

# Hate Crime Prosecution at the Intersection of Hate Crime and Criminalized 'Hate Speech'

A PRACTICAL GUIDE



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*Hate Crime Prosecution at the Intersection of Hate Crime and  
Criminalized 'Hate Speech': a Practical Guide*

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Designed by Homework



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# Introduction

The Office for Democratic Institutions and Human Rights (ODIHR) is the principal institution of the OSCE responsible for the human dimension and is mandated to provide assistance to participating States in their efforts to implement their commitments in the area of hate crimes.<sup>1</sup> To this end, ODIHR has designed and implemented capacity-building and practical assistance programmes and resources for law enforcement, prosecutors and civil society. These support a comprehensive approach to responding to hate crime for the benefit of victims and communities throughout the OSCE region.<sup>2</sup>

In the course its work<sup>3</sup> on hate crime, ODIHR has found significant gaps in practitioners' understanding of the correct application of hate crime laws, as evidenced by the misapplication of 'hate speech' laws to prosecute hate crimes.

This guide supplements existing ODIHR guidance on prosecuting hate crime by:

- Outlining the legal and conceptual differences between hate crime and criminalized 'hate speech';
- Outlining the consequences of misapplying 'hate speech' provisions to prosecute hate crime, providing practical guidance on how to avoid this; and
- Making recommendations on how to improve practice at the national level.

The publication does not provide guidance on how to handle individual cases of any form of criminalized 'hate speech', nor does it suggest what forms of behaviour should be criminalized.

1 [Ministerial Council Decision No. 9/09, "Combating Hate Crimes"](#), OSCE, Athens, 2 December 2009; [Ministerial Council Decision No. 4/03, "Tolerance and Non-Discrimination"](#), OSCE, Maastricht, 2 December 2003. For a full description of ODIHR's mandate and relevant OSCE Commitments, see [here](#).

2 [Training Against Hate Crimes for Law Enforcement \(TAHCLE\)](#), OSCE/ODIHR, 4 October 2012; [Prosecutors and Hate Crimes Training \(PAHCT\)](#), OSCE/ODIHR, 29 September 2014; [Hate Crime Training for Civil Society](#), OSCE/ODIHR Hate Crime Report website; [Information Against Hate Crimes Toolkit \(INFAHCT\)](#), OSCE/ODIHR, 29 August 2018; [Enhancing Hate Crime Victim Support \(ESTAR\)](#) project, OSCE/ODIHR, 1 January 2020 to 30 April 2022.

3 Most notably ODIHR's annual [Hate Crime Report](#), TAHCLE, PAHCT, INFAHCT and ESTAR programmes.

**Hate crimes** are criminal offences committed with a bias motivation.<sup>4</sup> A hate crime has taken place when a perpetrator has intentionally targeted an individual or property because of one or more identity traits, such as 'race',<sup>5</sup> language, religion or belief, ethnicity, nationality, sex, gender, sexual orientation, gender identity, disability or other common feature that is fundamental to identity, or has expressed hostility towards these identity traits during the crime. People or property associated with — or perceived to be a member of — a group that shares an identity trait can also be targets of hate crimes, such as human rights defenders, civil society organizations working with or representing a particular group, community centres or places of worship.<sup>6</sup>

There is no internationally agreed definition of '**hate speech**', but intergovernmental organizations have provided guidance on the fundamental elements of the phenomenon, which can encompass a wide range of criminal and non-criminal acts.<sup>7</sup> OSCE participating States have condemned 'hate speech' and intolerant discourse,<sup>8</sup> including racist, xenophobic and discriminatory public discourse,<sup>9</sup> and have emphasized the need to speak out against acts and manifestations of hate.<sup>10</sup>

Moreover, international human rights law (IHRL) does not provide a universal, legal definition of 'hate speech'. The criminalization of 'hate speech' is strictly limited by the obligation to balance the right to equality and non-discrimination with the right to freedom of expression, as guaranteed by Article 19 of the International Covenant on Civil and Political Rights<sup>11</sup> (ICCPR) and Article 10 of the European Convention on Human Rights<sup>12</sup> (ECHR). Incitement to discrimination, hostility or violence on national, racial or religious grounds is proscribed under Article 20(2) of the ICCPR,<sup>13</sup> by Article 4(a) of the International Convention on the Elimination

4 OSCE, [Ministerial Council Decision No. 9/09](#).

5 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.

6 [OSCE/ODIHR Hate Crime Report](#) website.

7 See, for example, the UN [Strategy and Plan of Action on Hate Speech](#), (18 June 2019), which defines hate speech as "**any kind of communication** in speech, writing or behaviour, that **attacks** or uses **pejorative** or **discriminatory** language with reference to a person or a group on the basis of **who they are**, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor" [ODIHR bold]; and Council of Europe [Recommendation CM/Rec \(2022\)16](#) of 22 May 2022 on Combating Hate Speech, Appendix to Recommendation, para. 2: "For the purposes of this recommendation, hate speech is understood as all types of expression that incite, promote, spread or justify violence, hatred or discrimination against a person or group of persons, or that denigrates them, by reason of their real or attributed personal characteristics or status such as "race", colour, language, religion, nationality, national or ethnic origin, age, disability, sex, gender identity and sexual orientation."

8 [Ministerial Council Decision No. 6/02](#), "Tolerance and Non-Discrimination", OSCE, Porto, 7 December 2002.

9 [Ministerial Council Decision No. 13/06](#), "Combating Intolerance and Discrimination and Promoting Mutual Respect and Understanding", OSCE, Brussels, 5 December 2006.

10 [Ministerial Council, Decision No. 10/05](#), "Tolerance and Non-Discrimination: Promoting Mutual Respect and Understanding", OSCE, Ljubljana, 6 December 2005.

11 [International Covenant on Civil and Political Rights](#) (ICCPR), UNGA Res. 2200A (XXI), 16 December 1966.

12 [European Convention on Human Rights](#), (ECHR), Council of Europe, 4 November 1950.

13 UN, [ICCPR](#).

of Racial Discrimination (ICERD),<sup>14</sup> Article 1 of the EU Council Framework Decision 2008/913/JHA on combating certain forms and expression of racism and xenophobia by means of criminal law (EU Framework Decision)<sup>15</sup> and the Council of Europe (CoE) Recommendation on Combating 'hate speech'.<sup>16</sup> The texts of these standards are in the [Annexe](#).

Both hate crime and 'hate speech' violate the dignity of their targets and create a hostile and degrading environment for marginalized groups. This guide aims to support prosecutors in distinguishing between hate crime and criminalized forms of 'hate speech', so they can select the correct qualification for the correct offence. This is a fundamental principle in upholding both the right to an effective remedy for victims and the right to legal certainty for defendants.

This guide is particularly important because, in contrast to criminalized 'hate speech', hate crimes (and the legal tools to address them) are less visible to police and prosecutors. There are three key reasons for this:

- First, in many countries, offences that criminalize 'hate speech' — such as incitement to violence and hatred — are well-established and understood as foundational declarations against some of the most serious threats to pluralist democracies and to peace and security. These offences are usually relatively visible in criminal codes and longer established than those that address hate crimes. They are also understood as an integral part of many countries' national hate crime concepts and are not distinguished from hate crimes per se in national policies and action plans.
- Second, hate crimes as a phenomenon are less visible, because they are more likely to target individuals who, as the evidence shows, are reluctant to report their experiences to the police.<sup>17</sup> In contrast, 'hate speech' is generally public and therefore more likely to be identified and reported.
- Third, on a practical level, the most common hate crime laws — general penalty enhancements — are less visible to practitioners as they are typically contained in a general part of criminal codes and do not constitute a substantive offence provision. They are therefore not included in the charge and are invoked at the sentencing stage. This reduces the chance that they are applied by the courts.<sup>18</sup> The most common

<sup>14</sup> [International Convention on the Elimination of All Forms of Racial Discrimination](#), (ICERD), UN GA Res. 2107 (xx), 21 December 1965.

<sup>15</sup> EU European Council [Framework Decision 2008/913/JHA](#) on combating certain forms and expression of racism and xenophobia by means of criminal law, 28 November 2008.

<sup>16</sup> [Recommendation on Combating Hate Speech](#), Council of Europe, CM/Rec (2022) 16, 20 May 2022.

<sup>17</sup> See, for example, [Hate crime recording and data collection practice across the EU](#), Eu Fundamental Rights Agency (FRA), 21 June 2018.

<sup>18</sup> When general penalty enhancements are used to punish hate crimes, the question of bias motive is usually considered when the perpetrator is sentenced. For an explanation and discussion of general penalty enhancements, see Section 2.1.3 of this guide and [Hate Crime Laws: A Practical Guide, revised edition](#), OSCE/ODIHR, 23 September 2022, p. 59.

criminalized 'hate speech' laws take the more visible form of specific, or substantive offences in the criminal code, and police and prosecutors are, therefore, more familiar with them.

Furthermore, in some jurisdictions, conceptual distinctions between hate crimes and criminalized 'hate speech' can be perceived as unimportant, because both are criminalized forms of hate in domestic law and are therefore both understood as hate crime. In other countries, the distinction is fundamentally important, because constitutional freedom of speech protections prohibit the criminalization of pure expression in almost any form.

Drawing on examples of laws and practice from across the OSCE region, this guide seeks to support the effective, fair and skilled prosecution of hate crime offences, particularly where they intersect with criminalized 'hate speech', ultimately increasing access to justice, safety and support for victims and legal certainty for defendants. It complements existing ODIHR publications referenced throughout the text.

## BACKGROUND

In 2023, ODIHR conducted a mapping exercise, involving prosecutors, policymakers and lawyers working directly with victims of hate crime, which documented their shared challenges and identified a pressing need for practical guidance and training. During a workshop in February 2024, prosecutors and lawyers with experience of representing victims of hate crime presented case studies detailing the practical and conceptual considerations this guide should address.

In June 2024, ODIHR organized a final consultation with representatives of inter-governmental organizations and agencies and international non-governmental organizations (IGOs, INGOs) in recognition of the increased cooperation in this area, and of the importance of aligning approaches at the international level. During the workshop, feedback was gathered and participants discussed and agreed on how to build synergies and coordinate capacity-building and monitoring activities in the area of addressing hate crime.

## WHY THIS GUIDE IS IMPORTANT

While the role and status of prosecutors varies greatly among OSCE participating States, in all jurisdictions prosecutors occupy a key position in the criminal justice system and exercise considerable powers and responsibilities.<sup>19</sup> Prosecutors are

<sup>19</sup> [The Status and Role of Prosecutors, A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide](#), UNODC, New York, 2014.

central to upholding the rule of law and protecting human rights. When determining whether a prosecution should proceed, and on what charges, prosecutors must take into account evidence that qualifies the seriousness of an offence. Identifying and collecting evidence of a bias motive is crucial to these decisions, and failing to act on such evidence has been determined to be in breach of human rights standards.<sup>20</sup> For example, in the case of *Lakatošová and Lakatoš v. Slovakia*, the European Court of Human Rights (ECtHR) found that it is the duty of the prosecutor to instruct the investigation to gather evidence of bias motive and to ensure the appropriate legal qualification. Failure to do so, the ECtHR concluded, was in breach of Article 2 in conjunction with Article 14 of the ECHR.<sup>21</sup> Further, the Committee on the Elimination of Racial Discrimination held that criminal punishment that lacks explicit consideration of the defendant's bias motive violated the right to effective protection and remedies against discrimination.<sup>22</sup>

Prosecutors also play a key role in coordinating with the police to ensure an effective investigation and in supporting the courts to consider the nature of the offence before them and the factors, such as the bias motive, that can aggravate the sentence. For victims, prosecutors play an essential role in identifying needs arising from being a target of hate or hostility, such as emotional, psychological or practical support, and specific accommodations when accessing their participation rights.

The effective prosecution of hate crime and criminalized 'hate speech' requires in-depth knowledge of national legislation and consistency in the appropriate qualification of hate-based offending. Conceptual clarity on criminalized 'hate speech' and hate crime strengthens, and is strengthened by, the consistency of responses at the national level. Due to their position in the criminal justice process — between the stages of investigation and adjudication — prosecutors can play a determining role in ensuring this consistency through informing the investigation, and in the correct selection and, where necessary, requalification of charges. This approach also increases the visibility of the importance of a comprehensive response to hate crime at the national level and supports conceptual coherence and synergies at the level of international cooperation.

Criminalized 'hate speech' provisions can be incorrectly applied to prosecute hate crime cases where national hate crime legislation is incomplete or relatively weak, for example, where only a general penalty enhancement provision is available to recognize bias motive, where the formulation of provisions is unclear or where only limited protected characteristics are included. Several OSCE participating

20 *Nachova and Others v. Bulgaria*, applications Nos. 43577/98 and 43579/98, European Court of Human Rights (ECtHR), 6 July 2005, §§ 160 et seq.; [Unmasking bias motives in crimes: selected cases of the European Court of Human Rights](#), FRA, 27 November 2018.

21 *Lakatošová and Lakatoš v. Slovakia*, application No. 655/16, ECtHR, 11 December 2018.

22 *Belemvire v. Republic of Moldova*, CERD/C/94/D/57/2015, Committee on the Elimination of Racial Discrimination, 26 October 2018, §§ 7.3–8.

States have significant gaps in their hate crime provisions, thus reducing the range of tools available to the prosecutor when handling hate crime cases.<sup>23</sup> Certain provisions, such as general penalty enhancements,<sup>24</sup> can be missed, because prosecutors do not know about them or may not know how and when to invoke them, or because they do not have the knowledge and skills to prove to the court how these provisions apply to the case at hand. Judges may also not be aware of the existence of applicable penalty enhancements and may, therefore, fail to apply them in relevant cases. In these contexts, criminalized 'hate speech' provisions that comprise substantive offences, such as incitement to hatred or violence offences, are significantly more 'visible' and accessible to prosecutors and judges, and therefore more likely to be applied.

However, failure to correctly apply the law means failing to give effect to the specific purposes intended by national legislators for the criminalization of specific offences. Different sets of criminal provisions aim to protect different rights, interests or values, which are reflected in the elements of a crime that need to be proven. For example, the offence of incitement to violence towards a protected group aims to protect sections of society from violence and to prevent escalation to broader public disorder and even to potentially genocidal acts. Conversely, the offence of racially motivated assault aims to protect the physical integrity of the targeted victim who is further and uniquely damaged by the bias motive.

The correct qualification and punishment of an offence requires careful consideration of the intention of the legislature when passing criminal provisions. Where there is a disconnect between legislative intent and legal practice, the purpose of sanctioning — which should correspond to the perpetrator's wrongdoings — can be undermined. In choosing an incorrect qualification, for example, by bringing a charge of incitement to hatred or violence rather than correctly qualifying a crime as a hate crime, prosecutors may face difficulty in proving the required elements of the offence, which may result in an acquittal on all charges. If improper charges survive judicial scrutiny, jurisprudence becomes established that is based on factual descriptions that do not correspond to the elements of the crime alleged. This brings into question the legality and fairness of the proceedings, which has implications for trust in the criminal justice system as a whole.

The victim experience can vary between hate crimes and 'hate speech' offences, depending on their criminalization under national law. Qualifying hate crimes as 'hate speech' can have an impact on a victim's role in criminal proceedings, in some cases leaving them without support or access to their participation rights.

23 For example, in ODIHR's 2022 hate crime reporting cycle, ten states were assigned a Key Observation regarding improving their hate crime legislation.

24 General penalty enhancements are sentencing provisions that apply to all criminal offences which do not already encompass bias as one of the constitutive elements. See Section 2.1.3 of this guide.

## CONSEQUENCES OF MISQUALIFICATION HATE CRIME



### INCORRECT QUALIFICATION

**Fails to give effect to the specific purpose** intended by national legislature for the criminalization of certain offences

**Undermines legal certainty** for defendants

**Diminishes access to participation rights** in criminal proceedings for victims

**Risks limiting access to specialist support** and protection for victims

**Provides misleading assessment** of nature and extent of hate crimes

**Produces misinformed policy** and legal responses



### CORRECT QUALIFICATION

Ensures **legal certainty** for defendants

**Increases access to participation rights** in criminal proceedings and access to specialist support and protection for victims

**Improves visibility of hate crimes** in police recording, official crime statistics, national policies and international data such as ODIHR's annual Hate Crime Report

**Informs effective strategic responses** by national authorities, including prosecution services

**Increases visibility** of a comprehensive response to hate crime at the national level and conceptual coherence and synergies at the international level.

The incorrect qualification of offences generates investigation and prosecution data that can create a misleading picture of the nature and extent of hate offending, leading to misinformed policy and legal responses. In contrast, the correct qualification of hate offences by prosecutors supports the better visibility of hate crime in statistics, policies and police records, as well as in ODIHR reporting data,<sup>25</sup> and improved strategic responses from national authorities, particularly prosecution services.

<sup>25</sup> OSCE/ODIHR Hate Crime Report website.

## HOW TO USE THE GUIDE

This guide is primarily intended for national prosecutors. It supplements existing ODIHR guidance on how to prosecute hate crimes<sup>26</sup> and demonstrates the key differences between hate crimes and criminalized 'hate speech', with a focus on the offences of incitement to violence or hatred.

The guide will also be useful for decision-makers, including policy- and lawmakers to help them assess the effectiveness of current policy, practice and legislation and decide whether specific national operational guidelines are required for prosecutors. The guide should also assist civil society organizations with their advocacy activities.

Chapter 1 focuses on the legal and **conceptual distinctions between hate crime and criminalized 'hate speech'**, in the context of international standards, with a focus on "incitement to discrimination, hostility or violence" as defined by Article 20 of the ICCPR<sup>27</sup> and the implications for prosecution strategies.

Chapter 2 provides an **overview of common legal provisions on hate crime and criminalized 'hate speech'** with examples.

Chapter 3 presents the **Prosecutor Decision Tree**, which shows how hate crime provisions should be applied and how they are distinguished from criminalized 'hate speech'; it also maps other relevant offences at the intersection of hate crime and criminalized 'hate speech'.

Chapter 4 presents **illustrative case studies of this complex area of prosecution practice**. These examples are drawn from various national contexts across the OSCE region and cover the practices of applying 'hate speech' provisions to prosecuting hate crimes (including in contexts where there are no applicable hate crime laws) and misqualifying the seriousness of hate crime offences. This chapter also considers cases at the intersection of hate crime and criminalized 'hate speech'.

Chapter 5 focuses on access to justice and the implications for victim support, notably, **the right to an effective investigation** and access to participation rights and support.

<sup>26</sup> Prosecuting Hate Crimes, A Practical Guide, OSCE/ODIHR, 29 September 2014.

<sup>27</sup> UN, ICCPR.



