* at ‘charge bargaining’ are very common, the majority of interviewees stated that charge bargaining no longer occurs in hate crime cases. However, a minority of independent barristers suggested that charge bargaining does occur occasionally.”⁶⁴ The study further identified that while there has been a clear shift in attitude towards plea bargaining, the possibility and perception that plea bargaining still occurs remains a cause for concern.

Enacting a hate crime law in the form of a penalty enhancement also has certain advantages and disadvantages.⁶⁵ Penalty enhancements are easier to incorporate into a penal code, as codes usually list certain factors that can increase a sentence for a crime. Penalty enhancements can apply to a wide range of crimes, and failure to prove the facts supporting an enhancement will not jeopardize a conviction on the underlying base offence.

61 Elizabeth Burney and Gerry Rose, “Racist offences — how is the law working? Implementation of the legislation on racially aggravated offences in the Crime and Disorder Act 1998”, Home Office Research Study 244, July 2002, p. 111.

62 “Racist and Religious Hate Crime - Prosecution Guidance”, United Kingdom Crown Prosecution Service, updated 21 October 2020, <https://www.cps.gov.uk/legal-guidance/racist-and-religious-hate-crime-prosecution-guidance>.

63 University of Sussex, 2017, *op. cit.*

64 *Ibid.* p. 12.

65 For a more detailed analysis, see: Gião Hanek A., “International Legal Framework for Hate Crimes: Which Law for the ‘New’ Countries?”, in Haynes A., Schweppe J., Taylor S. (eds.) *Critical Perspectives on Hate Crime*. Palgrave Hate Studies (London: Palgrave Macmillan, 2017).

However, many penalty enhancement provisions only come into play during or before the sentencing phase of the criminal proceedings. This creates the risk that the bias motivation is ignored at the early stages of investigation, during which essential evidence needs to be secured. In some cases, police officers may not even be aware of or instructed to abide by the “sentencing provisions”. Furthermore, penalty enhancements may be ignored simply because it is easier and faster to close a case by addressing only the base offence and thereby disregarding the bias motivation. Therefore, it is essential that criminal justice authorities establish effective systems to record bias motivation, train relevant officials and develop police and prosecutorial guidance to thoroughly investigate and record the potential bias motivation from the outset of the investigation, regardless of the legal qualification of an act.⁶⁶

Moreover, when deciding on a particular sentence, civil law courts operate within a certain sentencing range, prescribed or recommended by law. In common law systems, the discretion provided to judges is usually further structured by sentencing guidelines or similar measures.⁶⁷

The court usually assesses both the perpetrator’s aggravating and mitigating circumstances before deciding on a suitable sentence within the range. General penalty enhancements, also called aggravating circumstances, can be outweighed by mitigating circumstances. Mandatory statutory instructions or sentencing guidelines that require an automatic penalty enhancement when an offence is motivated by bias constitute a good practice in addressing the specific nature of bias motivation and protecting the relevant aggravating circumstances from being outweighed.⁶⁸

Another significant disadvantage with a penalty enhancement law, however, is that a court’s decision to enhance the penalty on the basis of a bias motive might not form part of the public record. In some cases, for example, the reasons for enhancement cannot be recorded publicly. A consequence is that an accused’s criminal record cannot be used to determine whether they have a history of bias-motivated crimes. Moreover, in some states, previous convictions for hate crimes, even if publicly recorded, may only be allowed as evidence in a subsequent case in very limited circumstances.

66 *Hate Crime Data Collection and Monitoring* (OSCE/ODIHR, 2014) *op. cit.*, p. 42.

67 For example, in England and Wales, the Sentencing Council has issued general and offence-specific guidelines. See, for example: “Sentencing Council guidelines for hate crimes based on racial and religious grounds or grounds of sexual orientation”, website of the Sentencing Council for England and Wales, <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/racial-hatred-offences-hatred-against-persons-on-religious-grounds-or-grounds-of-sexual-orientation/>. See also Section 66 of the Sentencing Act 2020 (on hostility), applicable in in England and Wales: “Sentencing Act 2020”, legislation.gov.uk, <https://www.legislation.gov.uk/ukpga/2020/17/section/66/enacted>.

68 See, for example: Article 81A of the Criminal Code of Greece or Section 146 Criminal Justice Act 2003 (United Kingdom). See also: “3. Approach to Sentencing”, website of the Sentencing Council for England and Wales, <https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/hate-crime/3-approach-to-sentencing/>; and “Homophobic, Biphobic and Transphobic Hate Crime – Prosecution Guidance”, United Kingdom Crown Prosecution Service, updated on 3 March 2022, http://www.cps.gov.uk/legal/h_to_k/homophobic_and_transphobic_hate_crime/#a15.

Without explicit recognition of the bias motive, the hate crime law loses much of its symbolic weight. Thus, a penalty enhancement, while easier to implement, may not fulfil the law's expressive function of recognizing and condemning a prohibited bias. This will depend in part on whether reasons for increasing the sentence are publicly stated in a court's decision or through communication with the public and whether such convictions are included within hate crime data.

For both substantive offences and penalty enhancements, the success of the case will be closely connected to the quality of the investigation, in particular the collection of evidence of motive.⁶⁹ General questions of evidence and proof of bias motive will be considered further in Section 6 — “Policy Question Five: What Evidence is Needed and What Degree of Motive is Required.”

Finally, a combination of approaches is always possible and, in order to address the various challenges related to all three types of hate crime laws, often desirable. Some states have specific substantive crimes requiring a bias motive as well as general penalty enhancement statutes for other crimes. This is the approach taken by both the United Kingdom and the United States. To combat hate crimes effectively, states are encouraged to enact a combination of the three types of hate crime provisions so that the fewest possible hate crime cases go unpunished.

1.4.1 RELATED CONSIDERATIONS

Once the decision as to whether the hate crime law should be a substantive offence or a penalty enhancement has been taken, there are a number of considerations that arise, some of which have already been touched on. These are best answered in light of each state's policy goals and priorities, as well as the requirements of a state's criminal procedure. Key issues to consider are:

- *Should the enhancement be stated on the record?* It is good practice to require courts to consider any evidence of bias motive and to state on the record the reasons for applying or not applying an enhancement. This ensures a record is kept of the court's decision-making process, so that any history of bias-motivated offending can be known to law enforcement authorities. It can also help focus the court's attention on the issue and reassures victims that the court has taken into account the motive for the crime.
- *If the substantive offences approach is used, which base offence or offences should have the bias element?* This requires some legislative fact-finding concerning what kinds of offences are frequently motivated by bias in that particular society. It may be both impractical and more difficult to create a large number of new substantive offences. Legislatures should focus on

69 See: *Prosecuting Hate Crimes* (OSCE/ODIHR, 2014), *op. cit.*

those crimes where creating a new substantive offence will have the most impact. For example, the penalties for harassment or property damage are usually quite low, but the impact of such offences when motivated by bias can be significant. Physical and sexual assaults and threats should also be covered by substantive offences, as such acts directly violate an individual's physical and mental integrity and dignity, and the bias motive further exacerbates the harm done.

- *If the penalty enhancement approach is used, should the law apply to all offences or only to particular ones? Should it specify the amount of increase in the sentence?* It is crucial that the penalty enhancement is applicable at least in respect of physical assaults, bodily harm, threats or property damage. Specifying the amount of increase might be necessary if there is a perception that courts are unwilling to sentence hate crime perpetrators more severely. In some countries, however, constraining the court's discretion in that manner would not be permissible. It will not always be necessary to add a penalty enhancement for a bias motive. If the base offence is already subject to the maximum penalty available in law, enhancement will be meaningless. However, prosecutors should still emphasize the bias motivation in the indictment in order to send a message to the victim, their community and society as a whole. Courts should do the same when explaining their decisions, even if the sentence is not increased.
- *Are all hate crimes 'public crimes'? As such, can they be investigated and prosecuted ex officio?* Some jurisdictions rely heavily on complaints and the subsequent private prosecution by the victim. This approach often applies to 'less serious' crimes, so that the vast proportion of hate crimes fall into the category of 'private crimes', which are rarely prosecuted. This needs to be taken into account when designing hate crime laws. Preferably, hate crimes should be prosecutable *ex officio*: their gravity is increased by the bias motivation underlying the base offence even if it is not very serious.

