



Prosecuting Hate Crimes

A Practical Guide



IAP

International Association of Prosecutors

osce
ODIHR

PROSECUTING HATE CRIMES

A PRACTICAL GUIDE



IAP

International Association of Prosecutors

Published by the OSCE
Office for Democratic Institutions and Human Rights (ODIHR)

Ul. Miodowa 10
00-251 Warsaw
Poland
www.osce.org/odihr

© OSCE/ODIHR 2014

All rights reserved. The contents of this publication may be freely used and copied for educational and other non-commercial purposes, provided that any such reproduction is accompanied by an acknowledgement of the OSCE/ODIHR as the source.

ISBN 978-92-9234-899-1

Cover designed by Homework
Designed by Homework

Printed in Poland by

Contents

PREFACE	7
ACKNOWLEDGEMENTS.....	11
ACRONYMS	14
CHAPTER ONE – INTRODUCTION.....	15
1.1 Why should prosecutors be concerned about hate crimes?.....	15
1.2 Criminal justice system response to hate crimes.....	16
1.3 Aims and goals of this guide.....	17
1.4 What is in this guide?	18
CHAPTER TWO – UNDERSTANDING HATE CRIMES	19
2.1 Defining hate crimes	20
2.1.1 Hate crimes are criminal acts.....	20
2.1.2 Hate crimes are motivated by bias.....	20
2.1.3 Characteristics commonly protected by hate crime laws.....	21
2.1.4 Hate crime offenders.....	21
2.2 Related issues	22
2.2.1 Hate speech	22
2.2.2 Discrimination.....	24
2.2.3 Genocide and war crimes.....	24

2.3 Hate crime laws	25
2.3.1 Types of laws that address hate crimes	26
2.3.2 Substantive hate crime laws	27
2.3.3 Penalty enhancements.....	27
2.3.4 General sentencing provisions.....	28
2.4 Characteristics	29
2.4.1 Race and racism.....	29
2.4.2 Ethnicity, national origin, nationality	30
2.4.3 Xenophobia.....	31
2.4.4 Religion or belief.....	31
2.4.5 Sex and gender.....	32
2.4.6 Other groups.....	33
2.5 Mistakes in perception	34
2.6 Victims by association	35
2.7 The international and regional framework	36
2.7.1 The United Nations.....	36
2.7.2 OSCE.....	39
2.7.3 Council of Europe	40
2.7.4 European Union	43
CHAPTER THREE – BUILDING A CASE	45
3.1 Opening the file	45
3.1.1 Using bias indicators to identify a potential hate crime case	46
3.1.2 Brutality of the attack	48
3.1.3 Signs and symbols	50
3.2 Types of evidence of bias motivation	50
3.3 Working with victims and witnesses	51
3.3.1 Addressing issues of reluctance to report.....	52
3.3.2 Assessing credibility without bias or prejudice.....	53
3.3.3 Addressing conflicts with victims.....	54
3.3.4 Co-operating with victim’s counsel or victim advocates	55

3.4	Preparing the evidence.....	56
3.4.1	Admissibility.....	56
3.4.2	Common types and sources of direct evidence.....	57
3.4.3	Circumstantial evidence.....	60
3.4.4	More than one motivation: mixed motives	62
3.4.5	Presenting the impact on victims: physical and psychological.....	63
3.5	Charging a hate crime case.....	64
3.5.1	Alternative charges and initial legal qualification.....	64
3.5.2	Plea bargains or mediation	65
3.5.3	Countering defence arguments	67
3.6	Sentencing a hate crime case.....	71
3.6.1	Restitution and compensation	72
3.6.2	Other orders	72
3.6.3	Dealing with minors.....	72
CHAPTER FOUR – POLICIES AND PROCEDURES		75
4.1	Specialized guidance and training	75
4.2	Specialized units.....	77
4.3	Public awareness campaigns and outreach with community groups and civil society	79
4.4	Media strategies.....	81
4.5	Contributing to data collection and monitoring and public reports	82
4.6	Putting the pieces together: comprehensive approach to combating hate crimes	85
ANNEXES		87
Annex 1: ODIHR programmes and resources to combat hate crimes.....		87
Annex 2: OSCE commitments on hate crimes		89
Annex 3: List of key international instruments and jurisprudence		93
Annex 4: IAP standards		96

PREFACE

Hate crimes are criminal acts committed on the basis of prejudice and intolerance. They occur in every country and are often of a particularly violent nature and, as such, pose a serious threat to both victims and societies. This guide was developed to help prosecutors recognize and understand hate crimes and to prosecute them more effectively. The guide is a joint publication of the OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the International Association of Prosecutors (IAP).