Chapter 6 reviews the importance of **recording hate crime prosecutions accurately** and considers the broader policy implications and opportunities for improved prosecution and community relationships in this area.

Chapter 7 **makes recommendations** on how to implement these recommendations at the national level.

# 1. Hate crime and criminalized ‘hate speech’: conceptual differences

This chapter defines hate crime and criminalized ‘hate speech’ based on international standards. It outlines the practical implications of the differences between the two concepts for prosecutors and why they require different institutional responses, including in approaches to training and capacity building.

## 1.1 HATE CRIME

Hate crimes are always comprised of two elements: a criminal offence and a bias motive. The first element is the criminal offence: the act must be an offence under ordinary criminal law.<sup>28</sup> ODIHR’s guidance refers to this criminal act as the ‘base offence’.<sup>29</sup> Due to variations in legal provisions from country to country, there is some divergence in the kind of conduct that amounts to a crime. In general, however, most countries criminalize the same type of violent acts. Almost any crime contained in a criminal code can be a hate crime; without the base offence there is no hate crime.

The second element is the motivation: the criminal act must be committed with a particular motive, referred to in ODIHR’s guidance as ‘bias’.<sup>30</sup> The motive manifests itself either in the *selection of the target* or in *hostility expressed* during the crime. In order to qualify as such, hate crimes need to target one or more members of, or the people or 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’, colour, language, religion or belief, nationality, national or ethnic origin, age, disability, sex, gender identity and sexual orientation or another common feature that is fundamental to their identity. Hate crimes usually have a direct victim.<sup>31</sup>

28 Many countries distinguish between crimes and less serious infractions, such as ‘misdemeanours’, although they are described in a variety of ways. In ODIHR’s guidance, ‘offences’ refers to all criminal law provisions; administrative infractions are therefore excluded.

29 For other examples of the discriminatory selection model of hate crime laws, see OSCE/ODIHR, [Prosecuting Hate Crimes](#), Section 3.

30 *Ibid.*, p. 15. See also EU European Council, [Framework Decision 2008/913/JHA](#), Article 4.

31 OSCE/ODIHR, [Prosecuting Hate Crimes](#), p. 1.

## 1.2 CRIMINALIZED 'HATE SPEECH'

Article 20, paragraph 2 of the ICCPR states, “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”<sup>32</sup> This standard, described as ‘incitement speech’,<sup>33</sup> is also contained in Article 4(a) of ICERD, Article 1 of the EU Framework Decision and two CoE Committee of Ministers standards: the Recommendation on combating ‘hate speech’ and the Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems.<sup>34</sup> (See the Annexe for the texts). The EU Framework Decision additionally directs Member States to ensure that the public dissemination or distribution of tracts, pictures or other material that incite hatred or violence, and the condoning, denial and gross trivialization of international crimes of genocide, crimes against humanity and war crimes is criminalized “when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.”<sup>35</sup>

Prosecutors from numerous jurisdictions will be aware that their national criminal codes contain additional criminalized ‘hate speech’ provisions, such as criminal defamation targeting individuals or groups that share a protected characteristic and bias-motivated insults, as well as offences of dissemination of hate-related materials and offences of denial and trivialization that do not require the condition that they are likely to incite violence or hatred. These provisions and their application are further mapped in section 2.2 and in case studies later in the guide.

It is also important to note that ‘hate speech’ that does not reach the criminal threshold can be very harmful to victims, can create and feed a hostile environment for marginalized communities and can threaten societal peace and security. A clear and robust framework of administrative and civil remedies is essential for combating these harmful effects and providing redress for victims. These points are discussed in more detail in later sections.

This publication does not provide guidance on prosecuting criminalized ‘hate speech’; nor does it endorse the criminalization of hate expression, beyond what is defined by Article 20(2) of the ICCPR. At the national level there is huge diversity in approaches to criminalizing speech that do not always align with international standards. A recent study on defamation and insult laws in the OSCE region found that “criminal defamation laws continue to be applied with some

32 UN, ICCPR.

33 One-pager on “incitement to hatred”, OHCHR, (no date).

34 See Annexe 1 for relevant excerpts of these standards. UN ICERD; EU European Council, [Framework Decision 2008/913/JHA](#); [Recommendation on Combating Hate Speech](#); [Additional Protocol to the Convention on Cybercrime , concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems](#), Council of Europe, 28 January 2003.

35 EU European Council, [Framework Decision 2008/913/JHA](#).

degree of regularity across the OSCE region, including against the media.”<sup>36</sup> It is also important to note concerns, for example expressed by the United Nations Special Rapporteur on Freedom of religion or belief, about the vague formulation of some domestic legal provisions that are designed to combat incitement of hatred, discord and intolerance.<sup>37</sup>

This section looks at the key conceptual and practical differences between hate crime and 'incitement speech' for two reasons. First, international standards are aligned in requiring or recommending the criminalization of speech that incites hatred or violence. This is not the case for other commonly criminalized forms of 'hate speech' that do not require the condition of inciting hatred or violence which are found in national criminal codes. These include offences such as defamation, public dissemination of hate materials and condoning, denial and gross trivialization of international crimes of genocide, crimes against humanity and war crimes. Second, it is at this particular intersection that ODIHR has found prosecutors may be most likely to misapply incitement to hatred or violence provisions to prosecute hate crimes.

### 1.3 PRACTICAL IMPLICATIONS

The graphic below shows the important differences between hate crime offences and incitement to violence or hatred offences, or 'incitement speech', from the practitioner's perspective.

Usually, the starting point for a hate crime is that it has been established, subject to a full investigation and evidence gathering, that a basic criminal offence has been committed, such as a threat, assault, murder or damage to property. The key technical question — and challenge — is proving that the offence was motivated by bias.

The usual starting point for 'incitement speech' offences is that the presence of bias or hate towards a protected characteristic is clear from the content of the expression. The technical question for prosecutors is whether there has been a crime; in other words, whether the hateful expression goes beyond freedom of expression protections — a cornerstone of democratic societies — and passes the criminal threshold.

<sup>36</sup> Scott Griffen, [Defamation and Insult Laws in the OSCE Region: A Comparative Study](#), OSCE RFOM, March 2017, p. 5.

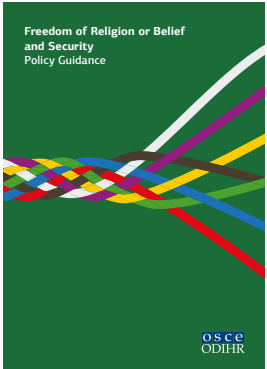
<sup>37</sup> See, for example, the Report of the United Nations Special Rapporteur on Freedom of religion or belief on the Republic of North Macedonia in which the Special Rapporteur noted that Article 319 of the national criminal code had allegedly been misused against a particular religious leader. See [A/HRC/13/40/Add.2](#), para. 47.

## CONCEPTUAL ISSUES AT THE INTERSECTION OF HATE CRIME AND “INCITEMENT SPEECH”

HATE CRIME	'INCITEMENT SPEECH'
<div style="display: flex; justify-content: space-around; margin-bottom: 5px;"> <div style="background-color: #e0e0e0; padding: 5px; border: 1px solid #ccc; text-align: center;">?</div> <div style="background-color: #e0e0e0; padding: 5px; border: 1px solid #ccc; text-align: center;">✓</div> </div> <div style="display: flex; justify-content: space-around; margin-top: 5px;"> <div style="background-color: #e0e0e0; padding: 5px; border: 1px solid #ccc; text-align: center;">EVIDENCE OF BIAS</div> <div style="background-color: #e0e0e0; padding: 5px; border: 1px solid #ccc; text-align: center;">CRIMINAL OFFENCE</div> </div>	<div style="display: flex; justify-content: space-around; margin-bottom: 5px;"> <div style="background-color: #e0e0e0; padding: 5px; border: 1px solid #ccc; text-align: center;">✓</div> <div style="background-color: #e0e0e0; padding: 5px; border: 1px solid #ccc; text-align: center;">?</div> </div> <div style="display: flex; justify-content: space-around; margin-top: 5px;"> <div style="background-color: #e0e0e0; padding: 5px; border: 1px solid #ccc; text-align: center;">EVIDENCE OF BIAS</div> <div style="background-color: #e0e0e0; padding: 5px; border: 1px solid #ccc; text-align: center;">CRIMINAL OFFENCE</div> </div>
<p><b>Core practice challenge:</b> Proving bias motive</p>	<p><b>Core practice challenge:</b> Determining whether speech / expression is covered by freedom of expression protections and is lawful, or whether it is unprotected and therefore criminal</p>
<p><b>Specific target:</b> Targets specific people or property of / associated with a particular community / individual belonging to a particular community (harm caused can be wider)</p>	<p><b>Public in nature:</b> Aim is to mobilize / incite others to hatred or violence against a specific group / person based on a protected characteristic</p>
<p><b>Base offence:</b> Prosecutors need to prove the elements of the base offence (e.g., assault, theft, threat, etc.)</p>	<p><b>Inchoate offence:</b> Prosecutors need to prove reasonable probability that speech or expression would succeed in inciting violence or hatred even if the act(s) itself is / are never committed.</p>

One reason why there can be confusion for prosecutors about whether to treat an incident as a criminalized 'hate speech' offence or a hate crime offence is where the **speech or expression itself is in fact evidence of a bias or discriminatory motive**. For example, where a perpetrator utters racial slurs before, during or after physically attacking a victim. This point is explored later in case studies.

Not only is freedom of expression rightly viewed as a fundamental right to be protected in any healthy democracy, but there is an **added challenge when politicians or high-profile individuals are the potential offenders**.<sup>38</sup> Prosecutors will need to be trained on, and familiar with relevant international and national case law and, where applicable, the case law of the ECTHR and United Nations human rights mechanisms. Other technical challenges concern whether evidence can be secured, especially in relation to online offences and/or whether cross-border application or cooperation is required.

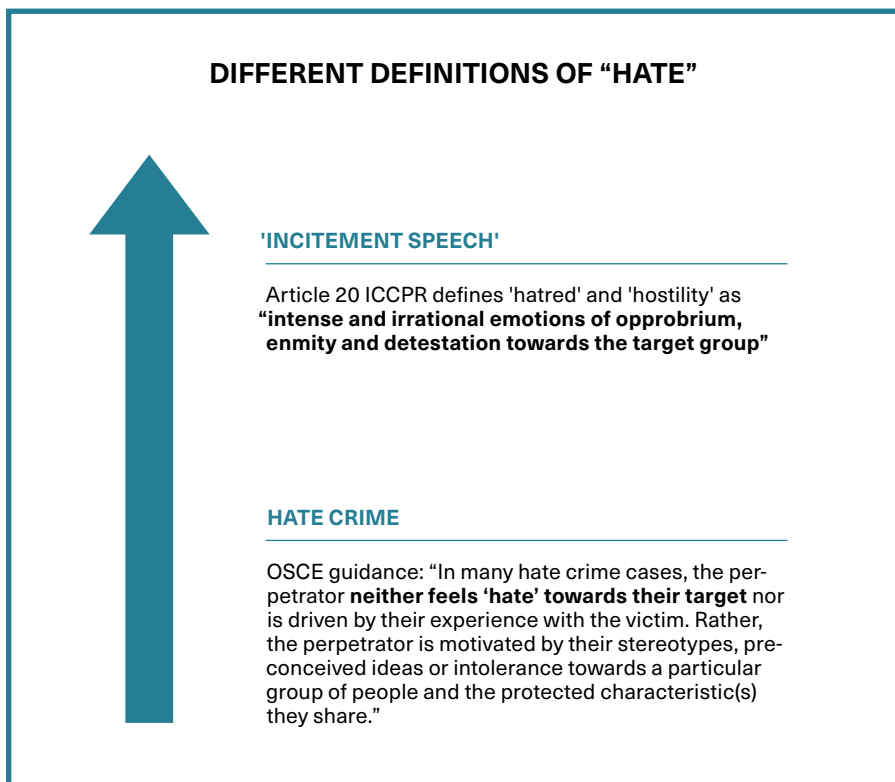


ODIHR's Policy Guidance on Freedom of Religion or Belief and Security<sup>39</sup> **encourages states to train law enforcement and judicial authorities to understand and apply the six-part test set out in the Rabat Plan of Action**,<sup>40</sup> in order to determine whether the threshold of incitement to violence or hatred has been met. When determining this question in cases of 'incitement speech' offences, the six-part test guides prosecutors to determine: (1) the context of the statement/expression, (2) the speaker's position or status, (3) the intent to incite an audience against a target group, (4) the content and form of the statement or expression, (5) the extent of its dissemination, and (6) the likelihood of harm, including imminence.

38 *Ibid.*, appendix, para. 36: "Political and religious leaders should refrain from using messages of intolerance or expressions which may incite violence, hostility or discrimination; but they also have a crucial role to play in speaking out firmly and promptly against intolerance, discriminatory stereotyping and instances of hate speech. It should be made clear that violence can never be tolerated as a response to incitement to hatred." See also *Beirut Declaration and its 18 Commitments on 'Faith for Rights'*, A/HRC/40/58, Annexes I and II.

39 *Freedom of Religion or Belief and Security Policy Guidance*, OSCE/ODIHR, 9 September 2019; see also OHCHR, *One-pager on "incitement to hatred"*; *Explanatory Memorandum to CM/Rec (2022)16 on Combating Hate Speech*, Council of Europe, § 32; *Factsheet – Hate Speech*, ECTHR, November 2023.

40 *Rabat Plan of Action*, 4 October 2012, UN OHCHR, A/HRC/22/17/Add.4.



**Different definitions of hate** are used to define hate crime offences compared to 'incitement speech' offences as demonstrated in the graphic below.

Where the terms 'hate' or 'hostility' are contained within national hate crime laws, their meaning is ultimately for the courts to decide. However, considering the need for robust freedom of speech protections when criminalizing hate expression, the meaning of 'hate' or 'hostility' would usually convey a higher level of severity with regard to 'incitement speech' compared to hate crimes. For example, OSCE guidance explains, “[i]n 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.”<sup>41</sup> In contrast, OHCHR guidance on Article 20 of the ICCPR defines 'hatred' and 'hostility' as “intense and irrational emotions of opprobrium, enmity and detestation towards the target group.”<sup>42</sup>

41 OSCE/ODIHR, [Hate Crime Laws](#).

42 OHCHR, [One-pager on “incitement to hatred”](#); Camden Principles on Freedom of Expression and Equality, Article 19, April 2009, Principle 12.1 (j).

Differentiation of definitions of 'hate' in hate crime and 'incitement speech' offences is also present in the national criminal codes that use both the 'discriminatory selection' model and 'animus' model of hate crime law.

### **Examples of different definitions of 'hate'<sup>43</sup> in national criminal law provisions<sup>44</sup>**

Different definitions of 'hate' can be seen in Slovenia's criminal code,<sup>45</sup> where its hate crime provision, in the form of a general penalty enhancement, requires evidence of "inclination" to commit a crime based on a protected characteristic.

#### **Article 49: General rules for the assessment of penalties**

"[...] (3) If the **inclination to commit a crime**<sup>46</sup> was the victim's nationality, race, religion or ethnicity, his gender, skin colour, origin, financial status, education, social position, political or other belief, disability, sexual orientation or any other personal circumstance, this is taken into account as an aggravating circumstance."

By contrast, Slovenia's incitement to hatred provision requires that 'hatred' etc., is "publicly" incited and contains a higher threshold of hatred.

#### **Article 297: Public incitement to hatred, violence or intolerance**

(1) Whoever publicly incites or stirs up hatred, violence or intolerance with respect to nationality, race, religion, ethnicity, gender, skin colour, origin, financial situation, education, social position, political or other beliefs, disability, sexual orientation, or any other personal circumstance, and commits an act in a manner that can jeopardize or disturb public law and order, or uses threats, verbal abuse or insults, shall be sentenced to imprisonment for up to two years.

North Macedonia also uses the 'discriminatory selection' model of hate crime law as set out in Article 122 (42) of its criminal code.<sup>47</sup>

43 For other examples of the 'discriminatory selection' model of hate crime legislation see Chapter 2; United Kingdom: [Section 29 of the Crime and Disorder Act 1998](#), Racially or religiously aggravated assaults; Crown Prosecution Service, [Racist and Religious Hate Crime – Prosecution Guidance, 2022](#).

44 Please note that all references to criminal codes in this chapter refer to the criminal codes in force on the day of publication of this guide.

45 [Criminal Code of Slovenia](#), (in Slovenian, unofficial English translation).

46 Please note that the use of bold typeface here and in all other quotations in this guide has been added by ODIHR and does not constitute part of the original texts.

47 [Criminal Code of North Macedonia](#), (in Macedonian, unofficial English translation).



“[The] Crime of hate explicitly foreseen by the provisions of this Code, shall be considered the crime against a natural person or a legal entity and associated persons thereto or a property **which is committed wholly or partially due to a real or speculative (imaginary, assumptive) characteristic or association of the person** and relates to the race, skin colour, nationality, ethnic origin, religion or conviction, mental or bodily disability, sex, gender identity, sexual orientation and political conviction.”

There is, of course, a diversity of approaches across the region. Some countries have adopted a 'hostility' or 'animus' model in drafting their hate crime legislation, requiring evidence of hostility to prove hate crimes. For example, when prosecuting a hate crime in England and Wales, prosecutors need to prove that the offence was either motivated by hostility towards a protected characteristic or that hostility was demonstrated before, during or immediately after the commission of the offence. However, even with regard to this legal model, it is important to note that the prosecution guidance on the meaning of 'hostility' implies a low threshold for the term, explaining, “Hostility is not defined in the legislation. Consideration should be given to ordinary dictionary definitions, which include ill-will, ill-feeling, spite, prejudice, unfriendliness, antagonism, resentment, and dislike.”<sup>48</sup>

Another key difference relates to the **public element of 'incitement speech' compared to hate crime, which targets a specific person, group of people or property**. In the example of a racist assault, the individual victim is the direct target of the message of hate, while the group they 'represent' is the indirect victim. In contrast, 'incitement speech' aims to mobilize or incite others against a specific group, thereby potentially impacting the broader community to which the group belongs.<sup>49</sup> The targeted nature of hate crime also engages **specific considerations regarding victim support**.

The legislature's intention when crafting hate crime and 'hate speech' laws should also be considered, because **the object of protection for hate crime and 'incitement speech' laws are different**. This question, along with a consideration of general legal principles, including legality and proportionality, is important when selecting the correct legal qualification for a criminal act. For example, when considering if an act falls within the boundaries of hate crime, prosecutors will consider if the offender intended to injure an individual(s), threaten their life

48 [Crown Prosecution Service, Racist and Religious Hate Crime – Prosecution Guidance, 2022](#). For other examples of the 'discriminatory selection' model of hate crime legislation see Section 3 of this guide.