2 POLICY QUESTION TWO: WHICH PROTECTED CHARACTERISTICS TO INCLUDE?

All hate crime laws define protected characteristics, but different states protect different characteristics. Thus, all hate crime laws in the OSCE region include 'race' as a protected category. Some include categories such as 'sex', 'gender', 'sexual orientation' and 'disability'. Less commonly, some hate crime laws protect characteristics such as 'education', 'profession', 'political affiliation' or 'ideology'.

This section will first outline the criteria for determining protected characteristics. It will then list and comment on the characteristics included in OSCE participating States' laws, in order of frequency.⁷⁰

2.1 CRITERIA FOR INCLUSION OF PROTECTED CHARACTERISTICS

The choice of protected characteristics is one of the most important decisions facing legislators and policymakers in the area of hate crime. There is no precise answer as to which characteristics should be included, but they are usually ones that are apparent or noticeable to others and thus more easily targeted by perpetrators. The decision must be made with regard to the needs and context of each society, but it must be based on a proper assessment of a number of factors, such as those discussed below.

2.1.1 FUNDAMENTAL CHARACTERISTICS

Hate crime is an identity crime. This is what renders it different from ordinary crimes. Hate crimes target an aspect of a person's identity that is fundamental to their sense of self. Such markers are usually evident, such as skin colour. But not all fundamental characteristics are markers of group identity. When determining the protected characteristics to include in a hate crime law, it is necessary to identify characteristics that function as a *marker of group identity*. For example, although blue-eyed people share the same eye colour, they do not usually identify together as a group, nor do others see them as a cohesive group; thus, eye colour is not typically a marker of group identity.

Conversely, there are a few characteristics, such as religion or belief, which though an individual should be free to change,⁷¹ nevertheless serve as a widely-recognized marker of group identity. This is particularly true when religion is expressed in visible ways, such as through the wearing of certain forms of dress or symbols, and which a person should not be forced to renounce or conceal.

2.1.2 SOCIAL, HISTORICAL AND LEGAL CONTEXTS

The process of determining which characteristics to include requires an understanding of current social problems as well as historical oppression and

70 Since the first issue of this Guide in 2009, the number of OSCE participating States that have enacted hate crime laws has increased from 37 to 53. There has also been an increase in the inclusion of certain protected characteristics, namely sexual orientation and disability. Thus, in 2009, 11 states included sexual orientation and 7 states recognized disability as protected characteristics in their hate crime provisions; as of 2022, these figures had risen to 33 and 25, respectively.

71 See: Universal Declaration of Human Rights, *op. cit.*, Article 18; and OSCE Ministerial Council, Decision 3/13, "Freedom of Thought, Conscience, Religion or Belief", Kyiv, 6 December 2013, <https://www.osce.org/mc/109339>.

marginalization of certain groups in society.⁷² Characteristics that have been the basis for past discrimination should be included, as should characteristics that are the basis for current human rights violations. To return to the example of the previous paragraph, blue-eyed people have not experienced historical or contemporary subjugation. Because criminal law attempts to deal with social issues, a legislature considering enactment of a hate crime law must understand what those issues are.

It is in this context that the legislative process will benefit from engaging in consultation and dialogue, in particular with those actors who are most familiar with the challenges facing historically and currently oppressed, marginalized and discriminated groups in a given society. These include national human rights institutions, ombudspersons, equality bodies, civil society organizations, groups religious or belief communities, and human rights defenders advocating on behalf of minority communities.

Finally, relevant international, universal and regional legal frameworks need to be considered. For instance, as of 2022, 47 of 57 OSCE participating States have ratified the European Convention on Human Rights and Fundamental Freedoms⁷³ which, as interpreted by the Court, imposes a duty on States Parties to effectively investigate violent acts and threats motivated by, among others, sexual orientation.⁷⁴

2.1.3 ISSUES OF IMPLEMENTATION

The law should be drafted with an understanding of the practical implications for investigators and prosecutors of the choice of characteristics. Does the inclusion of certain characteristics make a law more or less likely to be used? If a law includes a characteristic that is not visible, such as ‘birth’ or ‘marital status’, there may be problems regarding proof. It is harder to show that a perpetrator selected the victim on the basis of a protected characteristic if that characteristic is hidden. Thought should be given to how the prosecutor can prove that the perpetrator knew about the characteristic; issues relating to evidence are discussed in more detail in “Policy Question Five: What Evidence Is Needed and How Much Motive Is Required?” It is useful to consult with law enforcement bodies before enacting legislation, to ensure that these questions are considered thoroughly, and this will also help with implementation.

72 See, for example: Frederick M. Lawrence, “Enforcing Bias-Crime Laws without Bias: Evaluating the Disproportionate-Enforcement Critique”, *Journal of Law & Contemporary Problems*, Vol. 66, 2003, p. 49.

73 As of 16 September 2022, the Russian Federation ceased to be a High Contracting Party to the European Convention on Human Rights and Fundamental Freedoms; see: “Russia ceases to be a Party to the European Convention on Human Rights on 16 September 2022”, Council of Europe website, 23 March 2022, <https://www.coe.int/en/web/portal/-/russia-ceases-to-be-a-party-to-the-european-convention-of-human-rights-on-16-september-2022>.

74 See: *Identoba and Others v. Georgia and M.C. and A.C. v. Romania*, ECtHR, *op. cit.*

2.2 EXCLUDED CHARACTERISTICS

If a particular characteristic is not included in a hate crime law, it does not necessarily mean that there are no criminal sanctions for targeting an individual sharing that characteristic. For example, attacks on police officers or members of the military are serious crimes in most jurisdictions. They just do not fall within the concept of hate crime, since being a police officer or a soldier is not considered a fundamental identity marker (see Chapter 2.1.1 above).

Decisions about which characteristics to include will impact on how the law is used and what kinds of crimes are classified as hate crimes. If a law protects a very long list of characteristics, some of which may not even fall under the concept of hate crime, it may be applicable to a wide range of situations and offences, which may make it difficult to enforce effectively. In particular, the inclusion of characteristics that are not fundamental to the identity of a group, could even water down the objective of a hate crime law, which is to protect the most vulnerable. Conversely, if a hate crime law protects relatively few characteristics, it risks excluding groups that are commonly victims of hate crimes. Legislators therefore need to strike a balance between a law that is sufficiently comprehensive, on the one hand, and one that is overly broad and therefore meaningless, on the other. Ultimately, it is advisable that hate crime laws are as inclusive as possible so that the law adequately addresses the harm done to all hate crime victims.

2.3 FREQUENTLY PROTECTED CHARACTERISTICS

Within the OSCE region, ‘race’, national origin and ethnicity are the protected characteristics most frequently covered by hate crime laws, closely followed by religion. These characteristics were recognized during the early period of hate crime lawmaking.⁷⁵

Furthermore, some religious or belief communities may also be described in terms of ethnicity or ‘race’, and an individual may be victimized on the basis of more than one protected characteristic. Indeed the perpetrator may not make a distinction between the ethnicity, ‘race’ and religion of their victim.

Specific historical experiences have led to different priorities in national legislation. Thus, the American experience of slavery and the historic oppression of African-Americans made ‘race’, as that term was traditionally understood, a central preoccupation for lawmakers drafting hate crime laws in the United States in the 1980s. In Europe, Roma and Sinti have been subject to genocide, forced expulsions and pogroms, while recently, attacks on Muslims and on migrants have increased. These commonly-protected characteristics currently form the core of hate crime legislation.

⁷⁵ Namely, following the International Convention on the Elimination of All Forms of Racial Discrimination, which was adopted on 21 December 1965 and entered into force on 4 January 1969.

Examples of Frequently Protected Characteristics — Azerbaijan, Hungary and Latvia

Under Article 61.1.6 of **Azerbaijan's** Penal Code, aggravating circumstances include committing a crime “on grounds of **national, racial, religious** hatred or fanaticism”.

Under Section 216 of **Hungary's** Penal Code, a person “who assaults another person for being a member or a presumed member of a **national, ethnic, racial or religious group** or a certain group of population – especially due to a disability, sexual identity or sexual orientation – or compels him or her by applying violence or threats to do, to not do or to endure something shall be punishable by one to five years of imprisonment.”

Under Section 48 (14) of **Latvia's** Criminal Code, the following can be considered as aggravating circumstances: “the criminal offence was committed due to **racist, national, ethnic or religious** motives.”

Although characteristics such as ‘race’, colour, ethnicity and national origin are almost universally protected by hate crime laws, these terms are not subject to internationally agreed definitions. A number of common but potentially confusing terms are used, sometimes with overlapping meanings. Since the interpretation of these terms varies both across and within jurisdictions, the discussion which follows highlights important issues for legislators to consider.

2.3.1 ‘RACE’

Despite its prevalence in hate crime laws, ‘race’ is a social construct which has no basis in science.⁷⁶ The point was made as early as 1950 in the UNESCO Statement on Race, which was drafted following consultations with leading biologists, anthropologists and scientists from other disciplines. The Statement noted that “[i]t would be better when speaking of human races to drop the term ‘race’ altogether and speak of ethnic groups.” In their Race Statement, the International Union of Anthropological and Ethnological Sciences proposed that the UNESCO Statement be updated, and reiterated that “[p]ure races in the sense of genetically homogeneous populations do not exist in the human species, nor is there evidence that they have ever existed in the past history of the human family.”⁷⁷ The term ‘race’, because of its lack of clarity, can also cause problems of interpretation for courts and law enforcement. For these reasons, when drafting legislation it is preferable to utilize alternative terms such as ‘ancestry’, ‘national origin’ or ‘ethnicity’.

⁷⁶ See the disclaimer on the use of the term “race” in section 1.1.

⁷⁷ See: IUAES website, <https://www.waunet.org/>.

Although many international organizations, and some states, now avoid using the term ‘race’, the use of related terms such as ‘racism’ and ‘racial discrimination’ persists. As the European Union Agency for Fundamental Rights noted, “there is no term that, as yet, can effectively encapsulate ethnic discrimination in the same way that ‘racism’ continues to capture a range of discriminatory ideologies and practices.”⁷⁸ The use of ‘racial’ in CERD explicitly incorporates ‘race’, colour, descent and national or ethnic origin. Article 1 of the Convention states that:

“[T]he term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

ECRI has also adopted a broad definition of ‘racism’, defining it as the “belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.”⁷⁹

Case Highlight: The Trial of J. P. (Slovakia) *A Narrow Interpretation of ‘race’*

In 1996, J. P. was charged in connection with an attack on a Roma university student. At trial, the victim’s representative argued that the accused should be sentenced under Article 221(2) of the Criminal Code, which provided the basis for a penalty enhancement for certain racially-motivated crimes. The court ruled that the accused’s admitted hatred of the victim could not be because of ‘race’, because Roma and Slovaks belong to the same race. On 1 July 1999, the district court of Banska Bystrica upheld the decision that the attack could not have been racially motivated, adopting the same reasoning as the trial court. The court gave J. P. a suspended sentence of two years’ imprisonment. The legislature of the Slovak Republic then amended Article 221(2) to include ‘ethnic hatred’. ECRI described this addition as a measure “to ensure that

78 “Racist Violence in 15 EU Member States”, European Monitoring Centre on Racism and Xenophobia (EUMC), April 2005, p. 31. Note that the EUMC is now the European Union Agency for Fundamental Rights.

79 Paragraph 35 of ECRI’s Explanatory Memorandum to its General Policy Recommendation No. 7 (*op. cit.*) states that ECRI rejects theories based on the existence of different ‘races’, but that the term is used in this Recommendation “in order to ensure that those persons who are generally and erroneously perceived as belonging to ‘another race’ are not excluded from the protection provided for by the legislation.”

attacks against Roma would be taken into account as racially-motivated by the courts.”

Sources: “Slovak court decides racially motivated crime by Slovaks against Roma impossible”, European Roma Rights Centre; “Third Report on Slovakia” para. 11, ECRI, 27 January 2004.

2.3.2 NATIONAL ORIGIN/ETHNIC ORIGIN/ETHNICITY

‘National origin’, ‘ethnic origin’ or ‘ethnicity’ are concepts with meanings dependent on the particular context and local usage. They often have overlapping meanings.

ECRI describes ‘ethnic group’ as “a collectivity within a larger population having real or putative common ancestry, memories of a shared past, and a cultural focus upon one or more symbolic elements which define the group’s identity.”⁸⁰ ‘National origin’ can sometimes be used to mean ‘citizenship’ (see ‘Nationality’, below), but it can also mean cultural affiliation to a national group, which may be linked to a state other than that of which the person is a citizen, or to no state at all. The United Nations and the Council of Europe both recommend that such definitions be determined by their national context.

2.3.3 NATIONALITY

Nationality is not the same as national or ethnic origin. The term ‘nationality’ has a distinct meaning. The European Convention on Nationality, Article 2(a), provides that ‘nationality’ means the “legal bond between a person and a State and does not indicate the person’s ethnic origin.” Nationality typically implies citizenship or a legal status conferred by the state. Although ‘nationality’ is sometimes confused with ‘national origin’, the former should be used to denote the legal relationship between a state and an individual, while the latter should be used to refer to the individual’s ethnic or cultural origin.

2.3.4 RELIGION AND BELIEF

A hate crime law that includes religion as a characteristic should protect members of all religions, including theistic, non-theistic and atheistic belief systems, and should also protect those who do not follow any particular religion or belief system. In fact, some hate crime laws specify that ‘religion’ includes within its ambit the lack of any religious belief. Atheists and non-believers are thus

80 Patrick Simon, “‘Ethnic’ statistics and data protection in the Council of Europe Countries: Study report”, ECRI, Strasbourg, 2007, p. 27.

protected. In Malta, Section 222A of the Criminal Code provides for enhanced penalties for crimes against racial or religious groups and states that “religious group means a group of persons defined by reference to religious belief or lack of religious belief.”

2.3.5 GENDER, SEX, SEXUAL ORIENTATION AND GENDER IDENTITY

As of 2022, 33 OSCE participating States have hate crime laws relating to sexual orientation, 25 relating to sex or gender, and 21 relating to gender identity.

The terms in this category are more easily defined than ‘race’ and the analogous terms discussed above. In many countries, such terms already exist either in constitutional documents or in anti-discrimination provisions. Yet some concepts, such as gender and gender identity, despite being used in legislative acts, are subject to misunderstandings and misconceptions in practice.

The United Nations defines gender as “social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men.”⁸¹ In keeping with the OSCE concept of hate crime, gender-based hate crimes can be understood as criminal offences motivated by bias against a person’s gender. Laws that address crimes motivated by bias and that cover gender as a protected characteristic differ as to whether the term sex⁸² or gender is used. One of the motivating factors behind this type of crime is often the perpetrator’s perceptions of gender norms. The victims of such crimes are often targeted due to their perceived deviation from gender norms, including on the basis of their sexual orientation and gender identity.⁸³

2.3.6 DISABILITY

Mental or physical disabilities are also included in the list of frequently protected characteristics. As of 2022, 25 OSCE participating States include disability or health status in their hate crime laws. People with disabilities are

81 These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/time-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies, there are differences and inequalities between women and men in the responsibilities they are assigned, activities undertaken, their access to and control over resources, as well as decision-making opportunities. Gender is part of the broader socio-cultural context. Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age. See: “Important concepts underlying gender-mainstreaming”, UN Women, <https://www.un.org/womenwatch/osagi/pdf/factsheet2.pdf>.

82 See also the OSCE Ministerial Council Decision 12/04, which includes reference to “hate crimes motivated by [...] sex”: OSCE Ministerial Council, Decision 12/04, “Tolerance and Non-Discrimination”, Sofia, 7 December 2004, <https://www.osce.org/mc/23133>.

83 *Gender-Based Hate Crime* (OSCE/ODIHR) *op. cit.*

often the targets of hate crimes. Nevertheless, disability hate crime — crimes committed with a bias against people with disabilities — remains widely hidden and misunderstood.⁸⁴ Perpetrators may target people with disabilities, or people who are perceived to have a disability, because they believe them to be vulnerable due to the symptoms of their impairment or health condition.⁸⁵ Criminal acts based on such prejudice and bias thus need to be reflected appropriately in the criminal legislation which — as in the cases of, for instance, a helpless or dependent person — also protect the specific vulnerability of some victims. Aggravating circumstances based on such specific vulnerability pursue a different aim than hate crime laws.⁸⁶

A distinction should be made between disability and impairment. A person with a disability is someone *with an impairment who experiences disability*.⁸⁷ The prejudice, discrimination and social exclusion experienced by many people with disabilities is not inevitably a result of their impairments or medical conditions, but rather stems from specific barriers they experience on a daily basis: this is known as the social model of disability.⁸⁸ In the United Kingdom, section 146 of the Criminal Justice Act 2003 defines ‘disability’ as “any physical or mental impairment.”⁸⁹

Examples of Other Frequently Protected Characteristics – Canada, Croatia, France and Mongolia

Section 718.2 (a) (i) of **Canada’s** Criminal Code provides that “evidence that the offence was motivated by bias, prejudice, or hate based **on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or any other similar factor** [...] shall be deemed to be aggravating circumstances.”