49 These key features of 'incitement speech' and approaches to their criminalization, investigation and prosecution are comprehensively addressed in OHCHR guidance and the six threshold tests set out in the [Rabat Plan of Action](#), also relied on in judgments from the ECtHR.

or damage their property, with the added harm of a discriminatory motive. When considering whether an act falls within the boundaries of incitement, prosecutors will consider if the offender aimed to publicly incite violence or hatred against particular groups or individuals who share a protected characteristic.

However, it is also important to acknowledge that 'incitement speech' and other 'hate speech' provisions that criminalize conduct beyond what is envisaged by international standards can be found in the same chapters of the criminal code.<sup>50</sup> This is because they are understood by lawmakers to include the public expression of ideas which are deeply offensive and hurtful to a part of the population in a way that can contribute to increased hatred and violence and threaten social peace and security, even without their connection to a clear provocation or inciting expression. Gathering the range of hate crime and 'hate speech' offences together in national criminal codes indicates that lawmakers understand them as connected tools in an overall response to prevent group-based violence, social discord and acts that undermine social inclusion and cohesion.

#### **Example of differentiating hate crime and criminalized 'hate speech' offences in a national criminal code**

In the Czech Republic's Criminal Code,<sup>51</sup> three separate provisions addressing "violence against a group" (hate crime) (Article 352), "defamation of a group" (criminalized 'hate speech') (Article 355) and "incitement to hatred" (criminalized 'incitement speech') (Article 356) are all included under the heading "Criminal offences disrupting coexistence".

Where various forms of 'hate speech' are covered in the same article of the criminal code, it can be difficult to qualify accurately the conduct involved in a particular incident. The key for prosecutors is to consider carefully the conduct involved and to aim to select the most appropriate criminal provision, bearing in mind the object of protection intended by the legislature in the context of international standards.

<sup>50</sup> See Section 2.2.2 of this guide.

<sup>51</sup> Czech Republic, [Zákon trestní zákoník](#) [Criminal Code], (in Czech, unofficial translation).

Finally, **'incitement speech' is an inchoate offence**, requiring a particular prosecution strategy.

As explained in guidance produced by the Office for the High Commissioner on Human Rights (OHCHR),

“Incitement, by definition, is an inchoate crime. The action advocated through ‘incitement speech’ does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. **It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct.**”<sup>52</sup>

## 2. Legal provisions addressing hate crime and criminalized ‘hate speech’

This chapter consists of three sections. Section 1 explains the key elements of hate crime prosecutions and the corresponding types of legislative provisions, with examples. Section 2 outlines two main types of criminalized ‘hate speech’ provisions: ‘incitement speech’, and other forms of criminalized ‘hate speech’. Section 3 considers criminal acts that fall on the boundary of hate crime and criminalized ‘hate speech’.

### 2.1 HATE CRIME PROSECUTIONS

Prosecutors will need to be aware of the national legislative provisions that support **both** elements of a hate crime prosecution: 1) proving the base criminal offence and 2) proving the bias motive. The prosecutor’s role in prompting police to uncover all available evidence of bias motive from the earliest stages of the investigation cannot be overstated. Without evidence of bias motive, gathered from bias indicators,<sup>53</sup> the chances of a successful prosecution are significantly diminished.

These provisions take three main forms: a substantive offence, a specific penalty enhancement and a general penalty enhancement. It is important to note from the outset that prosecutors have several important duties towards potential hate crime victims, especially with regard to determining and ensuring appropriate protection and support. This is addressed in chapter 5 of this guide and in other ODIHR publications.<sup>54</sup>

53 Bias indicators are “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.” For more information see the Prosecutor Decision Tree in Chapter 3.

54 See resources from [eSTAR project Enhancing Stakeholder Awareness and Resources for Hate Crime Victim Support](#), OSCE/ODIHR; see especially [Hate Crime Victims in the Criminal Justice System, A Practical Guide](#), OSCE/ODIHR, 9 April 2022.

### 2.1.1 SUBSTANTIVE OFFENCES

Substantive offences are separate offences that include the bias motive as an integral element of the legal definition of the offence. They are the least common form of legislative hate crime provision in the OSCE region.<sup>55</sup>

#### Example of a substantive offence provision

Article 119 (1) of the Criminal Code of Poland<sup>56</sup> states, “Whoever uses violence or makes unlawful threats towards a group of people or a particular person **because of their national, ethnic, racial, political or religious affiliation, or because of their lack of religious beliefs**, shall be subject to the penalty of the deprivation of liberty for a term of between three months and five years.”

In these types of legislative provisions, the first element for a hate crime prosecution, the basic offence (“violence” or “unlawful threats”) and the second element, the bias motive (“because of their national, ethnic, racial, political or religious affiliation, or because of their lack of religious beliefs”) are contained within the same provision. From the prosecution perspective, substantive offences present several advantages. The police are more likely to be aware of the offences and therefore to seek evidence of bias; the offender is clear on exactly what they are being charged with; and, if proven, the offender is found guilty of both elements of the offence, allowing for transparency for victims and affected communities. Substantive offences are also much more easily identifiable in crime and prosecution data, allowing for easier tracking across the criminal justice process.

### 2.1.2 SPECIFIC PENALTY ENHANCEMENTS

Specific penalty enhancements are provisions attached to particular base offences. 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 subsections to provisions relating to the basic offence 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.

55 OSCE/ODIHR, [Hate Crime Laws](#).

56 [Criminal Code of Poland](#), (in Polish, unofficial translation).

### **Example of a specific penalty enhancement provision**

Criminal Code of Ukraine, Article 115<sup>57</sup>

1. Murder, that is the wilful, unlawful causing death of another person, shall be punishable by imprisonment for a term of seven to fifteen years.

2. Murder:

(14) based on racial, national or religious intolerance, shall be punishable by imprisonment for a term of ten to fifteen years, or life imprisonment with forfeiture of property in the case provided for by subparagraph 6 of paragraph 2 of this Article.

The first element for a hate crime prosecution, the basic offence of 'murder' is contained in Article 115(1) and the second element, the bias motive is contained in the qualifying Article 115(2).

From the prosecution perspective, in these types of legislative provisions there is the advantage that the provision is easy to find and resembles the substantive offence provisions in that the bias motivation is a constitutive element of the offence. The prosecutor should also endeavour to ensure that the police are aware of the need to gather evidence of bias to support a successful hate crime prosecution.

#### **2.1.3 GENERAL PENALTY ENHANCEMENTS**

In principle, general penalty enhancements apply to any crime in the criminal code that do not already encompass bias as one of their constitutive elements.

57 [Criminal Code of Ukraine](#), (in Ukrainian, unofficial translation).

### Example of a general penalty enhancement provision

Article 22 [Aggravating circumstances] of the Criminal Code of Spain<sup>58</sup>

The following are aggravating circumstances:

(...)

(4) Committing the offence for racist, anti-Semitic, anti-Roma or any other kind of discrimination related to the ideology, religion or beliefs of the victim, the ethnic group, race or nation to which he/she belongs, his/her sex, age, sexual or gender orientation or identity, reasons of gender, aporophobia<sup>59</sup> or social exclusion, the disease he/she suffers or his/her disability, regardless of whether such conditions or circumstances are actually present in the person on whom the conduct is committed (...).

In these types of legislative provisions, depending on the type of offence (e.g., assault, theft, homicide, sexual assault, etc.) the first element for a hate crime prosecution, the basic offence, can be found in the relevant part of the code. For example, if the offence is a racist assault, the first element for a hate crime prosecution will be the provision that defines physical assaults in the national criminal code. The second element, the bias motive, is contained in the general penalty enhancement provision, in this case, Article 22 of Spain's Criminal Code.

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.

There are several limitations to general penalty enhancements that reduce their effectiveness as a tool to make hate crime prosecutions visible and to punish offenders appropriately. First, prosecutors must be aware of their existence in order to draw the court's attention to them. Second, in contrast to specific penalty enhancements which re-qualify and increase the seriousness of the original offence, general penalty enhancements aggravate the punishment of

58 [Criminal Code of Spain](#), (in Spanish, unofficial translation).

59 Aporophobia — negative attitudes and feelings towards poverty and poor people.

the perpetrator at sentencing. Third, the final court judgement may not contain the full reasoning for the penalty imposed, because evidence of bias motive is considered along with other aggravating and mitigating factors involved in the case. Fourth, court data tends to record decisions according to the criminal code provision for which the perpetrator was found guilty, omitting specific data on the application of general penalty enhancements.

## 2.2 LEGAL PROVISIONS ADDRESSING CRIMINALIZED 'HATE SPEECH'

This section outlines two main types of criminalized 'hate speech' provisions: 'incitement speech' and other forms of criminalized 'hate speech'. The section does not intend to provide guidance on defining or applying criminalized 'hate speech' provisions. The purpose is to assist prosecutors in identifying and mapping relevant national legal tools for prosecuting criminalized 'hate speech' offences in the context of international standards, and to be able to differentiate them from hate crime provisions.<sup>60</sup>

### 2.2.1 'INCITEMENT SPEECH' OFFENCES

'Incitement speech' is that which publicly incites discrimination, hatred, hostility or violence against a group of people or members of a group defined by a range of protected characteristics. This conduct is addressed by a number of international standards explained in Section 1.2 and listed in the Annexe.

As explained in Section 1.2, 'incitement speech' offences present common technical challenges for prosecutors that are distinct from hate crime offences. These include proving an inchoate offence, determining whether the speech is protected, and determining if the offence publicly incites. These technical considerations are fully addressed by the Rabat Plan<sup>61</sup> six-part test and the Camden Principles.<sup>62</sup>

60 As explained elsewhere, this publication does not provide guidance on prosecuting criminalized 'hate speech'. Nor does it endorse the criminalization of hate expression, beyond what is defined by Article 20(2) of ICCPR.

61 UN OHCHR, [Rabat Plan of Action](#).

62 Article 19, [Camden Principles on Freedom of Expression and Equality](#); See the Annexe for further details.



### Example of an 'incitement speech' provision

Article 1 [Incitement to hatred, violence and property damage] of Greece's Law 927/1979, as amended by Laws 1419/1984, 2910/2001 and 4285/2014 and 4491/2017<sup>63</sup>

1. Anyone, who publicly incites, provokes, or stirs, either orally or through the press, the Internet, or any other means, acts of violence or hatred against a person or group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin, sexual orientation, gender identity, gender characteristic or disability, in a manner that endangers the public order and exposes the life, physical integrity, and freedom of persons defined above to danger, will be punished by imprisonment of from three months to three years and a fine of €5,000 to €20,000.

2. Anyone, who publicly incites, provokes, or stirs, either orally or through the press, the Internet, or any other means, acts of destruction against the assets of a person or group of persons defined by reference to race, colour, religion, descent or national or ethnic origin, sexual orientation, gender identity, gender characteristic or disability, in a manner that endangers the public order and exposes the life, physical integrity, and freedom of persons defined above to danger, will be punished by imprisonment of from three months to three years and a fine of €5,000 to €20,000.

It is important for prosecutors to be aware that there is great variation at the national level in how 'incitement speech' offences are given effect in national criminal codes and handled at the investigation and criminal justice stages. For example, the Rabat Plan noted a "pervasive dichotomy" where (1) the perpetrators of incidents which reach the threshold of Article 20 of ICCPR "are not prosecuted and punished" and where (2) "the persecution of minorities under the guise of domestic incitement law" can be overly vague.<sup>64</sup>

For example, in the 2009 Human Rights Council report on the former Yugoslav Republic of Macedonia,<sup>65</sup> the Special Rapporteur noted that Article 319 of the

63 See [Greece: New Law Criminalizes Denial of Genocide, Hate Speech, and Other Acts of Racism](#), Library of Congress, 24 September 2014.

64 [Rabat Plan of Action](#) on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, Conclusions and recommendations emanating from the four regional expert workshops organized by OHCHR in 2011, A/HRC/22/17/Add.4, p. 7, Morocco, 5 October 2012.

65 [Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir](#), UN HRC, A/HRC/13/40/Add.2, 28 December 2009, para. 47.

Criminal Code<sup>66</sup> had, in their view, been misused against a particular religious leader, Bishop Jovan (Zoran Vraniskovski).<sup>67</sup> In 2004, the domestic courts held that, in leaving the Macedonian Orthodox Church and establishing the Orthodox Archbishopric of Ohrid, the accused had created a schism **causing religious hatred, discord and intolerance**.<sup>68</sup> However, the fact that he was convicted for having instigated hatred towards himself from those with different beliefs was commented as “astounding”<sup>69</sup> since ‘incitement speech’ requires the speaker’s intention to promote hatred publicly towards the target group (Camden Principle 12.1), i.e., a triangular relationship<sup>70</sup> between speaker, audience and target. ODIHR, with expert input from its Panel of Experts on Freedom of Religion or Belief, also expressed concerns about the court’s approach.<sup>71</sup>

According to the UN Special Rapporteur on freedom of religion or belief, “the risk that legal provisions prohibiting ‘hate speech’ are interpreted loosely and applied selectively by the authorities underlines the importance of having unambiguous language and of devising effective safeguards against abuses of the law. [...] The legal uncertainty triggered by a loose formulation of incitement provisions may have a chilling effect on the willingness of individuals to exercise their freedom of expression as well as their freedom of religion or belief, for example by affecting their ability to changing their religion, to establish new religious or belief organizations, or to manifesting their religion or belief in worship, observance, practice and teaching in accordance with their convictions.”<sup>72</sup>

66 [Criminal Code of North Macedonia](#), “Article 319 [Causing hatred, discord or intolerance on national, racial, religious or any other discriminatory ground] 1. Whosoever by force, maltreatment, endangering the security, mocking of the national, ethnic, religious and other symbols, by burning, destroying or in any other manner damaging the flag of the Republic of Macedonia or flags of other states, by damaging other people’s objects, by desecration of monuments, graves, or in any other discriminatory manner, directly or indirectly, causes or excites hatred, discord or intolerance on grounds of gender, race, colour of the skin, membership in marginalized group, ethnic membership, language, nationality, social background, religious belief, other beliefs, education, political affiliation, personal or social status, mental or physical impairment, age, family or marital status, property status, health condition, or in any other ground foreseen by law on ratified international agreement, shall be sentenced to imprisonment of one to five years”, (in Macedonian, unofficial translation).

67 [Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, addendum, Mission to the former Yugoslav Republic of Macedonia](#), A/HRC/13/40/Add.2, paras. 47–48.

68 The Bitola Court of First Instance established that Bishop Jovan “had instigated hatred towards himself and his followers. The ensuing revolt and intolerance had derived from an infringement of the religious sensibilities of the people, who had requested the state authorities to intervene. He had even been threatened with assault.” See [Vraniskoski v. “The Former Yugoslav Republic of Macedonia”](#), Application no. 37973/05, 26 May 2009.

69 Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary*, Oxford University Press, 2016, p. 497.

70 [Rabat Plan of Action](#), appendix, para. 29; [United Nations Strategy and Plan of Action on Hate Speech, Detailed Guidance on Implementation for United Nations Field Presences](#), UN, 2020, p. 13.

71 [Opinion on the Case of Bishop Jovan \(Zoran Vraniskovski\)](#), Opinion-Nr.: FoRB – MK/035/2005, Expert Panel on FoRB/IU, 27 July 2005, para. 8.

72 [Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, addendum, Mission to the former Yugoslav Republic of Macedonia](#), A/HRC/13/40/Add.2, paras. 48 and 60.

### 2.2.2 OTHER CRIMINALIZED 'HATE SPEECH' OFFENCES

In addition to provisions that support the prosecution of 'incitement speech' offences, some national criminal codes may contain provisions to prosecute other criminalized 'hate speech' offences. This section gives examples of such provisions along with selected references to the international framework, to assist prosecutors both in mapping relevant national criminalized 'hate speech' provisions and in differentiating them from hate crime provisions.<sup>73</sup>

#### *Offences of denial of genocide, crimes against humanity and gross minimization*

Several countries criminalize the offence of Holocaust denial<sup>74</sup> without the requirement that it leads to incitement to hatred or violence. This is, for example, in contrast to the EU Framework Decision, which only foresees the criminalization of these sorts of offences where the conduct is carried out in a way that incites violence or hatred against a group of people or a member of such a group defined by reference to 'race', colour, religion, descent or national or ethnic origin.<sup>75</sup>

#### **Examples of denial of genocide, crimes against humanity and gross minimalization provisions<sup>76</sup>**

Article 6 of the Emergency Ordinance No 31 of Romania<sup>77</sup> provides that: "Denial, contestation, approval, justification or minimization in an obvious way by any means in public of the Holocaust or its effects is punished by imprisonment from six months to three years or by a fine." The same applies as regards genocide, crimes against humanity and war crimes. If a computer system is used in the above crime, a prison sentence of six months to five years applies.

In France, the Gaysot Act<sup>78</sup> criminalizes the act of "contesting" crimes against humanity as defined in Article 6 of the Charter of the International Military Tribunal annexed to the 1945 London agreement. In Austria, accord-

73 As explained elsewhere, neither this section nor the guide as a whole provides guidance on prosecuting criminalized 'hate speech'. Neither does it endorse the criminalization of hate expression, beyond what is defined by Article 20(2) of ICCPR.

74 Working definition of Holocaust distortion and denial, IHRA.

75 See EU European Council, Framework Decision 2008/913/JHA, Article 1(c) and Article 1(d).

76 Holocaust Denial in criminal law, European Parliament Briefing, January 2022.

77 Romania, ORDONANȚA DE URGENȚĂ nr. 31 [Emergency Ordinance No 31], 13 March 2022, Article 6, as amended by Law No 217 of 23 July 2015, (in Romanian, unofficial translation).

78 France, Loi n° 90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xénophobe [Law No. 90-615 of 13 July 1990 on the suppression of any racist, anti-Semitic or xenophobic act], (in French, unofficial translation).

ing to § 3h of the Prohibition Act,<sup>79</sup> anyone who “publicly denies, trivialises, approves or seeks to justify the National Socialist genocide or other National Socialist crimes against humanity” shall be punished with imprisonment of six months to five years. If the offence is committed in a printed work, on the radio or in any other medium or in such a way that it becomes accessible to many people, the punishment is imprisonment of one to ten years. In the most severe cases, the punishment can be imprisonment of ten to twenty years.

### *Public dissemination offences*

The EU Framework Decision also directs Member States to prohibit by law the public dissemination or distribution of tracts, pictures or other material that incite hatred or violence. However, the existing criminal codes of EU Member States do not always require that the dissemination conduct incites hatred or violence. For example, Denmark’s criminal code includes a dissemination offence, which is not explicitly linked to incitement to violence or hatred.