Article 132-77 of **France’s** Penal Code provides that aggravating circumstances include damaging “the honour or the reputation of the victim, or a group of persons to which the victim belongs, on account of their **sex, sexual orientation, actual or supposed gender identity.**”

Article 87, para. 21 of **Croatia’s** Criminal Code provides that “[a] hate crime shall mean a criminal offence committed on account of a person’s

84 *Disability Hate Crime* (Warsaw: OSCE/ODIHR, 2021), <https://www.osce.org/odihr/hate-crime-against-people-with-disabilities>.

85 *Ibid.*

86 See, for example, Section 42, letter h), of the Criminal Code of the Czech Republic, or Article 120, § 2, letter a) of the Criminal Code of Georgia.

87 *Disability Hate Crime* (OSCE/ODIHR), *op. cit.*

88 “Public statement on prosecuting disability hate crime and other crimes against disabled people”, United Kingdom Crown Prosecution Service, 3 March 2022, <https://www.cps.gov.uk/publication/public-statement-prosecuting-disability-hate-crime-and-other-crimes-against-disabled>.

89 United Kingdom Sentencing Act 2020, *op. cit.*, section 66 (6) letter d).

race, colour, religion, national or ethnic origin, language, disability, gender, sexual orientation or gender identity.”

Article 10.1.2.14 of the Criminal Code of **Mongolia** provides that “an unlawful killing of another human being [...] with hate motivation based on difference of **belief, race, national origin, religion, gender and LGBT status** is punishable from 12 years to 20 years of imprisonment or for life.”

2.4 LESS FREQUENTLY PROTECTED CHARACTERISTICS

Some of the less commonly protected categories include (political) affiliation, opinion or ideology; age; birth; social class, position or wealth; marital status; property; and military service. The examples given in this section illustrate how disparate hate crime laws can be. Some, but not all, of these concepts of protected groups are drawn from general anti-discrimination law, such as Article 21 of the Charter of Fundamental Rights of the European Union and Article 14 of the European Convention on Human Rights and Fundamental Freedoms.

Examples of Less Frequently Protected Characteristics — Georgia, the Russian Federation, Spain and the United States

Article 53. 3¹ of **Georgia’s** Criminal Code states that aggravating circumstances include “commission of a crime on the grounds of race, colour, language, sex, sexual orientation, gender identity, age, religion, political or other beliefs, disability, citizenship, national, ethnic or **social origin, material status or rank, place of residence** or other discriminatory grounds”.

Article 63 of the **Russian Federation’s** Criminal Code defines aggravating circumstances as crimes motivated by “**political, ideological,** racial, ethnic or religious hatred or animosity, or by hatred or animosity towards **any social group.**”

Article 22.4 of **Spain’s** Criminal Code defines aggravating circumstances as situations in which a crime is committed on racist, anti-Semitic or other discriminatory grounds related to the victim’s **ideology,** religion or beliefs, belonging to an ethnic group, race, nation, sex, sexual orientation or gender identity, gender role bias, or illness or disability.

Section 22-3701 of the **District of Columbia (United States)** Code defines ‘bias-related crime’ as an act that demonstrates an accused’s prejudice based on the actual or perceived race, colour, religion,

national origin, sex, age, marital status, **personal appearance**, sexual orientation, **gender identity or expression**, **family responsibility**, **homelessness**, physical disability, **matriculation [i.e., educational status]**, or **political affiliation** of the victim.

2.5 COMMENTARY

It is good practice to use a combination of terms such as ‘race’, ‘ethnicity’, ‘national origin’ and ‘nationality’ to ensure broad coverage. As regards the possible choice of further characteristics, a legislature must make an independent judgement about what should be included in a hate crime law.

Although there are no universal criteria for inclusion, factors to consider include:

- Historical conditions;
- Contemporary social problems;
- The international legal framework; and
- The incidence of particular kinds of crime.
- In addition, a legislature should assess the practical implication of including or excluding certain characteristics. For example, some of the “less frequently protected characteristics” are less likely to meet the criteria of a history of discrimination. Other characteristics might pose implementation problems for law enforcement officials. For example, the hate crime law of the District of Columbia in the United States, referenced in section 2.5 above, includes matriculation (educational status) as a protected characteristic. It would be difficult for investigators to show that a crime was committed for such a motive, since educational status is not a characteristic which is readily evident unless the victim is known to the perpetrator. Additionally, matriculation is not generally a strong marker of group identity nor is it usually associated with a history of discrimination.

A list that is too long or too vague can undermine the concept of hate crime and provide opportunities for abuse or misuse. The inclusion of categories linked to wealth or class might turn economic crimes into hate crimes. Furthermore, from a law enforcement point of view, the distinction may be impossible to draw. Is a robbery targeting a wealthy individual a hate crime on the grounds of ‘property’ or ‘social position’? Is it based on ‘hate’ or just greed?

Some categories can be confusing. For instance, where a term such as ‘social group’ is used without a clear definition, there are dangers that the law can fail to achieve its stated purpose. If a law includes characteristics that are not in some manner essential to a person’s sense of self and shared by people who as a group have experienced discrimination, exclusion or oppression, it can be discredited or disregarded as a hate crime law. Further, it can fail to protect

those groups which are in fact victimized. People protected under the term ‘social group’ might include police officers or politicians, neither of whom is typically perceived as an oppressed group or as sharing fundamental aspects of identity in common.

Further, the legal concept of certainty requires that a person be able to reasonably foresee the criminal consequences of their actions. The concept of legal certainty is a fundamental principle underlying any criminal justice system and, as such, is reflected in both domestic laws in the OSCE region and in international and regional human rights instruments. A law that imposes increased penalties but is unclear about the circumstances in which those penalties will be applied is likely to fail this fundamental test.

Some states, such as Canada and the Czech Republic, have opted for open-ended lists of protected grounds. In other words, they leave open the possibility that the law could apply to crimes based on characteristics beyond those already named in the law. In the Czech Republic, the list of protected grounds under the aggravating circumstances provision includes “out of motive of profit, vengeance, out of racial, ethnic, religious, class or other similar hatred, or another particularly condemnable motive”.⁹⁰ Although there are some advantages to this approach — as it allows the law to be developed over time in keeping with social experience — there are also problematic aspects. First, a legislative judgement about which characteristics to include and which groups are especially vulnerable is essentially a value judgement. Open-ended lists take away from the legislature the power to make decisions regarding when to increase the categories of crimes designated as hate crimes. Second, open-ended lists may be problematic for the same reason as vague laws: they can fail the test of legal certainty and be difficult to implement in a way that reflects the social reality of hate crimes.

Finally, legislative terms, such as ‘protected characteristics’, should be clearly defined or interpreted, be it by legislation or jurisprudence. Legislation can, of course, cross-reference terms and definitions that appear in other laws, and some hate crime statutes offer explicit definitions. For example, the hate crime legislation of Delaware, the United States, defines ‘sexual orientation’ as heterosexuality, bisexuality or homosexuality, and ‘gender identity’ as gender-related identity, appearance, expression or behaviour of a person, regardless of the person’s assigned sex at birth.⁹¹ Such terms can also be interpreted using legal commentaries or prosecutorial guidance.

⁹⁰ See: Section 42 b) of the Criminal Code of the Czech Republic.

⁹¹ See: Delaware Code Title 11, § 1304(a)(2).

3 POLICY QUESTION THREE: DEFINING MOTIVE – HOSTILITY OR DISCRIMINATORY SELECTION?

As mentioned in Part I, Section 1.2, despite the common use of ‘hate crime’ terminology, the notion of ‘hate’ can lead to misunderstandings. In fact, the key constitutive element of a hate crime is bias, not hate. The bias motivation then constitutes the motivation behind hate crimes. However, many national legislations use the terms ‘hate’ and ‘hatred’, which can make a significant difference to the categorization of offences as hate crimes. This Section explains the two key models of hate crime legislation, addresses some of the misconceptions and offers guidance.

The first type of hate crime legislation, referred to in this Guide as the **‘hostility’** model, uses hate-related terminology and is based on the premise that **perpetrators act out of hatred or hostility towards a particular characteristic** of the victim, such as the victim’s skin colour, ethnic or national origin, or religion. The second type, the **‘discriminatory selection’** model, does not use hate-related terminology but focuses on perpetrators’ **selection of the target due to their or its association with a group sharing a protected characteristic**.

It is important to bear in mind the impact that the choice of model can have on investigatory and prosecutorial approaches and resources. What prosecutors will be required to prove in a hate crime case depends on how the bias motive is stipulated in the relevant hate crime provisions.⁹²

Many states may have drafted their legislation without deliberately choosing either model. Jurisprudence, case law or implementation guidelines may therefore be needed to ensure meaningful application of such hate crime laws.

The following commentary highlights how the hostility and discriminatory selection models are applied in hate crime legislation.

3.1 THE HOSTILITY MODEL

In the hostility model, the perpetrator must have committed the offence because of hostility or hatred based on one of the protected characteristics. Some OSCE participating States have laws that specifically require hatred, hostility or enmity.⁹³ They require evidence that the perpetrator acted out of some kind of hostility towards the victim.

⁹² *Prosecuting Hate Crimes* (OSCE/ODIHR, 2014), *op. cit.*

⁹³ See, for example: Art. 63(1)(f) of the Russian Federation’s Criminal Code; Art. 62(1)(f) of Tajikistan’s Criminal Code; Art. 58(1)(f) of Turkmenistan’s Criminal Code; Art. 67(1)(3) of Ukraine’s Criminal Code; Art. 63(1)(6) of Armenia’s Criminal Code; and Art. 61(1)(6) of Azerbaijan’s Criminal Code.

The evidentiary threshold applied in practice⁹⁴ may thus be rather high and present certain obstacles to implementation. Whether a person actually feels ‘hate’ is a highly subjective question, which can be hard to prove in a court of law. The difficulty is compounded by the fact that almost no other criminal offences require proof of motive as an element of the offence.

Some hate crime laws built on the hostility model address such a challenge by focusing on the external expressions of hostility. In the United Kingdom, for example, Section 28 of the Crime and Disorder Act 1998 requires that the perpetrator “at the time of committing the offence, or immediately before or after doing so [...] demonstrates towards the victim of the offence hostility based on the victim’s membership (or presumed membership) of a racial or religious group”.⁹⁵ Elsewhere, guidance has been developed to interpret the relevant provisions by focusing on the external expressions of animosity, as well indirect, circumstantial evidence.⁹⁶

Examples of ‘Hostility Model’ Statutes – Belgium, Canada, Serbia and Ukraine

Article 377bis of the Penal Code of **Belgium** provides for an increased sentence if one of the motives of the offence is “**hatred, contempt or hostility**” towards a person because of a protected characteristic.

Section 718.2(a) of **Canada**’s Criminal Code provides that a court that imposes a sentence shall also take into consideration evidence that the offence was motivated by “**bias, prejudice or hate**” based on a protected characteristic.

Article 54a of the Criminal Code of **Serbia** states that “if a criminal offence is committed **from hate based on** race or religion, national or ethnic affiliation, sex, sexual orientation or gender identity of another, the court shall consider such circumstance as aggravating except when it is not stipulated as a feature of the criminal offence.”

Article 67(3) of **Ukraine**’s Criminal Code provides that if the offence was “**based on racial, national, or religious enmity and hostility or on the ground of sex**”, these shall constitute aggravating circumstances for the purpose of imposing a punishment.

94 A 2002 study found that people involved in all sectors of the criminal justice system wanted more guidance on the mental state required for an offence to be motivated by hostility on grounds of ‘race’. Burney and Rose, *op. cit.*, p. xvii.

95 “Crime and Disorder Act 1998”, legislation.gov.uk, Section 28 (1) a, <https://www.legislation.gov.uk/ukpga/1998/37/section/28>.

96 See, for example: *Guidelines on Prosecuting Hate Crimes in the Republic of Serbia*, OSCE Mission to Serbia, 2017.

3.2 THE DISCRIMINATORY SELECTION MODEL

In the discriminatory selection model, the perpetrator deliberately targets the victim because of a protected characteristic, but no actual hatred or hostility is necessary to prove the offence. The bias motivation depends on the selection of the victim or target based on a preconceived idea or bias about the group to which the victim belongs or with which the perpetrator associates them. For example, a perpetrator who attacks a migrant, thinking that the immigrant is less likely to report the crime to the police, would fall within the discriminatory selection category. Another form of discriminatory selection crime would be a perpetrator who assaults a gay man because 'gay-bashing' is common in their peer group and will gain them status and acceptance among their peers.

Many states do not mention hatred or hostility at all in their hate crime laws. Instead, the law requires that the perpetrator acted 'because of' or 'by reason of' the victim's protected characteristic. In other words, the law requires a causal link between the characteristic and the perpetrator's conduct, but no emotion or feeling on the part of the perpetrator towards the victim is specified.

Examples of statutes that fall under the discriminatory selection model – Bulgaria, Denmark, France and North Macedonia

Article 162(2) of **Bulgaria's** Criminal Code penalizes those who apply violence against another or damage another's property **because of** their nationality, race, religion or political conviction. The applicable sentence for such crimes are between one and four years of imprisonment and a fine from BGN 5,000 to 10,000, as well as public censure.

Section 81(vi) of **Denmark's** Criminal Code provides the basis for a penalty enhancement if it is shown "that the offence stems from others' ethnic origin, religious beliefs, sexual orientation or similar".

Article 132-76(1) of **France's** Penal Code provides that the penalties incurred for a felony or a misdemeanour be increased when the offence is committed **because of** the victim's actual or supposed membership or non-membership of a given ethnic group, nation, 'race' or religion.

Article 122 (42) of the Criminal Code of the **Republic of North Macedonia** provides the following classification of hate crimes: "A hate crime, as prescribed with the provisions of this law, is a criminal act against a person or legal entity and persons or property related to it, that is committed entirely or partially because of the actual or presumed characteristic of the person that refers to race, colour of skin, nationality, ethnic origin, religion or belief, mental or physical disability, sex, gender identity, sexual orientation, political affiliation."

3.3 COMMENTARY

The difference between these two models is important. The discriminatory selection law is broader because it applies to perpetrators who harboured no hostility or hatred towards their victim but selected them based on prejudices or stereotyped information about their identity or vulnerabilities. A discriminatory selection law does not require that hate be proven as an element of the offence. When a hate crime law requires ‘hostility’, it may be interpreted as requiring an assessment of the perpetrator’s mental state; an exercise that may be difficult and for which most law enforcement officials are not trained.

However, proving that the perpetrator selected a victim or a target particularly because of their perceived membership or association with a group can also be difficult in practice. Hybrid legislative solutions, such as those provided in Section 28 of the United Kingdom Crime and Disorder Act 1998, are a way to address this challenge. Both discriminatory selection laws and legislation requiring ‘hate’ or ‘hostility’ should be accompanied by interpretative guidance and training for law enforcement, prosecutors and courts as to what evidence is necessary and sufficient to prove the bias motivation. In developing such guidance, emphasis should be placed on the external expressions of hate rather than proving the emotional or mental state of the perpetrator.

The impact of a hate crime on the victim and members of their community does not decrease on learning that the perpetrator acted out of an emotion other than hate. From the victim’s perspective, what matters is that they were targeted because of a fundamental aspect of their identity.

Case Highlight: *People v. John Fox et al* (United States) *No Hate Required?*

A gay man was targeted for robbery by a group because they thought he would not fight back and would be reluctant to go the police. The victim, Michael Sandy, fled during the attempted robbery. As the men chased him, Michael Sandy ran across a highway and was struck by a car and killed. During the trial, the accused men argued that they could not be prosecuted for a hate crime because there was no evidence that they had any anti-gay hostility towards the victim. The court rejected this argument. The court interpreted the law to require nothing more than “intentional selection of the victim because of a particular attribute.”

Source: 844 N.Y.S.2d 627 (N.Y. Sup. 2007).

4 POLICY QUESTION FOUR: ISSUES OF ASSOCIATION, AFFILIATION AND MISPERCEPTION

Some crimes are committed against individuals because of their connection with a particular group. This connection might take the form of membership in or association with a group or an affiliation with a member of that group, such as a personal relationship, friendship or marriage or a professional relationship. Hate crimes also include cases when perpetrators misperceive the identity of a victim or their membership in a group.