### **Example of a national provision that criminalizes the public dissemination of racist (etc.) communication or statement(s)**

Section 266 b of the Criminal Code of Denmark<sup>80</sup>

Whoever **publicly or intentionally disseminates any statement or other communication** by which a group of persons is threatened, insulted or degraded because of their **race, colour, national or ethnic origin or religious belief, or disability, or because of their sexual orientation, gender identity, gender expression or sex characteristics** of that group, shall be punished with a fine or imprisonment of up to two years.

79 Austria, [Bundesrecht konsolidiert: Gesamte Rechtsvorschrift für Verbotsgesetz 1947, Fassung vom 17.10.2024](#), [Prohibition Act 1947, Federal Law Consolidated, Version from 13. 10 2024, (in German, unofficial translation).

80 Denmark, [Bekendtgørelse af straffeloven](#) [Criminal Code], (in Danish, unofficial translation).

### *Offences of defamation*

Criminal defamation against an individual or a group on the basis of specific characteristics can be found in the national criminal codes. However international standards do not recommend or require its criminalization.<sup>81</sup>

#### **Example of a defamation provision**

Article 355 of the Criminal Code of Czech Republic<sup>82</sup>

##### **(1) Who publicly defames**

- a) a nation, its language, a race or ethnic group, or
- b) a group of persons because of their real or perceived race, belonging to an ethnic group, nationality, political belief, religion or because they are actually or supposedly without a religion,

shall be punished by imprisonment for up to two years.

### *Offences of bias-motivated insults*

Various forms of provisions that criminalize bias-motivated insults may be available to prosecutors at the national level. It is also possible that relevant insult provisions are only available under civil law or not at all.

Article 5 of the Additional Protocol to the Convention on Cybercrime<sup>83</sup> stipulates, "1. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct: insulting publicly, through a computer system, (i) persons for the reason that they belong to a group distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors; or (ii) a group of persons which is distinguished by any of these characteristics. 2. A Party may either: a. require that

81 For a review and analysis of current approaches to the criminalization of defamation and insult across the OSCE Region see Scott Griffen, [Defamation and Insult Laws in the OSCE Region](#).

82 Czech Republic, [Zákon trestní zákoník](#) [Criminal Code], (in Czech, unofficial translation).

83 [Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, Racist and xenophobic motivated insult](#), Council of Europe, Strasbourg, 2003.

the offence referred to in paragraph 1 of this article has the effect that the person or group of persons referred to in paragraph 1 **is exposed to hatred, contempt or ridicule**; or b. reserve the right not to apply, in whole or in part, paragraph 1 of this article.”

Paragraph 11 of the CoE's Recommendation of the Committee of Ministers to Member States on combating 'hate speech'<sup>84</sup> recommends that sexist and LGBTI-phobic public insults **under conditions such as those set out specifically for online insults** in the Additional Protocol to the Convention on Cybercrime explained above are also subject to criminal liability.

### Example of an insult provision

According to Article 448 of the Criminal Code of Belgium,<sup>85</sup> “Anyone who **insults a person** either by facts, or by writings, images or emblems, in one of the circumstances indicated in Article 444, will be punished by imprisonment of eight days to two months and a fine of twenty-six [euros] to five hundred [euros], or one of these penalties only.”

Article 444 of the Criminal Code of Belgium states, “The guilty party will be punished by imprisonment of eight days to one year and a fine of twenty-six [euros] to two hundred [euros], when the imputations have been made either in meetings or public places; either in the presence of several individuals, in a non-public place, but open to a certain number of people having the right to assemble or frequent it; either in any place, in the presence of the offended person and in front of witnesses.”

According to Article 453bis of the Criminal Code of Belgium, “the minimum punishment for slander, defamation and **insult** can be **doubled if motivated by hate, contempt or hostility against persons due to their supposed race, skin colour, heritage, national or ethnic origin, birth, age, fortune, religious or philosophical conviction, present or future state of health, disability, language, political conviction, union conviction, physical or genetic characteristic or social origin.**”

As explained in a study commissioned by the OSCE Representative on Freedom of the Media, “the term ‘insult’ is not defined in statute, but, in general, is constituted

84 [Recommendation CM/Rec \(2022\) 16 of the Committee of Ministers to Member States on combating hate speech](#), Council of Europe, paragraph 11 (d).

85 [Criminal Code of Belgium](#).

by an imprecise accusation that may damage a person's honour. In practice, insult also requires an element of malice."<sup>86</sup>

### **Example of a bias-motivated insult and its prosecution (Belgium)<sup>87</sup>**

"The perpetrator(s) writes racist slurs and offensive graffiti in the stairwell of an apartment building in black pen, and an arrow pointing to the victim's apartment.

"This offence was prosecuted as an insult under Articles 448 and 444 of the Criminal Code, committed with a bias motive recognized by Article 453bis. Where a bias-motivated insult prosecution is not possible, prosecutors should aim to select an offence that takes into account the direct targeting in this offence indicated by the arrow pointing to the victim's apartment and the likely impact on the victim. For example, prosecutors could consider applying a racially aggravated damage to property offence, or depending on the circumstances, racially aggravated threat or harassment."

### **Note to prosecutors – civil and administrative offences<sup>88</sup>**

Civil and administrative remedies are particularly relevant in cases of 'hate speech' that do not meet the threshold for criminal prosecution. Civil remedies can include payment of damages, injunctive relief to prevent further occurrences, and the publication of acknowledgments that certain statements constituted 'hate speech'. Administrative remedies involve actions taken by government agencies to enforce regulations and can include fines, blocking or deletion of offending content, and the loss of licences. These remedies can be pursued in parallel to, or independently of criminal proceedings.

Prosecutors can play a key role in drawing victims and their lawyers' attention to these potential remedies and make referrals where appropriate.

86 Scott Griffen, [Defamation and Insult Laws in the OSCE Region](#).

87 This example is published by the Belgian equality body on their [website](#).

88 [Explanatory Memorandum to Recommendation CM/Rec\(2022\)16 of the Committee of Ministers to Member States on combating hate speech](#), Steering Committee on Anti-Discrimination, Diversity and Inclusion (CDADI) and Steering Committee on Media and Information Society (CDMSI), 1434<sup>th</sup> meeting, 11, 13 and 17 May 2022.

## 2.3 OFFENCES AT THE INTERSECTION

This group of offences includes threatening and harassing behaviour in a public place, causing others fear, alarm and distress. In the case of hooliganism, these offences can also include group violence. As set out in the Prosecutor Decision Tree in Chapter 3, depending on the context and circumstances, these offences can take place alongside criminalized 'hate speech' offences, including incitement to hatred or violence. A key question for prosecutors will be whether this conduct also incites others to violence or hatred (guided by the Rabat Plan six-part test), in which case freedom of expression considerations will be relevant.

This section also includes offences involving graffiti, because, depending on the context and on their particular features, these incidents can be comprised of hate crimes, bias-motivated insults, threats or criminalized 'hate speech' offences. As explained in Chapter 3, in some circumstances, graffiti can also be a bias indicator for a hate crime offence.

### 2.3.1 BIAS-MOTIVATED DISTURBANCE OF THE PEACE AND NUISANCE OFFENCES

This group of offences are speech acts or expressions where the basic, non-aggravated form of the offence will be present in the criminal code, and the content of the speech comprises the entirety of the offence. In some countries, lower-level disturbance or breach of the peace, and other public order and nuisance offences, are categorized as misdemeanours and administrative offences.

#### **Example of a bias-motivated breach of the peace (public order) offence provision**

Public Order Act 1986, Section 5, Harassment, alarm or distress (United Kingdom (England and Wales))<sup>89</sup>

- (1) A person is guilty of an offence if he—
- (a) uses threatening [or abusive] words or behaviour, or disorderly behaviour, or
  - (b) displays any writing, sign or other visible representation which is threatening [or abusive], within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

<sup>89</sup> United Kingdom, [Public Order Act, 1986, Section 5](#).



- (2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.
- (3) It is a defence for the accused to prove—
  - (a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or
  - (b) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or
  - (c) that his conduct was reasonable.
- (4) F2.....
- (5) F2.....
- (6) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Section 31 of the Crime and Disorder Act 1998<sup>90</sup> creates racially and religiously aggravated forms of this and other similar offences (substantive offences).

90 United Kingdom, *Crime and Disorder Act, Section 31*.

### **Example of a bias-motivated disturbance of the peace (public order) offence**

While walking down a busy shopping street in the middle of the day, a man repeatedly shouts racist and xenophobic slurs. He does not direct the shouting towards specific people, and he doesn't know anyone in the vicinity. He shouts in the direction and presence of the people he is aware of. There are several people on the street who make sure that they avoid him by crossing the road.

In this instance, several elements of disturbance of the peace offence are satisfied by this incident. The language is threatening and abusive, it is taking place in public and it is likely to cause alarm or distress to people within the hearing or sight of the offender. The offence is also clearly racially aggravated.

These sorts of incidents tend to fit a lower-level qualification of disturbance of the peace or nuisance offences. In practice, prosecutors will need to calibrate their approach to take into consideration the nature and impact of these offences and ensure that, where the behaviour is accompanied by a physical attack or direct threat, the content of the insulting or abusive behaviour is also carefully considered as a bias indicator and as potential evidence of a bias-motivated assault (hate crime). Prosecutors should look out for evidence of direct threats, behaviour such as wielding weapons, or incidents involving groups of offenders.

There can also be examples where these provisions can be **misused** to prosecute more serious hate crime offences as explained in Chapter 4.

### **2.3.2 OFFENCES OF BIAS-MOTIVATED HOOLIGANISM**

'Hooliganism' usually entails disruptive, abusive or unlawful behaviour such as vandalism, and violence carried out by groups. The conduct is most associated with violence at sporting events, for example, where football fans travel and attend games in order to act in an abusive and violent manner. Hooliganism can also include, or set the context for bias-motivated crimes. For example, violence targeting Pride events.<sup>91</sup> In some jurisdictions, prosecutors will have the option of qualifying an offence as bias-motivated hooliganism or drawing the court's attention to an applicable general penalty enhancement to recognize bias-motive at the sentencing stage. When considering the applicability of a charge of hooliganism to an incident, it is essential that prosecutors also consider whether the

91 See, for example, [Hooligans attack LGBT March in Poland](#), *New York Times*, 27 July 2019, video.

incident involved specific bias-motivated assaults or other hate crimes. Failing to additionally identify and address these specific offences denies individual victims their rights to an effective investigation and to their full participation rights and reduces their access to specialist support.

### Example of a bias-motivated hooliganism provision

Article 287 of the Criminal Code of Moldova<sup>92</sup>

- (1) Hooliganism, that is, deliberate actions that grossly violate public order, involving the use of violence against people or threats of its use, violent resistance to a representative of the authorities or another person suppressing hooligan actions, as well as actions characterized by exceptional cynicism in their content or special insolence, shall be punished by a fine in the amount of 550 to 1050 conventional units, or by unpaid community work for a period of 180 to 240 hours, or by imprisonment for a term of up to 3 years.
- (2) The same action performed: [...]; b) two or more persons; c) on the territory or building of a public or private health care institution, d) in relation to a doctor or medical worker in the performance of his official duties; e) **based on prejudice**, shall be punished by a fine in the amount of 750 to 1350 conventional units or imprisonment for up to 5 years.
- (3) Malicious hooliganism, that is, actions provided for in paragraphs (1) or (2), committed with the use or attempted use of weapons or other objects to cause bodily injury or other harm to health, is punishable by imprisonment for a term of 3 to 7 years.

### Illustrative example of a bias-motivated hooliganism offence

In May 2018, over 30 masked men attacked Roma homes near the village of Rudne in the Lviv region of Ukraine. The incident involved arson attacks on people's homes and serious physical assaults. The police informed the press that the attack had been qualified as 'hooliganism'.<sup>93</sup>

In this and similar cases, it is open to the prosecutor to consider charges for bias-motivated arson attacks and bias-motivated assaults. If the charge

<sup>92</sup> Criminal Code of Moldova, CP985/2002, (in Romanian, unofficial translation).

<sup>93</sup> Jonathan Lee, *Roma Burned from Their Homes by Masked Men as Violence Escalates in Ukraine*, European Roma Rights Centre, 12 May 2018. The case also referred to in *Understanding Anti-Roma Hate Crimes and Addressing the Security Needs of Roma and Sinti Communities*, OSCE/ODIHR, 18 May 2023, p. 17.

of hooliganism is also appropriate, under Ukraine's Criminal Code, it is also open to the prosecutor to bring the court's attention to the applicability of a general penalty enhancement provision to recognize the bias motive (Article 67 Circumstances aggravating punishment).

**Article 67 of Ukraine's Criminal Code**<sup>94</sup>

1. For the purposes of imposing a punishment, the following circumstances shall be deemed to be aggravating:

1), 2) ....

**3) the commission of a criminal offence on the grounds of racial, national, religious hatred or discord, or on the gender grounds;**

(4) – (13) ...

**2.3.3 GRAFFITI**

While graffiti is not a commonly specified offence in national criminal codes, depending on the context and on their particular features, these incidents can be comprised of hate crimes, bias-motivated insults, threats or criminalized 'hate speech' offences. For example, racist graffiti on a wall might be best qualified as a hate crime, such as 'property damage' in its aggravated form. On the other hand, the content of the graffiti, its context and location, including how this affects its potential dissemination and the likelihood of harm, might suggest a qualification of incitement to hatred or violence. Another possibility, explained in Section 2.2.1, is where racist graffiti on the wall of the victim's apartment was qualified as a bias-motivated insult. Similar targeted graffiti against a particular individual or group could be qualified as a bias-motivated threat. As explained in Chapter 3, in some circumstances, graffiti can also be a bias indicator for a hate crime offence. Prosecutors should consult Chapter 5 on victims' needs.

94 [Criminal Code of Ukraine](#), last modified 4 June 2021.

### Example of graffiti

In Šibenik, Croatia, anti-Serb graffiti, including swastikas and calls to kill Serbian children, was daubed on the wall of a school. The language included, “killed Arkan, then Ceca... kill Serbian children”, “kill a Serb, Vukovar — never ВУКОВАР.”<sup>95</sup> The graffiti also included a drawing of swastika with the year 1986 written in the four squares of the cross.

The prosecutor qualified the incident under Article 235 of the Croatian Criminal Code as “damage to the property of another person”, committed with a base motive.<sup>96</sup>

Article 325 of the Croatian Criminal Code sets out the offence: “Public incitement to violence and hatred”.<sup>97</sup> In these cases, it is open to the prosecutor to consider whether the graffiti or vandalism is directed at the targeted group that owns the facility, in which case it is more likely to be a hate crime, or whether the expression is aimed at the public in order to incite others to hatred, discrimination or violence. If so, prosecutors should consider domestic provisions, available case law and the Rabat Plan threshold tests to determine if an incitement to hatred charge is appropriate in this case.

95 Arkan was a Serbian military commander during the Balkans conflict. Ceca was the wife of Arkan. ВУКОВАР is the name for the town of Vukovar in Cyrillic, which is the Serbian script. Vukovar borders Serbia and was the site of an atrocity committed by the Serbian military in 1991 during the Balkan conflict.

96 Croatia, [Kazneni zakon](#) [Criminal Code], Article 235 (1), “Whoever damages, destroys, deforms or renders unusable another person’s property, shall be punished by imprisonment not exceeding two years... (3) If the perpetrator committed the criminal offence referred to in paragraph 1 or 2 of this Article **out of base motives** ...he or she shall be punished by imprisonment from six months to five years.” (In Croatian, unofficial translation).

97 *Ibid.*, Article 325 (Public incitement to violence and hatred), “(1) Whoever in print, through radio, television, computer system or network, at a public gathering or in some other way publicly incites to or makes available to the public tracts, pictures or other material instigating violence or hatred directed against a group of persons or a member of such a group on account of their race, religion, national or ethnic origin, language, descent, colour, gender, sexual orientation, gender identity, disability or any other characteristics shall be punished by imprisonment not exceeding three years.” (In Croatian, unofficial translation).

## 3. The Prosecutor Decision Tree

This decision tree is designed for professionals who are already trained in identifying and prosecuting hate crime. It aims to highlight key differences in prosecution practice between hate crimes and criminalized ‘hate speech’ offences and to provide guiding questions to support prosecutors in applying their national provisions. It cannot apply to all situations, and prosecutors will need to use their own judgement and apply national law as appropriate. For further information on the basics of the hate crime concept, refer to Chapter 1 above and ODIHR’s existing guidance on prosecuting hate crime.<sup>98</sup> This section takes the reader through the structure of the decision tree, and should be read with the graphic to hand.

The decision tree starts from the point where a case is referred to the prosecutor. Depending on the legal system and the powers and the role of the prosecutor, a case may be referred to the prosecutor at some point during or towards the completion of the investigation, or at the point of charge. By this stage, the investigation process has most likely identified a potential criminal offence that indicates a potential charge. The criminal offence could involve any crime in the criminal code.

Hate crimes are under-reported by victims and may not be identified and recorded by police investigators. To counter this risk of under-reporting and under-recording, the tool aims to set a ‘wide net’ to capture potential hate crimes by asking open questions and encouraging the use of bias indicators (see Question 1 below).

Questions 1–3 aim to support the prosecutors in:

- Establishing if hate, bias or prejudice is involved; and
- Determining if the evidence of hate or bias indicates either a hate crime or a criminalized ‘hate speech’ qualification.

98 OSCE/ODIHR, [Prosecuting Hate Crimes](#).

## 1: Does the incident involve hate, bias or prejudice?

The purpose of this question is to cast the net as wide as possible, especially important for identifying, recording and responding to hate crime offences.

As explained in Chapter 1, the presence of hate, bias or prejudice will be more obvious in cases of criminalized 'hate speech'. For hate crime cases, investigators and prosecutors may have to coordinate closely to identify and capture evidence of a bias motive. At the earliest stage, it is recommended to use bias indicators to identify possible evidence of bias. These tests should be re-visited and re-applied by prosecutors, as appropriate.

### **Bias indicators: an overview**<sup>99</sup>

Bias indicators are “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.”<sup>100</sup> As such, bias indicators are a crucial tool for identifying hate crimes.

Common bias indicators can be set out in eight main categories listed below. It is likely that more than one bias indicator will be present in a potential hate crime case. Bias indicators can also vary based on the type of hate crime. ODIHR’s annual hate crime reporting includes incidents of racist and xenophobic hate crime, anti-Roma hate crime, anti-Semitic hate crime, anti-Muslim hate crime, anti-Christian hate crime, other hate crime based on religion or belief, gender-based hate crime, anti-LGBTI hate crime and disability hate crime.<sup>101</sup>

### *Victim and witness perception*

Even in the absence of other bias indicators, how victims or witnesses perceive the crime they experience or witness is of vital importance. While they may initially not be able to pinpoint the factors that make them see the actions of offenders as bias-motivated, their impression of the attack cannot be discarded. In fact, investigators and prosecutors will often find other bias indicators to confirm their perception.