4.1 ASSOCIATION AND AFFILIATION

Some hate crime victims are chosen not because they themselves share a particular protected characteristic, but because of their association with others who do. Examples of such targeting are numerous. Belgium's hate crime law was first used against a perpetrator who used a hunting rifle to shoot Ouelamata Niangadou, a Turkish woman of African descent who wore a headscarf, and the child for whom she was caring. The child, Luna Drowart, was of the same ethnicity as the perpetrator but was shot because of her association with the identity of her carer.⁹⁷

In the case of *Škorjanec v. Croatia*, which concerned a violent assault against a person of Roma origin and his partner, the European Court of Human Rights ruled that the state investigating authorities' duty to "seek a possible link between racist attitudes and a given act of violence [...] concerns not only acts of violence based on a victim's actual or perceived personal status or characteristics but also acts of violence based on a victim's actual or presumed association or affiliation with another person who actually or presumably possesses a particular status or protected characteristic."⁹⁸

Similarly, hate crimes include acts of vandalism and other attacks against property, for example the offices of civil society organizations affiliated or working with individuals or communities sharing certain protected characteristics.

Case Highlights: A series of attacks against civil society organizations working on LGBTI issues

In February 2016, the office of an LGBTI civil society organization based in Warsaw, Poland, was attacked. The front door was spat on

97 "Two Die in Belgium 'race killing'" BBC News Website. 11 May 2006, <http://news.bbc.co.uk/1/hi/world/europe/4763655.stm>; "Belgian man sentenced to life in prison for racially motivated attack", The New York Times, 11 October 2007, <https://www.nytimes.com/2007/10/11/world/europe/11iht-belgium.4.7856486.html>.

98 *Škorjanec v. Croatia*, application no. 25536/14, ECtHR, 28 March 2017, § 56.

and vandalized with racist and anti-LGBTI graffiti, and the organization's name plate was torn and burnt.⁹⁹

In February and March 2017, a number of incidents were reported across the United States involving acts of vandalism against LGBTI organizations, community centres, LGBTI-friendly bars and restaurants, as well as a school that had introduced gender-neutral bathrooms and an LGBTI-friendly church. During the attacks, windows and doors were smashed and marked with anti-LGBTI death threats.¹⁰⁰

4.2 MISTAKES IN PERCEPTION

A perpetrator may also select the victim because of a mistaken belief about the victim's membership in a particular group. For example, in the Czech Republic, a Turkish man was attacked and killed by skinheads who thought they were targeting a Roma.¹⁰¹ In Germany, Marinus Schoberl, a 16-year old boy, was tortured and killed by perpetrators who believed he was Jewish. His body was discovered buried in a cesspit four months later.¹⁰² In the United States, following the terrorist attacks of 11 September 2001, a wave of 'backlash' crimes occurred against Muslims. Included among the victims were Sikhs, Hindus and Latinos because the perpetrators mistakenly thought they were Muslim.¹⁰³

4.3 COMMENTARY

Hate crime laws and monitoring systems that require the victim to be a member of a protected group will not capture the aforementioned categories of hate crimes. Hate crime laws focusing on the identity of the victim instead of the perpetrator's biased motives miss the essence of what constitutes a hate crime.

99 See: ODIHR's 2016 Hate Crime Report, Hate Crime Reporting website, <https://hatecrime.osce.org/poland?year=2016>; and Mateusz Wąsik and Piotr Godzisz, *Hate Crime in Poland, 2012-2016*, Lambda Warsaw, Association for Legal Intervention and the Diversity Workshop, 2016, p. 16, <https://interwencjaprawna.pl/wp-content/uploads/Hate-Crime-in-Poland-2012-2016.pdf>.

100 See: "Wave of Vandalism, Violence Hits LGBTQ Centers Across Nation", NBC News, 13 March 2017, <https://www.nbcnews.com/feature/nbc-out/wave-vandalism-violence-hits-lgbtq-centers-across-nation-n732761>.

101 "ERRC Press Release on Events in Great Britain", European Roma Rights Centre website, 22 October 1997, <www.errc.org/cikk.php?cikk=140>.

102 Liz Fekete, "Youth killed because they thought he was Jewish", IRR News, Institute of Race Relations, 1 February 2003.

103 See: "We are Not the Enemy: Hate Crimes Against Arabs, Muslims, and Those Perceived to be Arab or Muslim after September 11", Human Rights Watch, November 2002, p. 33, <www.hrw.org/reports/2002/usahate/usa1102.pdf>.

In Finland, for example, police were previously required to record as ‘racist cases’ any crimes committed against someone who “differs from the perpetrator with regard to race, color of the skin, nationality, or ethnic background.”¹⁰⁴ This instruction was criticized for excluding cases in which victims were selected because of their *perceived* membership in, or association with a protected group. Consequently, new recording guidelines were adopted in 2011, which state that “a hate crime refers to an offence that is motivated by prejudice or hostility towards a population group represented by the victim [...]. The victim does not necessarily need to belong to the group in question; it is enough for the perpetrator to assume that he or she belongs to it”.¹⁰⁵

Examples of legislation related to Association, Affiliation and Mistakes in Perception – France, Hungary, Slovakia and the United Kingdom

Article 132-76 of **France’s** Penal Code provides that the penalties incurred are increased when the offence is committed because the victim **“is in fact or supposition”** a member of a [protected group].

Section 216(2) of **Hungary’s** Penal Code provides that any person who assaults another person for being part of a protected group, **“whether in fact or under presumption”**, commits a felony.

Section 140 (e) of the Criminal Code of **Slovakia** defines as a specific motivation “hatred against certain group of persons or an individual because of their **real or perceived** affiliation to any race, nation, nationality, ethnic group; or because of their **actual or perceived** origin, colour of skin, sex, sexual orientation, political beliefs or religion.”

Section 28 of the **United Kingdom’s** Crime and Disorder Act 1998, provides that an offence is racially aggravated if the perpetrator demonstrates towards the victim hostility that is based on the victim’s membership or presumed membership of a racial or religious group. **‘Membership’ includes association with members of that group. ‘Presumed’ means presumed by the perpetrator.**

People or property affiliated or associated with a group that shares a protected characteristic can easily be overlooked as a category to include in hate crime laws. Therefore, hate crime laws should also penalize those who attack others on the basis of their association with members of protected groups.

104 “Hate Crime Report Card”, Human Rights First, 2007, p. 22.

105 *Ibid.* See also: “Hate crime recording and data collection practice across the EU”, European Union Agency for Fundamental Rights (FRA), 2018, p. 46, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-hate-crime-recording_en.pdf.

Similarly, ‘mistakes of fact’ or mistaken beliefs about the victim’s actual identity should not prevent an offence being categorized and prosecuted as a hate crime. Most hate crime laws are drafted in terms of the perpetrator’s motives and not in terms of the victim’s actual status. Failure to include such categories of victims would weaken the value of a hate crime law and undermine effective enforcement.

5 POLICY QUESTION FIVE: WHAT EVIDENCE IS NEEDED AND WHAT DEGREE OF MOTIVE IS REQUIRED?

5.1 WHAT EVIDENCE OF MOTIVE?

As with all criminal offences, the decision to press charges under a certain provision of the penal code depends on the availability of evidence. Thus, the successful prosecution of a hate crime depends on whether there is sufficient evidence to prove the bias motive. The nature of the crime, the quality of the law enforcement investigation, and any constitutional or statutory provisions regarding evidence will all affect this decision. In some crimes, the very nature of the offence shows that it was motivated by bias. For example, the use of anti-Muslim graffiti and pig remains during the vandalism of a military cemetery in northern France.¹⁰⁶ Often hate crime suspects make statements, either during or immediately after an attack, that reveal their motive.

Case Highlight: COVID-19 related assault on an indigenous woman (Canada)

The attacker shouted racial and xenophobic slurs

On 15 May 2020, a young Indigenous woman was punched repeatedly by a man uttering racist abuse while she was walking in a park in the evening. The attack happened during the COVID-19 pandemic and started after the victim sneezed. The perpetrator hit the woman multiple times in the face, causing her to fall to the ground, while telling her to go back to Asia and accusing her of bringing COVID-19 to Canada.

Source: “Young Indigenous woman says a sneeze sparked a racist attack in a Vancouver park”, CTV News, 17 May 2020, <https://bc.ctvnews.ca/young-indigenous-woman-says-a-sneeze-sparked-a-racist-attack-in-a-vancouver-park-1.4943269>.

106 “Vandals desecrate Muslim graves in northern France”, The New York Times, 6 April 2008, <https://www.nytimes.com/2008/04/06/world/europe/06iht-france.4.11707631.html>.

Sometimes the bias motive is less immediately apparent and will require deeper investigation. Police might seek to learn about the perpetrator's statements or admissions to friends and neighbours, their association with members of far-right or neo-Nazi groups, their political beliefs, and even the perpetrator's taste in magazines, books, music, movies, art and their Internet browsing history.