99 See, [Using Bias Indicators: A Practical Tool for Police](#), OSCE/ODIHR, 28 May 2019.

100 Massachusetts Model Protocol for Bias Crime Investigation; cited in: [Hate Crime Data-Collection and Monitoring Mechanisms: A Practical Guide](#), OSCE/ODIHR, 29 September 2014, p. 15.

101 [Hate Crime Factsheets collection](#), OSCE/ODIHR; ODIHR’s [Hate Crime Report](#).

*Comments, written statements, gestures or graffiti*

The perpetrators of hate crimes frequently make their prejudices clear before, during or after the act. Those who commit hate crimes generally want to send a message to their victims and to others, and these messages, from shouted insults to gestures to graffiti, and publications on the Internet, are powerful indications of bias motivation.

*Ethnic, religious or cultural differences between the perpetrator and victim*

Differences between perpetrators and victims can be a bias indicator. This is particularly true when victims can be visibly identified as members of a certain group. These identifiers can include skin colour, religious dress, such as a Muslim woman wearing a headscarf, or other identifying clothing such as wearing a rainbow flag in support of the LGBTI equality movement.

*Organized hate groups*

While not all hate crimes are perpetrated by organized groups, members or associates of such groups are often involved in the commission of these crimes.

*Location and timing*

Where and when an incident happened can be a significant bias indicator. This can include specific locations and timing relevant for, or connected with, a particular targeted community. As hate crime offenders can perceive their actions as justified by nationalist ideologies, significant dates and localities connected with the dominant culture, religion or even national celebrations can also provide the context for hate crimes.

*Patterns or frequent previous crimes or incidents*

If an individual victim was previously targeted in a bias-motivated crime, potential bias motivation should be seriously considered. If a similar modus operandi was observed before in a given area, if there is a spike in bias-motivated incidents or a particular group has received threats, these too should trigger suspicion of a bias motive. Likewise, if the suspects have a history of involvement in crimes motivated by bias, this should be considered a bias indicator.



### *Nature of the attack*

Because hate crimes are message crimes, i.e., aimed at spreading fear in others that share the protected characteristic of the victim(s), the degree of violence, damage and brutality tend to be serious. As an expression of superiority over and rejection of the targeted group, hate crimes can also involve degrading treatment aimed at diminishing the dignity of victims.

### *Lack of other motives*

Hate crimes often target victims as 'representatives' of their group. The selection of the target can, therefore, appear random and, given the lack of connection between the offender and the victim, no motive may be apparent. In these cases, the possibility of a bias motivation should not be dismissed.

It is important to note that **victim perception** is a key bias indicator. It is good practice to record where crimes are perceived by victims to involve bias, even if there is insufficient evidence to include bias motive at the point of charge or to present it later at the sentencing stage. It is also good practice for the police, and where appropriate, the prosecutor to acknowledge the victim's perception that the offence was a hate crime and to ensure that they are referred to a specialist support organization where available. Police and prosecutors' response to victims and communities who perceive that an offence was motivated by bias can have a lasting impact. A poor response can cause further individual harm, secondary victimization, and longer-term damage to community confidence, leading to fewer reported hate crime.

If the answer to Question 1 is "yes", prosecutors should check if the victim(s) has been referred to a specialist support service and, where appropriate, a lawyer. If the prosecutor anticipates that the victim is likely to be required to give evidence should the case progress, it isn't too early to consider the need for procedural and other accommodations. Prosecutors should also refer to Chapter 5 for further guidance on victims' needs.

If the answer to Question 1 is "no", or where a prosecutor is unsure, they are encouraged to look again, especially if the victim or witness perceives the offence to be a hate crime or motivated by bias. Consideration could be given to seeking the advice of a more experienced colleague or, if available, a hate crime specialist. If, after careful consideration, the answer is still "no", the case is not a hate crime

or criminalized 'hate speech' and should be handled according to national law and procedures.<sup>102</sup>

### **Note to prosecutors – civil and administrative law response**

If hate or bias is present and the criminal threshold is not met, it is important to remember that sub-criminal offences can indicate a risk of escalation into more serious criminal offending and also cause significant harm to victims. Prosecutors should coordinate with victims and their lawyers and other relevant stakeholders, such as equality bodies, media regulators or other authorities that can take forward a response under civil or administrative law.

## **2: Does the incident include biased speech or expression?**

'Biased expression' can be verbal, gestures or written (including online or graffiti).

Prosecutors should consider if there is any hate or bias expression present. At this point, it is not necessary to consider if the content of the expression itself reaches the criminal threshold (this is considered from Question 3 onwards). If there is no obvious bias or hate expression, prosecutors might consider one more time if there are any other indicators of bias or prejudice present in the offence, as outlined in point 1 above.

If the answer is "yes", proceed to Question 3.

If the answer is "no", but other bias indicators have been identified in Question 1, then go to Question 4.

## **3: Is the incident a crime if the biased expression is removed?**

Hate crimes are criminal offences committed with a bias motive. The 'bias' manifests itself where a perpetrator has intentionally targeted an individual or property because of one or more identity traits or expressed hostility towards these identity traits during the crime. This means that, even if the bias is removed, an identifiable crime, contained in the criminal code, such as an assault has still taken place. Alternatively, in the case of criminalized 'hate speech', it is the content of the

<sup>102</sup> Guidance or comments on the prosecution of cases that are not hate crimes or criminalized 'hate speech' are outside the scope of this guide.

expression that constitutes the offence. In other words, if the biased expression is removed, there is no offence. These points are explored in Chapter 1.

If the answer is “yes”, the incident is likely to be a hate crime. If the answer is “no”, the incident is likely to include some form of criminalized ‘hate speech’.

### **For hate crimes...**

#### **4: What crime is involved? What is the base offence?**

##### **4a: The base offence does not include speech or expression**

These offences tend to be crimes commonly found in national criminal codes, such as forms of physical and sexual assault, homicide and damage to property.

##### **4b: The base offence includes speech or expression**

Criminal offences such as threats are committed through speech or expression, for example, a threat to kill or cause serious harm or harassment. In other words, these offences are still crimes if the biased expression is removed; the base offence itself is also committed through expression.

#### **5: Identify, collect and capture indicator evidence of bias motivation**

At this stage, prosecutors can return to the evidence of bias indicators identified in Questions 1 and 2, and work with the police, where appropriate, to build evidence of bias motive that can be presented to court. These steps are fully explored in other ODIHR guidance.<sup>103</sup>

#### **6: Select the bias motivation provision**

Prosecutors should carefully review Section 2.1 along with their criminal codes to identify the most appropriate provision to recognize the bias motive (6a, 6b, 6c): substantive offence, specific penalty enhancement or general penalty enhancement.

It may be that there is no legal provision that corresponds to the bias motive (6d). For example, the offence may involve a homophobic motive, but national hate crime law does not include sexual orientation as a protected characteristic. In this case, prosecutors can acknowledge the bias motive to the victim, check if they have support and explain how the case will proceed where the criminal code does not contain an appropriate legal tool to address the specific bias motive. It may be that the court can consider general sentencing policies on aggravating

103 OSCE/ODIHR, [Prosecuting Hate Crimes](#).

and mitigating factors, such as the motivation of the perpetrator, which do not specifically mention bias motive but which could be applicable to the case.

In the absence of an appropriate hate crime provision, prosecutors may be tempted to use a criminalized 'hate speech' provision to recognize the bias element of the offence. As reviewed in Section 4.2, this is unlikely to be an appropriate prosecution strategy and risks undermining the principles of legality and proportionality. Prosecutors are encouraged to identify other appropriate charges and can draw on Chapter 4, especially the example in Section 4.2. As also explained in Chapter 4, at the appropriate time in the policymaking process, prosecutors can play an important role in highlighting to decision-makers and legislators the missing legal tools to address hate crimes.

### **For criminalized 'hate speech'...**

This publication does not provide guidance on prosecuting criminalized 'hate speech' offences. Its purpose is to show that these forms of offences are distinct from hate crimes and require different technical approaches and victim considerations. As such this part of the decision tree identifies commonly criminalized 'hate speech' provisions to support prosecutors in mapping their national legal tools.

Points 7 and 8 of the decision tree address the target and the effect of the speech or expression. As explained in the Introduction, criminalized 'hate speech' offences are public in nature; however, the legal meaning of the terms 'public' or 'publicly' and the target of the speech or expression can vary greatly.

### ***'Incitement speech' offences***

In these cases, the speech or expression aims to incite others to hatred or violence against a particular group (7c + 8d). As explained in Chapter 2, prosecutors should draw on the Rabat Plan six-part test, national case law and, where appropriate, relevant judgments from the ECtHR to guide their assessment.

It is important to note that, in the case of 'incitement speech' offences, the decision tree highlights the technical requirement involved when proving an inchoate offence. In other words, to show that the speech would succeed in inciting **others** to hatred or violence against the targeted group.<sup>104</sup> In this sense, the focus is to show that the speech addresses those who would be incited to hatred or violence against a protected group, or members of that group, as opposed to directly addressing the individual target.

It is equally important to bear in mind the impact of this speech on individuals who are the probable and eventual target of this hatred or violence, even if they are not

104 OHCHR, [One-pager on "incitement to hatred"](#).

a constituent element of, or the technical focus of these offences. For example, in the case of *Beizaras and Levickas v. Lithuania*, the ECtHR considered the refusal by the Lithuanian authorities to investigate and sanction online 'hate speech' comments aimed at inciting hatred and violence against lesbian, gay, bisexual and transgender persons in general, as well as personally at the two men. The Court held that Lithuania had violated Article 14 (prohibition of discrimination) of the Convention taken in conjunction with Article 8 (the right to respect for private and family life) and that Article 13 (the right to an effective remedy) had also been violated by the Lithuanian authorities.<sup>105</sup>

### ***Bias-motivated insults***

In these cases, the speech or expression is targeted towards an individual victim (7a) and can be harassing, insulting, threatening and offensive or expose the victim to hatred and/or ridicule (8a). Prosecutors should be mindful that this sort of conduct could escalate to direct threats of violence, in which case a qualification of 'threat' or something similar might be more appropriate. Prosecutors should consult Chapter 5 regarding victims' needs, Section 2.2.1 for examples and legal provisions and Section 4.4 for national examples.

### **For offences at the intersection....**

#### ***Bias-motivated disturbance of the peace and nuisance offences***

In these cases, the speech or expression usually takes place offline and in public (7c), and it aims to, or has the effect of being abusive, alarming or distressing (8b). However, inciting others to hate or act is not a constituent element of these offences. Examples and points to consider are shared in Section 2.3 and Section 4.4.

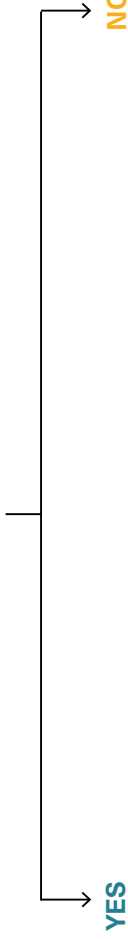
#### ***Bias-motivated hooliganism***

In these cases, the conduct involves violence carried out by groups. The focus is on violation of public order, but the conduct can also involve the targeting of individual victims. The conduct aims to, or has the effect of being abusive, alarming or distressing (8b) to the surrounding public (7c). However, inciting others to hate or act is not a constituent element of these offences. Examples and points to consider are shared in Section 2.3.2.

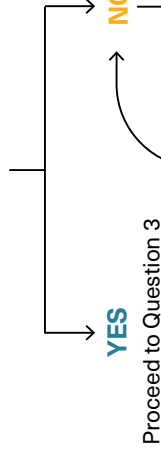
105 *Beizaras and Levickas v. Lithuania*, application no. 41288/15, ECtHR, 14 January 2020; *Protecting Minority Rights A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, OHCHR, Equal Rights Trust, New York and Geneva, 2023, p. 178.

# HATE CRIME/CRIMINALIZED HATE SPEECH PROSECUTOR DECISION TREE\*

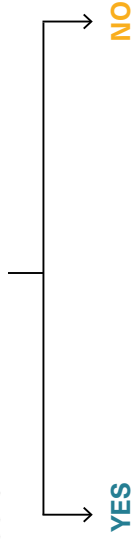
## 1: DOES THE INCIDENT INVOLVE HATE, BIAS OR PREJUDICE?



Look again: are there other signs of potential bias motive? Refer to bias indicators explained in Chapter 3 of the guide, especially 'victim perception'



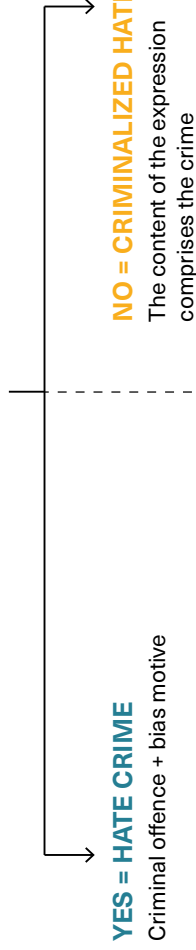
## 2: DOES THE INCIDENT INCLUDE BIASED SPEECH OR EXPRESSION?



Proceed to Question 3

Look again: are there other signs of potential bias motive?

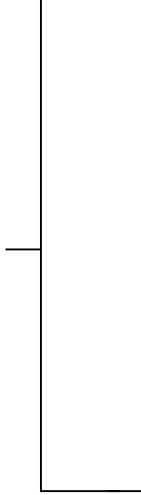
## 3: IS THE INCIDENT A CRIME IF THE BIASED EXPRESSION IS REMOVED?



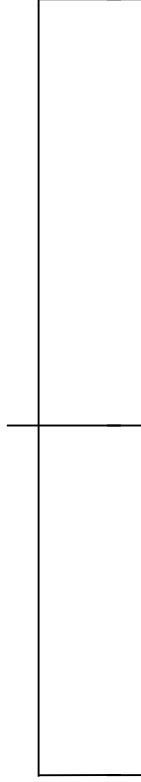
**YES = HATE CRIME**  
Criminal offence + bias motive

**NO = CRIMINALIZED HATE SPEECH**  
The content of the expression comprises the crime

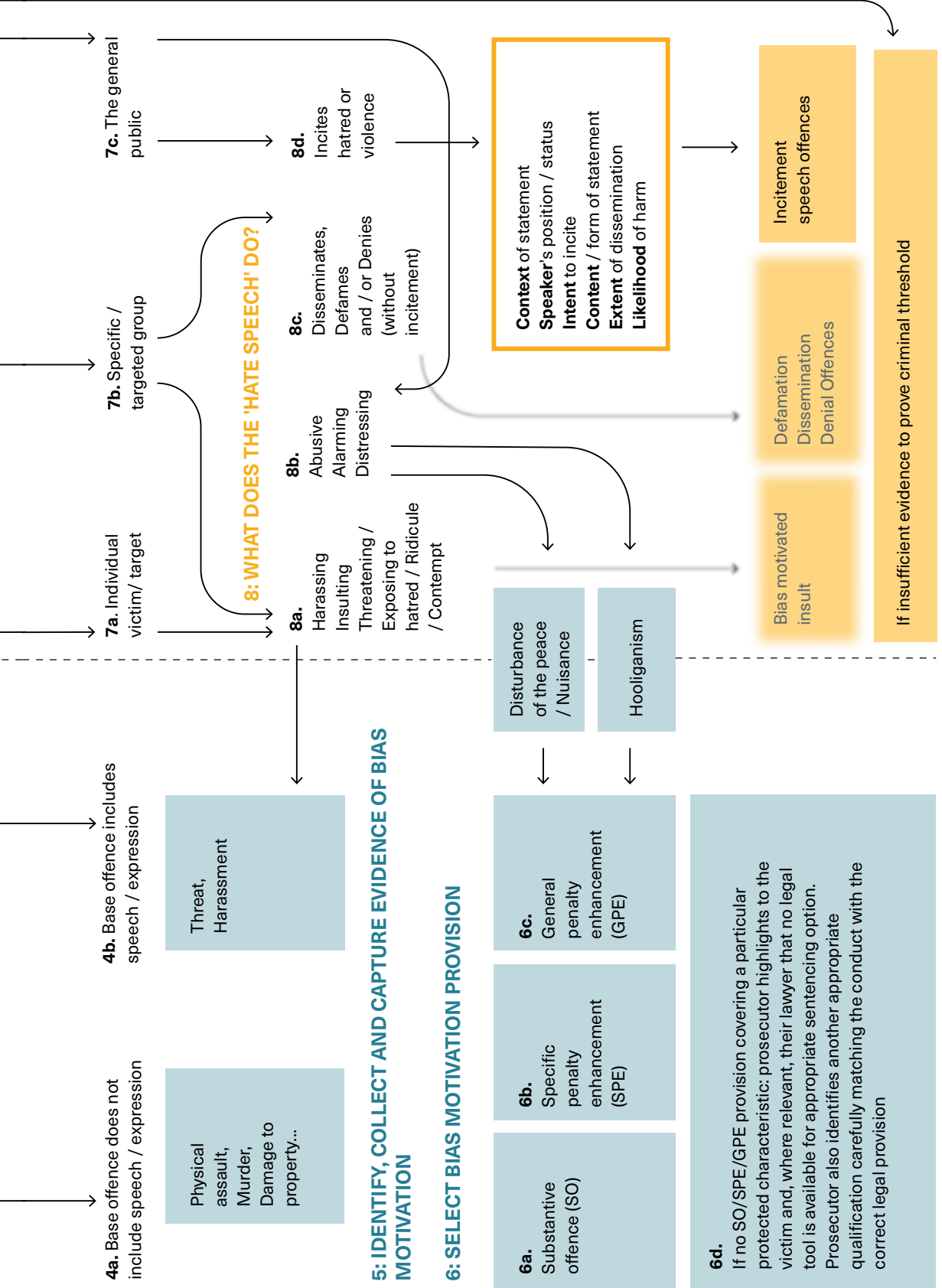
## 4: WHAT CRIME IS INVOLVED: WHAT IS THE BASE OFFENCE?



## 7: WHO DOES THE SPEECH ADDRESS?



Coordinate with partners including victim's lawyer on seeking appropriate civil or administrative remedies.



\* Use Prosecutor Decision Tree in conjunction with Chapter 3 of the guide, which provides guidance on using this tool

## 4. Examples of prosecution in practice

This chapter presents illustrative case studies of practical prosecution challenges in this area, drawn from national contexts. These include: the practice of applying 'hate speech' provisions to prosecuting hate crimes, including in contexts where there are no applicable hate crime laws, and misqualifying the seriousness of hate crime offences. The chapter also considers examples of mixed cases, where a single incident includes prosecutable hate crime and criminalized 'hate speech' offences, and 'borderline' offences, where incidents are challenging to categorize, because they contain the characteristics of both hate crime and criminalized 'hate speech'.

**NOTE:** The legal provisions referenced in the case studies in this chapter are those that were in force at the time that the incidents were prosecuted. Footnotes refer to the texts as they were; current codes may differ significantly.

### 4.1 APPLYING 'HATE SPEECH' PROVISIONS TO PROSECUTE HATE CRIMES

This section contains two case studies where criminalized 'hate speech' provisions were used to prosecute hate crime offences.

#### 4.1.1 CASE 1

Took place in Žepče municipality, Zenica-Doboj Canton, Bosnia and Herzegovina in 2022 and was prosecuted under applicable law.

##### *Brief outline of the case*<sup>106</sup>

During the night, two men resisted arrest and attacked two police officers, after being pulled over for committing multiple traffic violations. The perpetrators were of Croat ethnicity, and the police officers had name tags displayed on their uniforms indicating their Bosniak ethnic identity. While one of the police

<sup>106</sup> This case took place in a mixed community. Zenica-Doboj Canton, municipality Žepče, composed of ethnic Croats and ethnic Bosniaks, with a history of ethnic division and violence.



officers was in the process of issuing a written citation against the driver, the driver stated, “You are that local sheriff from Zavidovići<sup>107</sup> who came to Žepče to bring order” and uttered anti-Bosniak racist insults. The driver also knocked the official documentation out of the police officer’s hands. The police officer tried to apprehend the driver, who responded by pushing the officer and kicking the flashlight and handcuffs out of his hands. At that same moment, the passenger exited the vehicle and attacked the same police officer by grabbing him by the vest and ripping it. The driver also ripped the police officer’s shirt. The second police officer, intending to help his partner, grabbed the passenger’s hands so that his partner could apprehend the driver. The passenger resisted arrest by attacking the second police officer, kicking his glasses, mobile telephone and his badge. Eventually, he too was apprehended. The driver further offended and threatened the first police officer, including with anti-Bosniak slurs and saying, “I will slaughter you sooner or later. You came here to *ustaša*<sup>108</sup> territory to enforce laws.”

As a result of this attack, both police officers suffered light bodily injuries.

### *The prosecution decision*

The driver and the passenger were charged with “Attacking an Official while Carrying out Security Work”. The driver was also charged with “Inciting National, Racial or Religious Hatred, Discord or Hostility”. Both accused were charged with committing these criminal offences as accomplices.

### *Commentary*

There are several points to consider when exploring the approach taken by the prosecuting authorities. The essential elements of Article 163 of the Criminal Code of the Federation of Bosnia and Herzegovina<sup>109</sup> (FBiH) are: a) publicity, b) incitement, c) national, racial or religious hatred, discord or hostility, d) constituent peoples. Element a), publicity, entails an offence committed publicly with an audience that is able to see, hear or read, rather than an offence committed in a public place. Importantly, Article 163 itself prescribes that the criminal act should be inciting or inflaming hatred (as a continuous action) among “constituent peoples and others who live in the FBiH”.

107 The nearby town was 90% inhabited by Bosniaks.

108 The Ustaše was a Croatian fascist and ultranationalist organization active, as one organization, between 1929 and 1945, formally known as the Ustaša — Croatian Revolutionary Movement. See, e.g., [Ustaša | Fascist Regime, Genocide & War Crimes | Britannica](#).

109 Criminal Code of the Federation of Bosnia and Herzegovina, Art. 163, as at 2022: “Whoever publicly incites and inflames national, racial or religious hatred, discord or hostility among constituent peoples and others who live in the Federation, shall be punished by imprisonment for a term between one and five years.” (In Bosnian, unofficial translation).

In this case, only four people were aware of the attack at the time of the crime (two police officers and two perpetrators), and the incident occurred at 4:20 AM in a relatively isolated area. This criminal offence must be committed with intent and, given the circumstances, it would be difficult to demonstrate that the accused attacked the police officers in order to incite hatred among constituent peoples or others in FBiH or with the knowledge that such an outcome would be the likely result of their actions. Therefore, if there is no audience or awareness of the incident, it is difficult to argue that an act is, indeed, inciting hatred among the specified peoples.

Based on the above, it would have been open to the prosecutor to have brought a charge under Article 359 of the Criminal Code, paragraph 2, "Attacking an Official while Carrying out Security Work",<sup>110</sup> committed with bias motivation. Article 2.11 of the Criminal Code establishes bias as an aggravating circumstance for any criminal offence.<sup>111</sup> With such a charge, even if the prosecutor was unable to prove the bias motivation, there would likely still be sufficient evidence to prove that the attack — the basic offence — did occur. It is important for prosecutors to note in these cases that the bias indicators of racial slurs that accompany commission of a hate crime should not be 'double charged' as 'hate speech' and hate crime. In these cases, hate crime and 'hate speech' prosecutions are alternative strategies and should not be combined.

#### *Applying the Prosecutor Decision Tree*

- The answer to both Question 1 and 2 is "yes". The incident presented strong bias indicators, including difference in ethnicity between the victims and the accused; and unprovoked violence. A key bias indicator was also the specific language/expression used during the attack.
- The answer to Question 3 is "yes". The incident involved several assaults, which would remain crimes without the bias expression. In this case, the prosecutor should follow the left side of the decision tree to establish the type of hate crime offence and to determine applicability of relevant national law.
- Question 4 (what crime is involved?): the base offence could have been identified as Article 359 of the Criminal Code, paragraph 2, "Attacking an Official while Carrying out Security Work" (4a).

110 *Ibid.*, Art. 359, para. 2, as at 2022: "Whoever attacks or seriously threatens to attack an official person or a person who assists an official person in carrying out work related to public security or security of the Federation, or duties related to the maintenance of public order, shall be punished by imprisonment for a term between three months and three years." (In Bosnian, unofficial translation).

111 *Ibid.*, Art. 2.11, as at 2022: "Hate crime is any criminal offence committed for reasons of race, colour, religious belief, national or ethnic origin, language, disability, sex, sexual orientation or gender identity. Such an act shall be considered an aggravating circumstance unless this Code expressly provides for a more severe punishment for the aggravated form of the crime committed out of hatred." (In Bosnian, unofficial translation).

- Point 5: The bias indicators are identified above, and evidence should be available through witness statements taken from the two police officers.
- Point 6: The relevant bias motivation provision is identified as Article 2.11, a general penalty enhancement, which establishes bias as an aggravating circumstance for any criminal offence (6c).

#### *Other observations*

- In choosing to charge incitement to hatred rather than charging as a hate crime, the prosecutor's office could face difficulties in proving the required elements of the offence, which may result in an acquittal on all charges.
- The bias expression outlined in this case appeared in fact to be evidence of a potential discriminatory motive for the assaults rather than amounting to the offence of incitement to violence or hatred.
- If the prosecutor fails to prove incitement to hatred, the resulting, more lenient sentencing would de facto contribute to impunity for bias motivation. This, in turn, fails to meet the statutory purpose of punishment, per Article 42 of the Criminal Code, namely, to condemn the offence, to deter both the offender in question and others from committing such offences, and to increase community awareness of the danger of the offence. Such uncertainty and inconsistency can undermine the purpose of sanctioning, which should correspond to the perpetrator's wrongdoings and which — with individualization of sentencing — should inform the sanctions being sought/applied.
- When improper charges survive judicial scrutiny, it establishes jurisprudence based on factual descriptions that do not correspond to the elements of the crime alleged. This can bring into question the legality and fairness of the proceedings, which are relevant to the broader considerations of the criminal justice system as a whole.

More broadly, this case illustrates a pattern of practice in countries where 'incitement speech' provisions can be overused to prosecute hate crimes. In order to avoid these misapplications of the law, multi-agency efforts are needed to ensure that the correct decisions are made at all stages of the process, from investigation, through prosecution to sentencing.

#### *Impact on data*

The judicial database would have data on this case under Article 163 of the Criminal Code as a standalone criminal offence of public incitement to hatred. This would, therefore, provide a misleading impression of the prevalence of 'hate speech' as a crime, and of the overall absence of hate crimes, resulting in poorly informed policy decisions. Victims of both hate crimes and 'hate speech' should be able to rely on available data to understand their rights and manage

expectations. Accurate data is also necessary to raise awareness among the general public about the nature and prevalence of hate crime and criminalized 'hate speech'.

#### *Potential implications for victims*

The charges selected by the prosecutor do not recognize the police officers as victims of a hate crime, and the police officers were interviewed as witnesses and not injured parties. It is also important to note that, during the main trial, the presiding judge asked the police officers whether they would like to submit a compensation claim as a result of the damage inflicted on them.

#### **4.1.2 CASE 2**

This case was adapted from the website of the Swiss Federal Commission Against Racism.<sup>112</sup> It took place in Switzerland and was adjudicated in 2016 under applicable law.

#### *Brief outline of the case*

A woman using a mobility aid asked a motorist to move his car so that she could access the lowered pavement and enter a shop. The driver refused to move his vehicle and shouted at her from the window that she should "fend for herself". A passer-by approached to help the woman. The driver shouted racist, and specifically anti-Albanian abuse at the passer-by and punched her, inflicting a two-centimetre wound on her face.

#### *The prosecution decision*

The criminal prosecution authority qualified the acts as simple bodily harm (Article 123.1, para. 1), of insult (Article 177, para. 1) and racial discrimination (Article 261bis, para. 4). It argued that when racist expressions are used to portray Albanians as people of lesser value, they constitute an attack on human dignity, and that it is not necessary for the persons discriminated against to belong to the 'race', ethnic group or religion to which they are attributed.

The court found the accused guilty of the three charges listed above. He was sentenced to a pecuniary penalty of 60 day's fine at CHF 30.00<sup>113</sup> and incurred the costs of the proceedings of CHF 510.00.

<sup>112</sup> This case is adapted from the website of the [Federal Commission Against Racism](#), Switzerland.

<sup>113</sup> A day's fine ('un jour-amende') is equivalent to one day's custodial sentence (Article 36 of the Swiss Criminal Code). In the event of partial payment of the financial penalty, the duration of the custodial sentence is reduced according to the amount already paid. The value of the daily fine determined by the judge.

### Commentary

Article 261bis para. 4 of the Swiss Criminal Code<sup>114</sup> is a complex provision which contains both hate crime and criminalized ‘hate speech’ offences and could present prosecution challenges as a result. The wording is, “Anyone who publicly, by speech, writing, image, gesture, by assault or in any other way, degrades or discriminates in a way that violates human dignity a person or a group of people because of their racial, ethnic or religious affiliation or their sexual orientation [...] is punishable by a custodial sentence of up to three years or a monetary penalty.” The elements that refer to “publicly”, “speech, writing, image and gesture” in the first part of the provision correspond to criminalized ‘hate speech’, while “assault” could correspond to the base offence of a hate crime.

In this case, another relevant provision not used in this case is Article 47 of the Swiss Criminal Code, which could apply to this case as a general sentencing enhancement provision: (1) The court determines the sentence according to the culpability of the offender. It takes account of the previous conduct and the personal circumstances of the offender as well as the effect that the sentence will have on his life. (2) Culpability is assessed according to the seriousness of the damage or danger to the legal interest concerned, the reprehensibility of the conduct, **the offender’s motives and aims**, and the extent to which the offender, in view of the personal and external circumstances, could have avoided causing the danger or damage.

It is also open to prosecutors to share this and similar cases with policymakers to illustrate the gaps and challenges presented by current national legal frameworks. For example, many hate crimes may fall outside the protection of Article 261bis para. 4 because of its requirement that the offence is committed “publicly”. Furthermore, the general sentencing enhancement option offered by Article 47 is not in line with international standards relevant to hate crime laws which recommend that protected characteristics regarding ‘motive’ are specified.<sup>115</sup>

114 [Swiss Criminal Code](#), SR 311.0, of 21 December 1937 (Status as of 1 July 2024).

115 For an explanation and discussion of protected characteristics in hate crime laws, see Section 2.1.3 of this guide and OSCE/ODIHR, [Hate Crime Laws](#), pp. 46–56.

### *Applying the Prosecutor Decision Tree*

- In this case, the answer to both Question 1 and 2 is “yes”. The incident presented strong bias indicators, unprovoked violence and the specific language/expression used during the assault. Other bias indicators — victim perception and difference in ethnicity between the victims and the accused — were possibly also present.
- The answer to Question 3 is also “yes”. The incident involved an assault, which would remain a crime without the bias expression. In this case, the prosecutor should follow the left side of the decision tree to establish the type of hate crime offence and to determine the applicability of relevant national law.
- Question 4 (what crime is involved?): The base offence of simple bodily harm (Article 123.1, para. 1) appears to best match the incident, and was one of the qualifications chosen by the prosecutor. The two other charges of insult and racial discrimination might not be necessary, because the insults are closely connected to the assault and are therefore more accurately interpreted as indicators of bias motive for the assault and not separate additional offences. The incident, including bias motive, appears to be most appropriately addressed as a racially aggravated assault (see Point 6 below).
- Point 5: The bias indicators are identified above and evidence should be available through witness statements taken from the two victims: the woman using a walker and the passer-by who was assaulted.
- Point 6: The relevant bias motivation provision is Article 47 of the Swiss Criminal Code, which could apply to this case as a general sentencing enhancement provision (6c). In jurisdictions where the hate crime law is a penalty-enhancement provision and the sentencing and finding of guilt are separate stages of the proceedings, a judge may refuse to sentence on the basis of a bias motive if the bias element has not been included in evidence during the trial phase. Similarly, in the case of a guilty plea, the motivation must be included within the accepted facts in order for the penalty enhancement to be applied. In jurisdictions where hate crime laws are rarely used, it can be helpful for prosecutors to ensure that the case file includes a clear analysis of why sentencing should take into account the bias motive. The analysis should clearly specify the presence of a racist or xenophobic motive, including references to international standards, and draw on arguments that demonstrate the perpetrator selected the victim because of their protected characteristic or that bias was demonstrated during the attack. This should be sufficient for the court to consider the offence as a hate crime.<sup>116</sup>

- Point 6d: Prosecutors might also use this and similar cases as evidence of a potential gap in national hate crime laws, which do not currently recognize specific bias motive such as a racist or xenophobic motive.

#### *Impact on data*

As explained above, the provision that was used to prosecute the incident outlined in this case included a mix of hate crimes and other offences. As a result, specific hate crime data would be unavailable to the authorities and policymakers.

#### *Potential implications for victims*

The lack of visibility of hate crimes in official data and statistics can hinder efforts to advocate for specialist victim services or training for law enforcement and judicial authorities.

## **4.2 USING CRIMINALIZED 'HATE SPEECH' PROVISIONS IN THE ABSENCE OF RELEVANT HATE CRIME PROVISIONS**

In contexts where there are no applicable hate crime laws, prosecutors might seek to apply criminalized 'hate speech' provisions to prosecute a hate crime. While this can be an understandable tactic in efforts to recognize hate in an offence, it risks undermining the principles of legality and proportionality, which require that individuals are charged with the offence that matches the conduct.

### **4.2.1 CASE 3**

The case was adapted from the website of the District Courts of Iceland.<sup>117</sup> It took place in Reykjavík in 2016 and was prosecuted under applicable law.

#### *Brief outline of the case*

The victim, of Arab and Muslim background, was working as a security guard in a shop. During an extended incident, the offender, an Icelandic man, grabbed the victim by the throat and choked his airway, elbowed him in the head and body, pushed him in the side and caused him to fall on the railing. These actions were accompanied by threats to kill. The victim suffered rib fractures, bruises on the chest, head injuries and a sprained neck.

117 The website of the [District Courts of Iceland](#).

During the incident, the offender swore at the victim and said he was going to see to it that the Arabs who were working at the shop were fired. He also said, "you Arabs should not be here and should go to your homes" and insulted the victim with a mix of racist and homophobic slurs.

### *The prosecution decision*

At the time of the offence, in 2016, Iceland's Criminal Code<sup>118</sup> did not include a hate crime law. The case was prosecuted using Article 218 (Threat), Article 233 (Deliberate Assault) and Article 233a (Defamation and Offences against the inviolability of Private life).

### *Commentary*

While the incident happened in public, Article 233a requires that the offender "publicly mocks, defames, denigrates, or threatens a person or groups of people with comments, or an expression of other nature...for their ethnic origin, colour, race, religion...". There is a difference in meaning between 'in public' and 'publicly'. The latter term suggests that the offender is engaging in the comments and expression with the public as their intended audience. In this case, it appears that the offensive remarks were closely connected to the assault and are better understood as bias indicators, i.e., insults and biased language directed towards the individual victim during the commission of the offence. Taken together, the facts of the case appear to better match a hate crime qualification where the assault was motivated by bias towards the victim's 'race' or religion or belief. The first element of the hate crime prosecution is the assault (Article 218), and the second element, the bias motive, should be addressed by a penalty enhancement in the form of a substantive offence, specific penalty enhancement or general penalty enhancement.

This incident occurred before Iceland's general penalty enhancement was in place. As such, there was no available tool to prove and allow for the punishment of the bias motive. While it can be tempting to use other offences — in this case Article 233a — to seek to recognize the bias motive in a racist assault, prosecutors should be cautious when choosing qualifications that do not fully reflect the actions of the defendant. Charges that do not match the crime undermine broader rule of law principles of legality and proportionality. Where the appropriate legislative provisions are not in place, prosecutors can consider raising awareness about these gaps for legislators to consider during the course of debating and crafting hate crime legislation. In this regard, it is important for prosecutors to gather examples of such cases and to share other data that informs policymakers about the types of legislative provisions that are necessary for the most effective and fair hate crime prosecutions.

118 General Penal Code of Iceland No. 19, February 12, 1940, 1 March 2004, as at 2016.



### *Applying the Prosecutor Decision Tree*

- In this case, the answer to both Question 1 and 2 is “yes”. The incident presented strong bias indicators, including unprovoked violence, the specific language/expression used during the attack and difference in ethnicity between the victims and the accused.
- The answer to Question 3 is also “yes”. The incident involved an assault, which would remain a crime without the bias expression. In this case, the prosecutor should follow the left side of the decision tree to establish the type of hate crime offence and to determine the applicability of relevant national law.
- As explained above, in relation to Question 4 (What crime is involved?), the base offences were identified as Article 218, threat and Article 233, deliberate assault. The crime of “Defamation and Offences against the inviolability of Private life” was also selected; however, as explained above, the facts of the case do not appear to match this charge.
- On Point 5, even without the legal tool to address the bias motive in this offence, it is still important to collect evidence of bias motive and to acknowledge its existence to the victim.<sup>119</sup>
- On Point 6, at the time of the offence, there was no available tool to present to the court for it to acknowledge bias motive. However, it is open to prosecutors to consider point 6d in the decision tree and, as explained above, to use these examples to highlight gaps in legal protection for hate crime victims.