Some states have hate crime laws that indicate the kind of evidence that can be used to establish a bias motive and determine certain temporal conditions that such evidence should meet.

Evidentiary provisions in hate crime laws in France and the United Kingdom

Articles 132-76 and 132-77 of the **French** Penal Code provides that aggravating circumstances are established when “the offence is **preceded, accompanied or followed by written or spoken words, images, objects or actions of whatever nature which damage the honor or the reputation of the victim**, or a group of persons to which the victim belongs” on account of the victim's membership or non-membership in a given ethnic group, nation, race or religion, or on account of their sex, sexual orientation, actual or supposed gender identity.

Section 28 of the **United Kingdom's** Crime and Disorder Act 1998 provides the following guidance on the evidence that can lead to a finding that an offence was racially or religiously aggravated if: “**At the time of committing the offence, or immediately before or after doing so, the perpetrator demonstrates** towards the victim of the offence **hostility** based on the victim's membership (or presumed membership) of a racial group”.

Case Highlight: *Crown v. Paul Taylor* (United Kingdom) *Murder Weapon Used to Carve Swastikas*

On the night of 28 July 2005, Anthony Walker and his cousin, both teenagers of Afro-Caribbean ancestry, were chased through a park in Merseyside, England, by two men. One of the men drove an ice axe deep into Anthony's skull, killing him. At trial, the cousin testified that the men had taunted them with racist slurs. The manager of a nearby pub testified that he had earlier seen the perpetrator brandishing a knife and saying, “Someone's going to get this tonight.” An examination of the pub revealed that swastikas and the perpetrator's nickname had been scratched into the pub sign with the same axe that killed Anthony. The court found that the attack had been racially motivated. The perpetrator was sentenced

to 23 years in prison and his co-conspirator, who initiated the attack and supplied the murder weapon, was sentenced to 17 years.

Sources: "Severe sentences for 'poisonous' racist killing", The Times website, 1 December 2005, <https://www.thetimes.co.uk/article/severe-sentences-for-poisonous-racist-killing-wlzhpr6ll0j>; "Walker killing: prosecution case", BBC News, 16 November 2005, http://news.bbc.co.uk/2/hi/uk_news/england/merseyside/4442378.stm.

5.2 MIXED MOTIVES

In addition to general problems in proving motive, hate crimes often present specific questions concerning mixed motives. A mixed motive crime is when the perpetrator may have had more than one reason for committing the offence.

Although there is a popular conception of a 'typical' hate crime in which the perpetrator is motivated purely by hatred of the victim's group, sometimes the motives behind a hate crime are far more complex. Research has shown that hate crime offences often have mixed motivations. "[O]ften perpetrators are influenced equally or more strongly by situational factors (including social norms that identify particular groups as suitable victims) than by their own attitudes towards the target group."¹⁰⁷

The combination of bias and opportunistic motives is particularly seen in disability hate crimes, in which perpetrators often exploit their victims' vulnerability in a calculated and cynical way. A study in the United Kingdom, for example, showed that 27 per cent of adults with autism had money or possessions stolen, and 37 per cent had been forced or manipulated to do something they did not want to do (all by someone they thought of as a friend).¹⁰⁸

Hypothetical scenario: Dispute over noise pollution

A research paper addressing mixed motivations suggests the following scenario:

"A minor personal dispute about noise pollution escalates into a conflict during which an individual lashes out in the heat of the moment, using racist or homophobic expletives. In such cases, the 'crime' or 'incident'

107 See: Lu-in Wang, "The Complexities of Hate", *Ohio State Law Journal*, Vol. 60, 1999, p. 807.

108 See: "Mate Crime in Merseyside", Autism Together, 8 July 2015, <https://www.autismtogether.co.uk/mate-crime-in-merseyside-our-report/>; R. Simmonds, C. Burke, E. R. Ahearn and A. Kousoulis, "A life without fear? A Call for Collective Action against Learning Disability Hate Crime", Mental Health Foundation, London, 2018, p. 11, <https://www.mentalhealth.org.uk/sites/default/files/FPLD%20a%20life%20without%20fear%20%28005%29.pdf>.

is not necessarily the direct result of the perpetrator's feelings of identity-based prejudice, but is instead a vocalised demonstration of racism or homophobia that is used as a way of venting frustration at the victim, often occurring while the perpetrator is intoxicated [...] In these types of cases it can be very difficult to ascertain whether identity-based prejudice is partly causal to the incident, or whether the hostility demonstrated is incidental to the crime committed."¹⁰⁹

In American case law, a number of courts have adopted the requirement that the bias motive be a 'substantial factor' behind the offence. Incidental use of racist language is generally not considered sufficient. The substantial motive requirement, however, does not exclude the possibility of mixed motives. By contrast, other countries may require a 'dominant' bias motive. The problem associated with such a requirement is that it is very difficult, in the case of mixed motives, to calculate the exact proportion or percentage of the different motive involved.

A related mixed motive problem concerns classification. In Canada, a study found that police forces employed widely different standards when it came to classifying offences as hate crimes. The country's largest police force in Toronto used an 'exclusive definition', whereby only acts based *solely* on a victim's protected characteristic were classified as hate crimes. Other Canadian police agencies defined hate crimes as offences where the act was motivated in whole or part by bias.¹¹⁰

Narrowing the application of hate crime laws to cases where bias is the only motivation — while failing to apply the same legislation to mixed-motive hate crimes — has raised questions related to the obligation to investigate hate crime effectively under international human rights standards. Thus, the UN Committee on the Elimination of Racial Discrimination has criticized this practice and has recommended amending the relevant legislation.¹¹¹ In the case of *Balázs v. Hungary*, the European Court of Human Rights stressed that "not only acts based solely on a victim's characteristic can be classified as hate crimes. [...] perpetrators may have mixed motives, being influenced by situational factors equally or stronger than by their biased attitude towards the group the victim belongs to." According to the Court, the prosecuting authorities' insistence on identifying an exclusive racist motive, their reluctance to link the perpetrator's racist social media posts to the incident despite remarkable

109 Mark Austin Walters, Rupert Brown and Susann Wiedlitzka, "Causes and Motivations of Hate Crime", *Equality and Human Rights Commission Research Report* 102, 2016, pp. 17-18, <https://ssrn.com/abstract=2918883>.

110 See: "Everyday Fears: A Survey of Violent Hate Crimes in Europe and North America", *Human Rights First*, September 2005, p. 30; and Julian Roberts, "Disproportionate Harm: Hate Crime in Canada. An Analysis of Recent Statistics", Department of Justice Canada, 1995, https://www.justice.gc.ca/eng/rp-pr/csj-sjc/crime/wd95_11-dt95_11/index.html.

111 CERD, *UN Committee on the Elimination of Racial Discrimination: Concluding observations, Italy*, 9 March 2012, CERD/C/ITA/CO/16-18, § 16.

concordances, and their failure to identify the racist motive in the face of powerful hate crime indicators — such as the comments on social media — resulted from a manifestly unreasonable assessment of the circumstances.¹¹² In some states, prosecutorial guidance has been developed to ensure that the law is interpreted in line with international standards.¹¹³

Examples of Mixed Motive Hate Crime Laws — Belgium, Malta, the United Kingdom and the United States

Article 377bis of **Belgium’s** Penal Code provides for an increase in punishment if “one of the motives of the crime” is hatred, contempt or hostility towards a person because of a protected characteristic.

According to Article 83B of **Malta’s** Criminal Code, “[t]he punishment established for any offence shall be increased by one to two degrees when the offence is aggravated or motivated, **wholly or in part** by hatred against a person or a group, on the grounds of gender, gender identity, sexual orientation, race, colour, language, national or ethnic origin, citizenship, religion or belief or political or other opinion”.

Section 146.2(b) of the United Kingdom’s Criminal Justice Act 2003 provides for an increase in sentences for aggravation related to disability or sexual orientation if the offence is motivated (wholly or partly) (i) by hostility towards persons who are of a particular sexual orientation, or (ii) by hostility towards persons who have a disability or a particular disability. “It is immaterial [...] whether or not the perpetrator’s hostility is also based, to any extent, on any other factor not mentioned in that paragraph.”

Sections 422.55 and 422.56 of the Penal Code of the **state of California** (United States) provides that ‘hate crime’ means a criminal act committed, **in whole or in part, because of** one or more actual or perceived protected characteristics of the victim. ‘In whole or in part’ means that the bias motivation must be a reason for the offence, although other reasons may also exist. **When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the particular result.** There is no requirement that bias be a main factor, or that the crime would not have been committed but for the actual or perceived characteristic.