### *Impact on data*

At the time of the offence, Iceland’s Criminal Code did not include a hate crime law. As the case was prosecuted using base offences (Threat and Assault) alongside a Defamation offence, the case will not be visible in any available hate crime data or statistics.

<sup>119</sup> Iceland has since enacted a general penalty enhancement provision: [Art. 70 \(Chapter VIII. Factors influencing the severity of punishment\)](#), “When punishment is decided, the following factors, in particular, are to be considered. [...] 10. Whether the offence can be attributed to ethnic or national origin, colour, race, religion, disability, gender characteristics, sexuality, gender identity or other similar factors.” (In Icelandic, unofficial translation).

### *Potential implications for victims*

The limited hate crime legal framework prohibited the court from recognizing and appropriately punishing the bias motive, denying the victim an effective remedy. This gap also limits the visibility of hate crimes in official data and statistics, hindering efforts to advocate for specialist victim services or training for law enforcement and judicial authorities.

## **4.3 MIXED CASES: INCIDENTS THAT INCLUDE HATE CRIME AND CRIMINALIZED 'HATE SPEECH' OFFENCES**

### **4.3.1 CASE 4**

Took place in Liège, Belgium in 2023 and was prosecuted under applicable law.

#### *Brief outline of the case*

In this case, a family provided shelter to a 35-year-old homeless man, offering him a place to live. As he became more settled, his behaviour changed in specific ways. Professing 'extremist' beliefs, he targeted the family's underage daughter in Facebook posts, declaring his intentions to marry her forcibly, abduct her and father her children.

Based on the statements to the police of the victim's father and mother, and from the suspect's own publications on the social network Facebook, the defendant claimed to have been elected to be the King, that the victim (aged 17) was destined for him, that he would therefore make her his Queen, marry her, convert her to Islam and have children with her, regardless of any opposition from her parents or anyone else.

The victim told investigators, "(...) Yesterday, I learned from my father about the presence of videos on social networks where the suspect talks about my identity and his plans with me. As a result, I am deeply shocked and fear for my physical integrity. I'm afraid to run into him. I have had several occasions to find myself in groups where he was also present (meals with my family) and I was struck by his behaviour. He showed interest in me. He had contact with my mother, but I don't know how (...) Today, out of fear, I stay with my other brother (...) I think the suspect is crazy. He often talked to himself and would sometimes shout incoherent things (war, conspiracy, ...). I have nothing else to add except that I don't want to see him anymore."

The father of the victim said, “When he became more comfortable with me, his remarks became unbearable and he became aggressive. I kicked him out of my house and changed the gate code (...) I managed to record some less compromising videos, but it was still frightening (he is against the system, etc. ...). I filed a complaint and requested an urgent restraining order (...) I fear for my physical integrity, as well as that of my daughter. He clearly mentions that anyone who stands in his way will suffer the consequences (...)”. The father confirmed this serious disturbance to his peace of mind, saying, “He really scared me with his words (...) He scared me with his intolerance, and he gives me the impression that he could harm someone. He is a walking time bomb to me. His remarks about society are frightening. They are just words, but he scared me (...) I have lost trust and he scares me.”

During his police interview and during the trial, the defendant admitted the accuracy of his reported actions and statements concerning the victim, but clarified at the hearing on 22 September 2023, “My intention was good. I didn’t want to scare her.” He also explained that he was in a disturbed state of mind at the time, which he attributed to his excessive consumption of alcohol and drugs.

Through his Facebook profiles, he posted numerous writings and personal videos in which he expressed a desire for the death of individuals towards whom he harboured a manifest hatred. On one hand, based on their ethnic or national origin, specifically targeting Western white individuals, Flemish, Dutch and Belgians, and on the other, based on their religion, specifically targeting Christians and anyone not following Islam. His actions escalated further when he communicated these views repeatedly to both a national television network and the Prime Minister’s office.

### *The prosecution decision*

The case was assigned to a hate crime/‘hate speech’ specialist prosecutor, who selected a mix of hate crime and criminalized ‘hate speech’ charges. The hate crime prosecution strategy relied on building a case for bias-motivated harassment, relying on the specific offence of harassment and a general penalty enhancement provision to recognize the bias motive. The prosecutor relied on Article 78 of the Belgian Penal Code<sup>120</sup> to argue that “one of the perpetrator’s motives was hatred, contempt, or hostility towards a person because of their alleged race, skin colour, ancestry, national or ethnic origin, nationality, gender... religious or philosophical belief..., whether this characteristic was actually present or only assumed by him, or that one of his motives consisted of a real or assumed link between the victim and a person towards whom he harboured hatred, contempt, or hostility for one or

120 Belgian Criminal Code, as at 2023.

more of the aforementioned actual or assumed characteristics, to the detriment of BF (father's victim) and RF (victim)."<sup>121</sup>

The 'hate speech' prosecution strategy relied on building a case for the substantive offence of incitement to hatred under Article 444 of the Belgian Penal Code.<sup>122</sup> Based on the offender's behaviour of publishing messages and videos on social networks "wishing for the death of Western white people, Flemish, Dutch, and Belgians on several occasions between 1 May 2023 and 8 June 2023", the defendant was charged with inciting hatred or violence towards a group, community, or their members because of one of the protected criteria referred to in Article 4, 4° of the Law of 30 July 1981.<sup>123</sup>

### *Commentary*

The correction to the prosecution strategy was made because the duty prosecutor had the presence of mind to alert their specialized colleague. If this had not been done, it is likely that the specific charges set out above would never have been pursued.

It is important to note that the charges selected were potentially incomplete. The suspect also published a series of hateful comments about the LGBTI community, but these actions could not be prosecuted because, according to the Court of Cassation, they constitute a press offence. Article 150 of the Constitution<sup>124</sup> does not allow a criminal court to hear a press offence of a homophobic nature (the exception provided by Article 150 covering only press offences of a racist or xenophobic nature). For these homophobic remarks on Facebook, it would have been necessary to refer the case to an assize court, which was not feasible from a pragmatic perspective.

121 Provided by contributor to the guide as a case example, no sourcing given.

122 *Ibid.*

123 [Loi tendant à réprimer certains actes inspirés par le racisme ou la xénophobie](#) [Law to suppress certain acts inspired by Racism or Xenophobia], 30 July 1981, and amendments, Article 4, 4°: "protected criteria: nationality, alleged race, skin colour, ancestry or national or ethnic origin; Article 20 4°: "Is punished by imprisonment of one month to one year and a fine of fifty euros to a thousand euros, or one of these penalties if: Anyone, in one of the circumstances indicated in article 444 of the Penal Code, incites hatred or violence against a group, a community or their members, due to one of the protected criteria..."; (in French, unofficial translation).

124 [The Belgian Constitution](#).

*Applying the Prosecutor Decision Tree*

In this case, both branches of the Prosecutor Decision Tree are relevant. First, the offender's behaviour towards the daughter in the household is considered.

- The answer to both Question 1 and 2 is “yes”. The incident presented strong bias indicators, including victim perception, difference in ethnicity between the victims and the accused, and the specific language/ expression used during the attack.
- The answer to Question 3 is “yes”. The incident involved a course of harassment, which would remain a crime without the bias expression. In this case, the prosecutor followed the left side of the decision tree to establish the type of hate crime offence and to determine the applicability of relevant national law.
- Question 4 (what crime is involved?): the base offence includes expression and was qualified as harassment (4b).
- Point 5: The bias indicators are identified above and evidence was available through witness statements taken from the daughter and the father.
- Point 6: The relevant bias motivation provision is identified as a general penalty enhancement, Article 78 of the Belgian Penal Code, which establishes bias as an aggravating circumstance for any criminal offence (6c).

Second, the criminalized ‘hate speech’ elements of the incident are considered.

- The answer to Question 1 and 2 is “yes”. His Facebook profiles contained expressions of bias towards specific ethnic and religious groups.
- The answer to Question 3 is “no”. If the biased expression is removed from the content, there would be no qualifiable crime. As such the content of the expression constitutes the potential criminal offence. In this case, the prosecutor should follow the right side of the decision tree to determine the target of the expression (7) — which appears to be the general public as well as the Prime Minister (7c) — and the aim of the expression, which is set out in points 8a, 8c, 8c and 8d. In this case, the prosecutor qualified the expression as incitement to hatred under Article 444 of the Belgian Penal Code (8d).

### *Impact on data*

Since the police did not correctly register the complaint as a hate crime and criminalized 'hate speech', it will not appear as such in police statistics. However, the correction was made at the judicial level.

### *Potential implications for victims*

The statements of the victim and her family indicate that the perpetrator's behaviour was very distressing, with a severe impact on their wellbeing. The actions of the prosecutors and outcome of the court process<sup>125</sup> also provided them relief and reassurance.

## **4.4 ADDRESSING VERBAL ABUSE AND SPEECH ACTS AT THE BORDER OF HATE CRIME AND 'HATE SPEECH'**

### **4.4.1 CASE 5**

Took place in Budapest, Hungary in 2021 and was prosecuted under applicable law.

#### *Brief outline of the case*

One night, a gay couple was walking in downtown Budapest. During the walk, a man followed the couple, shouting homophobic abuse and said, "I'll catch up with you and beat you up." The couple tried to seek shelter at a shop that was open all day and night, where the man caught up with them. They tried to go into the shop, where the perpetrator wanted to follow them, so one of them blocked his way. After a brief exchange of words, the offender punched one of the victims in the face with his palm and grabbed him by the neck. A group of three people were standing outside the shop supporting the offender, only one of whom tried to defend the victims when the offender grabbed him by the neck. In the meantime, the first police patrol arrived, as the victims had called the emergency line several times. A member of the group outside the shop pulled the hair of one of the victims in the presence of the police patrols and commented that the victim was 'gay'.

125 The defendant was found guilty of all crimes and sentenced to 20 months, including 10 months in prison. He also received mandatory treatment orders and was prohibited from contact with the victims and from living in the same village for five years.

*The prosecution decision*

The victims called the police hotline several times, while the man was following them and also when they were waiting at the shop on Kolosy Square. At first, they were advised to stop and wait for the police but, when the offender continued to approach aggressively, the victims walked on. The victims were on the police hotline throughout the assault outside the shop. Proceedings were initiated on the basis of a complaint by one of the victims, and police investigated the case for a misdemeanour of assault. The Háltér Society, which provides legal and practical support to victims of hate crime, requested that the investigation be continued for a hate crime offence of violence against a member of the community. As a result, the Budapest District III Police Headquarters transferred the criminal proceedings to the Budapest Police Headquarters Criminal Investigation Department, which is competent to conduct the proceedings. The Háltér Society had to request an update about the procedural steps taken, since no information was provided after the investigation had been moved to the Budapest Police Headquarters.

The defendant in the case was charged with nuisance (vandalism) under Section 339 of the Criminal Code as at 2021.<sup>126</sup> The defendant received a fine (300.000 HUF, approx. 790 EUR).

*Commentary*

The facts of the case indicate that the incident constituted the hate crime offence of violence against a member of a community. Bias indicators were present and the Budapest District III Police Headquarters agreed with the Háltér Society's request to transfer the case to the competent body. For the charge of 'nuisance', the constitutive element of the crime is to exhibit behaviour that is capable of causing outrage or alarm in others, and as such there are no direct victims. Had the crime been qualified under Section 216, Violence Against a Member of the

126 Section 339 (Public Nuisance) of Hungary's Criminal Code, as at 2021 (in Hungarian, unofficial translation):  
 "(1) Any person who displays an apparently anti-social and violent conduct aiming to incite indignation or alarm in other people is guilty of a misdemeanour punishable by imprisonment not exceeding two years, insofar as the act did not result in a more serious criminal offense.  
 (2) The penalty for a felony shall be imprisonment not exceeding three years if public nuisance is committed:  
 a) in a gang;  
 b) in a manner gravely disturbing public peace;  
 c) by displaying a deadly weapon;  
 d) by carrying a deadly weapon, or  
 e) in a public event."

Community,<sup>127</sup> the targeted people in this case would have been entitled to participation rights as victims.

#### *Applying the Prosecutor Decision Tree*

- In this case, the answer to both Question 1 and 2 is “yes”. The incident presented strong bias indicators, including victim perception, unprovoked violence, and the specific language/expression used during the attack.
- The answer to Question 3 is also “yes”. The incident involved an assault, which would remain a crime without the bias expression. In this case, the prosecutor should follow the left side of the decision tree to establish the type of hate crime offence and to determine the applicability of relevant national law.
- As explained above, in relation to Question 4 (what crime is involved?), the base offences should be qualified under Section 216, Violence Against a Member of the Community.
- On Point 5: The bias indicators are identified above and evidence should be available through witness statements taken from the two victims and from the bystanders present during the assault.
- On Point 6: it is open to the prosecutor to charge the aggravated form of Section 216, Violence Against a Member of the Community, at the time of the offence, which is a substantive hate crime offence (6a).

#### *Impact on data*

As the case was not investigated or prosecuted as a hate crime, it will not have been recorded as a hate crime or be visible in hate crime data or statistics.

127 Section 216 (Violence Against a Member of a Community) of Hungary's Criminal Code as at 2021 (in Hungarian, unofficial translation): “(1) A person who, because of the fact that another person, actually or presumably, belongs to a national, ethnic, racial or religious group or another group of society, in particular because of his disability, gender identity or sexual orientation, displays a conspicuously anti-social conduct that is capable of causing alarm in members of the respective group is guilty of a felony and shall be punished by imprisonment for up to three years.”



*Potential implications for victims*

For research, the Háltér Society interviewed one of the victims in November 2022. The judicial procedure had a serious impact on him, causing him periods of depression. The inactivity of the police, the lack of adequate information made him feel that “his report was put in a drawer and left there”. He did not receive adequate information on the procedure. The police officers did not show any empathy towards them. He felt that his case was a “five-minute topic” before everyone moved on. He lost his victim status in the judicial procedure and received no communication on the charges. He and his legal representatives were only informed of the prosecution service’s position in the court hearing, without notice. He said that he had lost trust in the criminal justice system as a result. More generally, misqualifying hate crimes limits their visibility in official data and statistics, hindering efforts to advocate for specialist victim services or training for law enforcement and judicial authorities.

**4.4.2 CASE 6**

This case was adapted from the 2010–2011 [Hate Crime and Crimes Against Older People Report](#)<sup>128</sup> of the Crown Prosecution Service for England and Wales. It took place in West Yorkshire, England, and was prosecuted under applicable law.

*Brief outline of the case*

Three men with intellectual disabilities and their support worker were out in the local town centre when they were approached by a man — the defendant — who demanded money from them. When they refused, the defendant became very aggressive and started shouting, using disablist insults against the men. The support worker encouraged the three men to go to a nearby church and then called the police. The defendant followed the men into the church where he was identified by the support worker and arrested by the police on suspicion of a disability-aggravated section 4a Public Order Offence. Police took a witness statement from the support worker. Statements were not taken from the three men because they were too distressed.

128 The 2010–2011 [Hate Crime and Crimes Against Older People Report](#), Crown Prosecution Service for England and Wales, 2011, p. 28.

### *The prosecution decision*

The perpetrator was charged under section 4a of the Public Order Act 1986 as at the time of the offence. The defendant pleaded not guilty but was convicted after trial and sentenced to a 12-month community order with 12 months supervision as well as attendance on a six-month alcohol treatment course. During the sentencing hearing, the prosecutor followed national guidance to draw the court's attention to the relevant law allowing the court to recognise the aggravating factor of 'disability hate' in the case in its sentencing decision.

### *Commentary*

There are several points to consider in this case. Section 4A of the Public Order Act 1986,<sup>129</sup> Intentional harassment, alarm or distress, is a basic offence and provides the following:

"A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he—

(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,

thereby causing that or another person harassment, alarm or distress.

In this incident, the defendant shouted at the three men because they did not give him money. He then followed them into the church where they had sought safety.

The defendant also shouted disablist slurs and insults at the men, thus demonstrating hostility towards disability at the time of committing the basic public order offence. In this case Section 66 of the Sentencing Act 2020 (s.66 SA)<sup>130</sup> applied. The relevant wording is as follows,

129 United Kingdom, [Public Order Act 1986, Section 4A](#).

130 The relevant law at the time was Section 146 Criminal Justice Act 2003, which has since been incorporated into the [Sentencing Act 2020](#).

## “Section 66 Hostility

This section applies where a court is considering the seriousness of an offence which is aggravated by—

...

(c) hostility related to disability,

...

This is subject to subsection (3).

(2) The court—

must treat the fact that the offence is aggravated by hostility of any of those types as an aggravating factor, and

must state in open court that the offence is so aggravated.

...

For the purposes of this section, an offence is aggravated by hostility of one of the kinds mentioned in subsection (1) if—

(a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—

...

(iii) a disability (or presumed disability) of the victim,

...

(b) the offence was motivated (wholly or partly) by—

...

(iii) hostility towards persons who have a disability or a particular disability,

...

(5) For the purposes of paragraphs (a) and (b) of subsection (4), it is immaterial whether or not the offender’s hostility is also based, to any extent, on any other factor not mentioned in that paragraph.

(6) In this section—

...

(d) “disability” means any physical or mental impairment;

...

(f) “presumed” means presumed by the offender.”

In this case, both elements of a hate crime prosecution were present — the basic offence and the bias motive.

The second consideration is how the sentencing uplift is applied by the court. If the defendant admits the basic offence, but denies the hate crime element, the prosecutor’s duty is to then call evidence to prove the hate crime element to the criminal standard. Only once the hate crime element is admitted by the defendant or proved by the prosecution can the court apply s.66 SA 2020 to uplift the defendant’s sentence.

Once the hate crime element is admitted or proved, England and Wales case law requires the court to adopt the following two-stage approach to sentencing:

- First, the court must calculate (using the relevant sentencing guidelines) the appropriate sentence if there had been no bias motive, and announce that in open court;
- Second, the court must calculate the appropriate sentence, taking into account the extra aggravating factor of the bias motive and announce that in open court as the actual sentence that the defendant will receive.