112 *Balázs v. Hungary*, ECtHR, *op. cit.*, §§ 15, 69 and 70.

113 See, for example: *Guidelines on Prosecuting Hate Crimes* (OSCE Mission to Serbia), *op. cit.*

5.3 COMMENTARY

Investigations into motive require substantial police work, such as interviews with friends, neighbours and co-workers of the suspect; the use of search warrants to obtain evidence from the suspect's residence; securing social media and other online content from Internet service providers; and surveillance to determine the suspect's membership in or association with hate groups. Procedures for obtaining and admitting evidence vary among OSCE participating States, which will, of course, affect the nature and extent of the investigation.

Where there is no direct evidence of a bias motive — such as a confession to police or an admission to friends — courts can sometimes infer the existence of bias from other evidence. Thus, a court might consider other indicators of bias, such as the fact that an attack was unprovoked, that there was no prior history of hostility between the parties and that derogatory or insulting comments were made.

Given the difficulties in proving motive and the fact that many perpetrators may have more than one reason for committing a crime, hate crime laws should allow for mixed motives. As noted, applying hate crime laws only to crimes motivated solely by bias can drastically limit the number of offences that could be charged as hate crimes or to which a hate crime penalty enhancement might apply. In some OSCE participating States, guidance issued to police and prosecutors allows potential hate crimes to be investigated and prosecuted as such regardless of the presence of other motives. However, the absence of a law that directly addresses hate crimes committed with mixed motives may produce varying interpretations on the part of police, prosecutors and courts.

Case Highlight: *People v. Schutter* (United States) *Road Rage or Racism?*

After a car swerved in front of him on a highway, the victim, Ronald Robinson, stopped his car, got out and approached the driver and his passenger. The perpetrators responded by severely beating Robinson, while yelling racist slurs. The trial court dismissed the ethnic intimidation charge, reasoning that this was a case of 'road rage'. The trial court found that the assault of Robinson was motivated by the highway incident and not racism. The Court of Appeals reinstated the ethnic intimidation charge, placing special emphasis on the perpetrators' use of racist insults during the beating. "[W]hat may have started out as merely road rage escalated into an act of ethnic intimidation."

Source: 265 Mich. App. 423 (29 April 2005).

6 KEY RECOMMENDATIONS FOR LEGISLATORS

As has been emphasized throughout this Guide, hate crime laws will differ from country to country and should be drafted with close attention to the national context and relevant international standards. There are some key issues necessary for a sound and well-functioning hate crime law. These have been addressed in the policy questions set out in Part II of this Guide and are summarized here for the benefit of legislators.

- Hate crime laws should recognize that either people or property can be victims.
- Courts should be required to consider evidence of motivation.
- Courts should be required to state on the record the reasons for applying or not applying a penalty enhancement.
- States should consider a combination of substantive offences and penalty enhancements.
- Hate crime laws should include characteristics that are fundamental to a person's identity, including gender, sex and sexual orientation.
- Hate crime laws should recognize social and historical patterns of discrimination.
- Hate crime laws should include characteristics that are visible or readily known to the perpetrator.
- Hate crime laws should avoid using vague or undefined terminology.
- Hate crime laws should use a combination of terms such as 'race', ethnicity, national origin and nationality in order to ensure broad applicability.
- Hate crime laws should not require a specific emotional state, such as 'hate' or 'hostility' and, if they do, the laws or interpretative guidance should focus on external expressions of hate.
- Hate crime laws should protect victims or property associated or affiliated with people or groups having protected characteristics.
- Hate crime laws should include offences where the perpetrator was mistaken about the victim's identity.
- Hate crime laws should also apply to cases where perpetrators acted with multiple or mixed motives.

Even the most comprehensive and coherent law will fail to achieve the aims of the legislature if it is not enforced. Once a hate crime law is enacted, its use should be monitored and assessed. In particular, criminal justice systems must ensure that hate crimes are being prosecuted and the perpetrators convicted. Monitoring of the implementation of hate crime laws will help to identify problems in applying the laws in practice and can also contribute to raising awareness of the laws, including among potential victims and perpetrators.

An increased sentence for a hate crime only comes at the end of a long sequence of events. For a perpetrator to be subject to a hate crime law, a victim must be willing to report the crime, the police must investigate it carefully, the prosecutor must file a hate crime charge, and the court must convict. Any misstep in the sequence means a lost opportunity to combat hate crime. Interpretative guidance and robust training for criminal justice officials are therefore necessary accompaniments to any meaningful hate crime legislation.



ANNEXE: OSCE COMMITMENTS ON HATE CRIME

Participating States' main commitments on hate crime:

- “enact, where appropriate, specific, tailored legislation to combat hate crimes, providing for effective penalties that take into account the gravity of such crimes” (MC.DEC/9/09);
- “collect, maintain and make public, reliable data and statistics in sufficient detail on hate crimes and violent manifestations of intolerance, including the numbers of cases reported to law enforcement, the numbers prosecuted and the sentences imposed. Where data-protection laws restrict collection of data on victims, States should consider methods for collecting data in compliance with such laws” (MC.DEC/9/09);
- “introduce or further develop professional training and capacity-building activities for law-enforcement, prosecution and judicial officials dealing with hate crimes” (MC.DEC/9/09);
- “promptly investigate hate crimes and ensure that the motives of those convicted of hate crimes are acknowledged and publicly condemned by the relevant authorities and by the political leadership” (MC.DEC/9/09);
- “ensure co-operation, where appropriate, at the national and international levels, including with relevant international bodies and between police forces, to combat violent organized hate crime” (MC.DEC/9/09);
- “conduct awareness raising and education efforts, particularly with law enforcement authorities, directed towards communities and civil society groups that assist victims of hate crimes” (MC.DEC/9/09);
- “nominate, if they have not yet done so, a national point of contact on hate crimes to periodically report to ODIHR reliable information and statistics on hate crimes” (MC.DEC/9/09);
- “consider drawing on resources developed by ODIHR in the area of education, training and awareness raising to ensure a comprehensive approach to the tackling of hate crimes” (MC.DEC/9/09);
- “calls on participating States to increase their efforts, in co-operation with civil society to counter the incitement to imminent violence and hate crimes, including through the Internet, within the framework of their national legislation, while respecting freedom of expression, and underlines at the same time that the opportunities offered by the Internet for the promotion of democracy, human rights and tolerance education should be fully exploited” (MC.DEC/10/07);
- “collect and maintain reliable data and statistics on hate crimes and incidents, to train relevant law enforcement officers and to strengthen co-operation with civil society” (MC.DEC/10/07);
- “collect and maintain reliable data and statistics on hate crimes which are essential for effective policy formulation and appropriate resource allocation in countering hate motivated incidents” (MC.DEC/13/06);

- “[s]trengthen efforts to collect and maintain reliable information and statistics on hate crimes and legislation, to report such information periodically to ODIHR, and to make this information available to the public and to consider drawing on ODIHR assistance in this field, and in this regard, to consider nominating national points of contact on hate crimes to ODIHR” (MC.DEC/10/05);
- “[s]trengthen efforts to provide public officials, and in particular law enforcement officers, with appropriate training on responding to and preventing hate crimes, and in this regard, to consider setting up programmes that provide such training, and to consider drawing on ODIHR expertise in this field and to share best practices” (MC.DEC/10/05);
- “consistently and unequivocally [speak] out against acts and manifestations of hate, particularly in political discourse” (MC.DEC/10/05);
- “[c]ombat hate crimes which can be fuelled by racist, xenophobic and anti-Semitic propaganda in the media and on the Internet, and appropriately denounce such crimes publicly when they occur” (MC.DEC/12/04);
- “condemn publicly, at the appropriate level and in the appropriate manner, violent acts motivated by discrimination and intolerance” (MC.DEC/4/03).

Ministerial Council Decisions tasking ODIHR to:

- “strengthen, within existing resources, its early warning function to identify, report and raise awareness on hate-motivated incidents and trends and to provide recommendations and assistance to participating States, upon their request, in areas where more adequate responses are needed” (MC.DEC/13/06);
- “continue its close co-operation with other relevant intergovernmental agencies and civil society working in the field of promoting mutual respect and understanding and combating intolerance and discrimination, including through hate crime data collection” (MC.DEC/13/06);
- “continue to serve as a collection point for information and statistics on hate crimes and relevant legislation provided by participating States and to make this information publicly available” (MC.DEC/13/06).