#### *Applying the Prosecutor Decision Tree*

- The answer to Questions 1 and 2 is “yes”. The incident included presented strong bias indicators, through the specific language/expression used during the incident.
- The answer to question 3, ‘Is the incident a crime if the biased expressions is removed’, places the incident on the border of hate crime and criminalized ‘hate speech’. The defendant was shouting and following the three men with intellectual disabilities, which, on its own can amount to ‘intent to cause a person harassment, alarm or distress’. The inclusion of disablist insults as part of his harassing behaviour is also relevant to the question of whether the defendant’s behaviour fits the offence. As such, it is open to the prosecutor to consider that the content of all of the expression comprises the crime.

- Following the decision tree down the right-hand side, the answer to question 7, 'who does the speech address' is a mix of individual targets (7a) and a specific target group (7b).
- In answer to the question 8, the behaviour best fits the description of 8b 'abusive, alarming distressing', leading to the 'borderline' offences of 'disturbance of the peace', 'nuisance' and in this case, a "public order" offence. It is important to note that, depending on the precise facts and circumstances of the case and the available law, prosecutors might consider charges such as threats or harassment, or insults alongside disturbance of the peace, nuisance and other similar offences.
- On point 6, the prosecutor selected a general penalty enhancement to present to the court, which was applied.

#### *Impact on data*

Recording guidance for prosecutors in England and Wales allows this and similar incidents to be recorded as a disability hate crime, even though there are no substantive disability hate crime offences in the national Criminal Code. This approach is particularly positive because it allowed the incident to be visible in prosecution performance data and also highlighted in the Crown Prosecution Service annual hate crime report.

#### *Potential implications for victims*

The correct investigation, recording and prosecution of all elements of the disability hate crime offences should contribute to improving the visibility of the victim experience at the national level. The access needs for victims with intellectual disabilities with regard to giving a statement and, where appropriate, to giving evidence should also be addressed in national policies, guidelines, training and practice.

## 5. Access to justice and support implications for victims

This chapter outlines several principles, based on ODIHR guidance, for national authorities to consider in order to ensure protection, support and access to justice for hate crime victims.

First, it should be ensured that hate crime cases and victims of hate crimes are identified as early as possible in the process, and that hate crime victims are recognized as such. This helps hate crime cases and victims of hate crimes to be identified as early as possible in the process.

Second, it should be guaranteed that hate crime victims can claim protection and support as a consequence of the harm they have suffered.

Finally, it should be ensured that hate crime victims may be heard during criminal proceedings and can participate in, or have access to criminal proceedings in order to present the impact a crime has had on them and obtain a decision on compensation by the offender.<sup>131</sup> Prosecutors play a central role in bringing these principles to life. It is therefore essential to qualify hate crimes as such accurately, so that victims have access to these benefits and rights.

There can be serious implications for victims' rights if offences that should be prosecuted as hate crimes are misqualified, for example, as basic offences without the bias motive or 'incitement speech'. These can impact victims' right to effective investigation, access to support and participation rights. Qualifying a case as a basic offence, without integrating the bias motive as part of the prosecution, denies the victim their right to an effective investigation that unmask bias motive. Prosecuting what should be a hate crime as, for example, an incitement to hatred or violence offence can distance victims from their rights if, for example, they cannot show that they have been directly harmed by the conduct.

In EU Member States, the EU Victims' Rights Directive<sup>132</sup> lays down rights for all victims of all crime. Notably, victims shall receive "a timely and individual

<sup>131</sup> OSCE/ODIHR, *Hate Crime Victims in the Criminal Justice System*, Chapter 3.

<sup>132</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (Eu Victims' Rights Directive), OJ L 315, 14 November 2012, pp. 57–73.

assessment” to determine specific protection needs related to vulnerability to secondary and repeated victimization, intimidation or retaliation.<sup>133</sup> Particular attention of the individual assessment is given to some categories of victims. In this regard, for instance, victims of hate crime shall be duly considered. The EU Victims’ Rights Directive also provides for a right to a review of a decision not to prosecute, in accordance with the victim’s role in the relevant criminal justice system.<sup>134</sup>

Finally, it is essential for prosecutors to receive ongoing training, with input from victim support organizations in order to become sensitized to the specific needs of victims of hate crime, including avoiding their re-victimization or secondary victimization during the investigation stage and the following proceedings.

## 5.1 THE RIGHT TO AN EFFECTIVE INVESTIGATION

Article 14 (prohibition of discrimination) of the European Convention on Human Rights<sup>135</sup> in conjunction with Article 2 (right to life) imposes on the criminal justice authorities a procedural duty to adequately investigate and unmask possible discriminatory motives in the commission of the offence.<sup>136</sup> In practical terms, this means that the full evidence of motive must be investigated and brought to the attention of the court, including where hate is only considered in the context of a penalty enhancement. This duty has been expanded to Article 14 in conjunction with Articles 3 (prohibition of torture and inhuman and degrading treatment)<sup>137</sup> and 8 (right to respect for private and family life).<sup>138</sup>

## 5.2 ACCESS TO SUPPORT

Protection and support rights for victims of hate crimes include immediate medical support, psychological counselling, legal aid and safe accommodation. ODIHR guidance makes a number of recommendations to responsible state authorities that aim to ensure victims’ full and early access to support.<sup>139</sup> In particular, victims of hate crime should be recognized as a distinct and particularly vulnerable

133 Article 22 of the [EU Victims’ Rights Directive](#) provides that victims shall receive “a timely and individual assessment, in accordance with national procedures, to identify specific protection needs and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings, as provided for under Articles 23 and 24, due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation” and that “particular attention shall be paid to victims who ...have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; ...In this regard, victims of... hate crime, ...shall be duly considered.”

134 Article 11 of the [EU Victims’ Rights Directive](#) — Rights in the event of a decision not to prosecute.

135 [European Convention on Human Rights](#).

136 *Nachova and Others v. Bulgaria*, No. 43577/98 and 43579/98, ECtHR, 6 July 2005; [Unmasking Bias Motives in crimes: selected cases of the European Court of Human Rights](#), FRA, 2018.

137 *Bekos and Koutropoulos v. Greece*, No. 15250/02, ECtHR, 13 December 2005.

138 *Balázs v. Hungary*, No. 15529/12, ECtHR, 20 October 2015.

139 OSCE/ODIHR, [Hate Crime Victims in the Criminal Justice System](#), Chapter 3.

category of victims, in law and/or policy. This involves establishing a definition of a hate crime victim and defining criteria for early access to protection and specialist support. This means that victims should have these rights whether or not they report the crime and whether or not the case progresses through a criminal justice process. With regard to countries within the EU, under Article 8 of the EU Victims' Rights Directive,<sup>140</sup> access to support services is not dependent on victims making a formal complaint with regard to a criminal offence to a competent authority.

Prosecutors should be aware that, although victims may have the right to support even without making a formal complaint, several factors can limit their access to this right. Firstly, police and other authorities who initially interact with hate crime victims may not be informed about or fail to communicate the availability of support services. Additionally, there may be insufficient referral processes to specialist support services, coupled with a very limited availability of these specialized services for hate crime victims.<sup>141</sup> Prosecutors can play an important role in checking whether victims have been referred to support services and in assessing and meeting relevant access or protection needs.<sup>142</sup>

### 5.3 ACCESS TO PARTICIPATION RIGHTS

ODIHR guidance makes a number of recommendations to responsible state authorities that aim to secure victims' rights as parties to the proceedings, where guaranteed in national law. Hate crime victims should also have effective and early access to criminal proceedings to enable them, at a minimum, to present the harm they have suffered and to obtain a decision on compensation.

In common law systems, procedural and participation rights for hate crime victims are typically limited. The state prosecutes crimes, and victims usually do not have the standing to participate directly in proceedings. However, victims can provide testimony and submit impact statements during sentencing. One example is the Canadian Victims Bill of Rights,<sup>143</sup> which allows victims to present testimony and seek restitution without directly participating in the prosecution.<sup>144</sup>

Conversely, in continental or civil law systems, victims often have more robust participation rights, allowing them to act as an injured party, join the prosecution and claim compensation. For instance, in Germany, victims of violent crimes can

140 [EU Victims' Rights Directive.](#)

141 [The State of Support Structures and Specialist Services for Hate Crime Victims, Baseline Report, OSCE/ODIHR, 22 October 2020.](#)

142 [OSCE/ODIHR, Hate Crime Victims in the Criminal Justice System, p. 112.](#)

143 [Canadian Victims Bill of Rights.](#)

144 [OSCE/ODIHR, Hate Crime Victims in the Criminal Justice System, p. 136.](#)



join as private accessory prosecutors, giving them rights to participate in the trial and influence proceedings.<sup>145</sup>

Recalling the case study in Section 4.4.1, what appeared to be bias-motivated assaults against a gay couple were qualified as nuisance (vandalism) under Section 339 of the Criminal Code. For the charge of 'nuisance', the constitutive element of the crime is to exhibit behaviour that is capable of causing outrage or alarm in others, and as such there are no direct victims. With this charge, the victims lost all access to justice and procedural rights. Had the crime been correctly qualified under Section 216, Violence against a member of the community, the targeted individuals in this case would have had access to these rights.

## 6. Data and policy development

As explained in Chapter 1, the correct qualification of hate offences by prosecutors will lead to the better visibility of hate crimes in statistics, policies, police records and ODIHR reporting data, as well as improved strategic responses by national authorities, particularly prosecution services. The incorrect qualification of offences generates investigation and prosecution data that create a misleading picture of the nature, extent and scale of hate offending, leading to misinformed policy, legal and practical responses. In practice, this could lead to a de-prioritization of community engagement with victim protection services.

Law enforcement, prosecutors and the courts should work together to identify whether and how hate crime cases are being misrecorded and misqualified as 'hate speech' cases, as well as other errors. Where national law uses general penalty enhancements to recognize the bias motive in hate crimes, specific flagging systems should be in place to ensure that potential hate crimes are recorded as early as possible. This work could take the form of inter-agency case reviews, which also consider victim support and communication, and would ideally be coordinated by specialist practitioners, drawing on promising practice from colleagues in other jurisdictions. Findings could inform strategic work to identify training needs, alongside gaps in legislation and policy. This work could be guided by agency-specific and inter-agency protocols that are supported by senior leadership of the respective institutions.<sup>146</sup>

Depending on the institutional context, where hate crime laws are being considered by parliament, prosecutors can have a role in sharing evidence of gaps in the law and, therefore, in their prosecution 'toolbox'. For example, their evidence might include cases that could not be prosecuted because specific groups are not yet protected in hate crime laws. Information shared by prosecutors might also indicate challenges in gathering evidence for, and effectively drawing the court's attention to the opportunity to apply general penalty enhancements.

<sup>146</sup> For further details on how to establish a system of standardised procedures for recording hate crimes, please see OSCE/ODIHR, [Hate Crime Data-Collection and Monitoring Mechanisms](#); see also OSCE/ODIHR, [Information Against Hate Crimes Toolkit \(INFAHCT\)](#).

Due to the complex, sensitive and high-profile nature of 'incitement speech' and the need to uphold fundamental rights to freedom of expression, for legal clarity it is often necessary for these cases to be considered by the higher courts. This might require specific leadership from prosecution authorities to take cases to the courts, where appropriate, in order to get this guidance. Affected parties, such as direct victims and affected communities, will need to be fully consulted so that expectations are managed.

## 7. Recommendations

As has been emphasized throughout this guide, hate crimes and criminalized 'hate speech' are conceptually, legally and practically distinct. This is a complex area of practice, which requires clear legal frameworks, guidance and training for all those involved in identifying and responding to hate crime and criminalized 'hate speech', and particularly at the intersection between these two areas. The role of the prosecutor is central to these efforts. This chapter summarizes key points covered in the guide for the benefit of practitioners and policymakers and supplements existing guidance on:

- Developing and implementing hate crime laws;<sup>147</sup>
- Creating comprehensive victim support policies and services;<sup>148</sup>
- Training, policies and procedures to support the effective prosecution of hate crimes;<sup>149</sup> and
- Implementing hate crime recording and data collection frameworks.<sup>150</sup>

### Legislators

- Review current hate crime legislation with the goals of 1) ensuring a comprehensive, clear and consistent legal framework on hate crime, allowing for prosecutors and courts to recognize bias motives in all hate crimes, and impose sanctions accordingly; and 2) a clear distinction between hate crime and criminalized 'hate speech' provisions.

147 OSCE/ODIHR, [Hate Crime Laws](#).

148 OSCE/ODIHR, [Hate Crime Victims in the Criminal Justice System](#).

149 OSCE/ODIHR, [Prosecuting Hate Crimes](#).

150 For further details on how to establish a system of standardised procedures for recording hate crimes, please see OSCE/ODIHR, [Hate Crime Data-Collection and Monitoring Mechanisms](#); see also OSCE/ODIHR, [Information Against Hate Crimes Toolkit \(INFAHCT\)](#).

## Policymakers

- Ensure coordination across a range of stakeholders, including criminal prosecution authorities and lawyers working with hate crime cases, when devising and implementing comprehensive policies and strategies on hate crime to increase the effectiveness of national hate crime response.
- Separate hate crime and criminalized 'hate speech' in relevant national strategies, action plans and policies, such as national anti-racism and hate crime action plans.
- Ensure that effective policies are in place for law enforcement, prosecutors and the courts to ensure the recording of hate crime and criminalized 'hate speech' as distinct offences.

## Law enforcement and criminal prosecution authorities

- Review existing standard operating procedures shared by police and prosecutors to take account of the practical implications identified in this guide, including how to distinguish between hate crime and criminalized 'hate speech' offences correctly.
- Consider applying and adapting the Prosecutor Decision Tree presented in this guide for national use.
- Support close coordination between law enforcement and prosecution services.
- Consider implementing a centralized response to hate crime and criminalized 'hate speech' referrals that is supported by a network of trained specialists.
- Mainstream victims' needs and rights throughout the investigation and judicial process.
- Use case examples and data to highlight gaps in national legal frameworks pertaining to hate crime and share these during relevant policy and lawmaking processes.

## Partner IGOs

- IGOs that have a mandate to work on 'hate speech' should consider building on this guide to develop complementary guidance on the prosecution of criminalized 'hate speech'.

## Civil society

- Use this guide in ongoing advocacy, victim support and capacity-building activities to secure appropriate and effective law, policy and practice in this area.

# Annexe: International standards and resources on criminalized ‘hate speech’

## INTERNATIONAL STANDARDS

### **Article 20(2) International Covenant on Civil and Political Rights (ICCPR)<sup>151</sup>**

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

### **International Convention on the Elimination of Racial Discrimination (ICERD), Article 4<sup>152</sup>**

States Parties (a) Shall declare an offence punishable by law ... incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin...

### **European Council Framework Decision 2008/913/JHA on combating certain forms and expression of racism and xenophobia by means of criminal law, Article 1<sup>153</sup>**

1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:
  - (a) **publicly inciting to violence or hatred directed against a group of persons or a member of such a group** defined by reference to race, colour, religion, descent or national or ethnic origin;
  - (b) [...]
  - (c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of

151 UN, ICCPR.

152 UN, ICERD.

153 EU European Council, [Framework Decision 2008/913/JHA](#).

the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin **when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;**

- (d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin **when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.**

**Recommendation CM/Rec(2022)16 of the Committee of Ministers to member States on combating 'hate speech', Council of Europe**<sup>154</sup>

*Criminal law*

11. Member States should specify and clearly define in their national criminal law which expressions of 'hate speech' are subject to criminal liability, *such as*:
- a. public incitement to commit genocide, crimes against humanity or war crimes;
  - b. public incitement to hatred, violence or discrimination;
  - c. racist, xenophobic, sexist and LGBTI-phobic threats;
  - d. racist, xenophobic, sexist and LGBTI-phobic public insults under conditions such as those set out specifically for online insults in the Additional Protocol to the Convention on Cybercrime concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189);
  - e. public denial, trivialisation and condoning of genocide, crimes against humanity or war crimes; and
  - f. intentional dissemination of material that contains such expressions of 'hate speech' (listed in a-e above) including ideas based on racial superiority or hatred.

**Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, Council of Europe**<sup>155</sup>

154 Council of Europe, [Recommendation on Combating Hate Speech](#).

155 Council of Europe, [Additional Protocol to the Convention on Cybercrime](#).

*Article 2 – Definition*

1 For the purposes of this Protocol: “racist and xenophobic material” means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.

[...]

*Article 3 – Dissemination of racist and xenophobic material through computer systems*

1 Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct: distributing, or otherwise making available, racist and xenophobic material to the public through a computer system.

[...]

*Article 4 – Racist and xenophobic motivated threat*

1 Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct: threatening, through a computer system, with the commission of a serious criminal offence as defined under its domestic law, (i) persons for the reason that they belong to a group, distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or (ii) a group of persons which is distinguished by any of these characteristics.

*Article 5 – Racist and xenophobic motivated insult*

1 Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct: insulting publicly, through a computer system, (i) persons for the reason that they belong to a group distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors; or (ii) a group of persons which is distinguished by any of these characteristics.

[...]



*Article 6 – Denial, gross minimisation, approval or justification of genocide or crimes against humanity*

1 Each Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right: distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.

## OTHER RESOURCES

The Rabat Plan of Action<sup>156</sup> on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence brings together the conclusions and recommendations from several OHCHR expert workshops (held in Geneva, Vienna, Nairobi, Bangkok and Santiago de Chile). By grounding the debate in international human rights law, the objective has been threefold:

- To gain a better understanding of legislative patterns, judicial practices and policies regarding the concept of incitement to national, racial, or religious hatred, while ensuring full respect for freedom of expression as outlined in articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR);
- To arrive at a comprehensive assessment of the state of implementation of the prohibition of incitement in conformity with IHRL and;
- To identify possible actions at all levels.

The Rabat Plan of Action was adopted by experts at the wrap-up meeting in Rabat on 4–5 October 2012.

The Camden Principles on Freedom of Expression and Equality, “The Camden Principles”,<sup>157</sup> were prepared by ARTICLE 19 on the basis of discussions involving a group of high-level UN and other officials, and civil society and academic experts in IHRL on freedom of expression and equality issues. The Principles set out the relationship between Freedom of Expression and Equality and “represent a progressive interpretation of international law and standards, accepted State

<sup>156</sup> UN OHCHR, [Rabat Plan of Action](#).

<sup>157</sup> Article 19, [Camden Principles on Freedom of Expression and Equality](#).

practice (as reflected, inter alia, in national laws and the judgments of national courts), and the general principles of law recognised by the community of nations.”

Council of Europe online course on [Combating 'hate speech'](#)

Council of Europe [Toolkit for Human Rights Speech](#)

OHCHR [Faith for Rights Toolkit](#)

ECRI General Policy Recommendations 7 and 15<sup>158</sup>