The OSCE is the world's largest regional security organization, made up of 57 participating States. The OSCE Ministerial Council has repeatedly asserted that hate crimes not only infringe on individual human rights, but also have the potential to lead to conflict and violence on a wider scale.¹ Since 2003, OSCE participating States have made a number of commitments to address hate crimes.² In particular, participating States have committed themselves to "...strengthen training for all sectors of the criminal justice system – law enforcement, prosecutors and judges."³

In response to the Ministerial Council's decisions, ODIHR has developed a range of programmes and publications to assist participating States in ad-

¹ See, for example, OSCE Ministerial Council, Decision No. 9/09, "Combating Hate Crimes", Athens, 1-2 December 2009. The text of all relevant OSCE decisions can be found in Annex 2.

² OSCE Ministerial Council, Decision No. 4/03, "Tolerance and Non-Discrimination" Maastricht, 2 December 2003.

³ OSCE Ministerial Council, Decision No. 9/09, *op. cit.*, note 1.

addressing hate crimes effectively and comprehensively. ODIHR's approach recognizes that isolated steps to combat hate crimes have only a limited impact, and that prosecuting hate crimes is most successful when it is part of a broader approach. ODIHR's contribution to the development of this guide has, therefore, drawn on the Office's extensive knowledge of many aspects of addressing hate crimes, as well as on its experience of working in different country contexts throughout the OSCE area.

The International Association of Prosecutors (IAP) is the only worldwide organization for prosecutors. It was established in 1995 to improve, *inter alia*, co-operation in the prosecution of transnational crime and to set standards for prosecutors. The IAP's "Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors"⁴ were formulated in 1999 and were endorsed by a Resolution of the United Nations Commission for Crime Prevention and Criminal Justice in 2008.

Since holding its 8th European Regional Conference in The Hague in 2008, the IAP has made addressing hate crimes an essential area of professional development for prosecutors. At the 15th IAP Annual Conference, which took place in The Hague in September 2010, a workshop on Hate Crime entitled "Hate Crime – towards universal recognition and action" provided an opportunity for prosecutors from all over the world to review and comment on an early concept paper developed for this guide. For the present publication, ODIHR drew on the IAP's numerous experts, as well as the Association's experience-based insight into hate crime prosecutions.

This guide was produced as an additional tool to improve the investigation and prosecution of hate crimes.⁵ Developed by experts from various jurisdictions across the OSCE region, the guide is relevant to different legal systems and legislative frameworks. We hope that the guide will be used extensively and encourage its users to disseminate it widely and to translate it into local languages.

We acknowledge that the guide cannot address detailed issues of law and procedure that may arise in different jurisdictions. Therefore, ODIHR is ready to offer its support to participating States that wish to use the guide

⁴ See <http://www.iap-association.org/Resources-Dokumentation/IAP-Standards/Professional-Responsibility/Standards_English>. The full text of the Standards is included in Annex 4.

⁵ The Guide is available for download at <<http://www.osce.org/odihr/prosecutorsguide>>.

as a basis for developing national or local policies and/or training for prosecutors.

Michael Georg Link
Director
ODIHR

Elizabeth Howe
General Counsel
International Association
of Prosecutors

ACKNOWLEDGEMENTS

This guide was developed by ODIHR in close co-operation with prosecution experts from across the OSCE region and in collaboration with the IAP. The development of this guide was made possible thanks to generous contributions by the governments of Austria, the Netherlands, the United Kingdom and the United States.

An initial core group of prosecution experts helped develop the overall structure and content of this guide. Elizabeth Howe of the IAP and Nasrin Khan and Allison Jernow of the International Commission of Jurists were instrumental in the conceptualization and drafting of the guide. A larger group of prosecutors provided feedback and guidance at a series of roundtable discussions organized during the drafting process in 2011 and 2012. Participants at the roundtables also provided their own observations and some of the case examples used in this guide.

Based on this input, the guide was drafted by ODIHR and edited and revised by Peter Eicher. A training manual was prepared, and a pilot training to test the practical application of the guide was conducted in July 2012. Prior to its publication in 2014, the guide was used in training sessions conducted by ODIHR, in which it was adapted to the local legal situation and used as a basis for training.

ODIHR and IAP express their gratitude to those involved in the drafting process, and would like to extend particular thanks to the following members of the Expert Reference Panel:

- **Reshat Abdiev**, Deputy Prosecutor, Prosecutor's Office of the Autonomous Republic of Crimea, Ukraine;
- **Agnieszka Adamowicz**, Prosecutor of the District Prosecutor's Office in Lublin, Poland;
- **Arstanaly Arakeev**, Prosecutor, the Prosecutor General's Office of the Kyrgyz Republic;
- **Patrícia Naré Agostinho**, Prosecutor, Central Department of Investigation and Prosecution, Office of Prosecutor, Portugal;
- **Elisabetta Ceniccola**, Prosecutor, Public Prosecutor Office, Italy;
- **Artur Davtyan**, Deputy Head of the Department on Crimes against Individuals, General Prosecutor's Office of Armenia;
- **Oana Dragomir**, Prosecutor, International Judicial Co-operation, Prosecutor's Office attached to the Supreme Court of Cassation and Justice, Romania;
- **Nataliya Dryomina-Voloc**, Senior Researcher, National Academy of the Public Prosecutor's Office of Ukraine;
- **Birgitte Arent Eiriksson**, Rigsadvokatassessor, Director of Public Prosecutions, Denmark;
- **Miguel Angel Aguilar Garcia**, Prosecution Coordinator, Prosecutor's Office of Barcelona, Service of Hate Crimes and Discrimination, Spain;
- **Kamal Gilijov**, Head of Supervision over Law-Enforcement Agencies Department, Office of the Prosecutor General, Azerbaijan;
- **Dimitrios Gizis**, Public Prosecutor at the Athens Court of First Instance, Greece;
- **Barbara van Haren**, Prosecutor, Public Prosecution Office, National Expertise Centre on Discrimination, Zwolle, Netherlands;
- **Jakob Holmberg**, District Attorney, Prosecutor's Office of Malmo, Sweden;
- **János Homonnai**, Prosecutor at the Chief Prosecution Office of the Capital, Hungary;
- **Gordana Janicijević**, Deputy Republic Public Prosecutor of the Republic of Serbia;
- **Maia Kvirikashvili**, Head of the Human Rights Unit at Chief Prosecutor's office of Georgia;
- **Oleksii Lazarenko**, Senior Expert, Human Rights Monitoring Unit, Ministry of the Interior, Ukraine.
- **Bodan Lazarevski**, State Prosecutor's Office, former Yugoslav Republic of Macedonia;
- **Daniela Masheva**, Prosecutor's Office, Bulgaria;
- **Lars Morand**, Senior Public Prosecutor, Malmo, Sweden;

- **Eduard Patic**, Prosecutor of the Human Rights Section, Prosecutor General's Office, Moldova;
- **Kuandyk Rakhmetov**, Senior Prosecutor, Department for Supervision over Legality of Investigation and Interrogation, Prosecutor General's office of the Republic of Kazakhstan;
- **Goran Rubil**, Prosecutor, District Prosecutor's Office of Dobož, Bosnia and Herzegovina;
- **Eugen Rusu**, Deputy General Prosecutor, General Prosecutor's Office of Moldova;
- **Amina Ruždić**, Prosecutor, Cantonal Prosecutor's Office of Sarajevo, Bosnia and Herzegovina;
- **Nikola Samardžić**, Deputy Basic State Prosecutor in Herceg Novi, Montenegro;
- **Arben Smaçi**, Prosecutor in the Prosecution Office of Shkodra District, Albania;
- **Miloš Šoškić**, Deputy Basic State Prosecutor in Podgorica, Montenegro;
- **Ewa Stasiak**, Public Prosecutor, Poland;
- **Kole Sterjev**, State Prosecutor's Office, former Yugoslav Republic of Macedonia;
- **Anar Taghiyev**, Prosecutor, International Relations Department, Office of the Prosecutor General of Azerbaijan;
- **Bruno Vekarić**, Deputy War Crimes Prosecutor, The Office of the War Crimes Prosecutor of the Republic of Serbia;
- **Maartje Vrins**, Senior Policy Advisor, Public Prosecution Service, National Expertise Centre on Discrimination, Netherlands;
- **Saskia Wildemors**, Prosecutor, Public Prosecution Office, National Expertise Centre on Discrimination, Haarlem, Netherlands; and
- **Aleksey Zhafyarov**, Head of the Division on Supervision of Implementation of the Legislation on Interethnic Affairs, General Prosecutor's Office of the Russian Federation.

ACRONYMS

CERD	Convention on the Elimination of all Forms of Racial Discrimination
CPS	Crown Prosecution Service of England and Wales
CRS	Community Relations Services, United States Department of Justice
CSO	Civil society group and/or organization
ECHR	European Convention on Human Rights
ECRI	European Commission against Racism and Intolerance
EU	European Union
IAP	International Association of Prosecutors
ICCPR	International Covenant on Civil and Political Rights
LGBT	Lesbian, gay, bisexual or transgender
ODIHR	OSCE Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
PAHCT	Prosecutors and Hate Crimes Training (ODIHR programme)
TAHCLE	Training against Hate Crimes for Law Enforcement (ODIHR programme)
UN	United Nations

CHAPTER ONE

INTRODUCTION

In simple terms, hate crimes are criminal acts where the victim is targeted because of her or his group identity (such as race, national origin, religion or another group characteristic). Hate crimes may target one or more persons or their property. Almost any crime contained in a penal code can be a hate crime.

It is the element of prejudice towards a group (the “bias motivation”) that distinguishes hate crimes from other crimes and makes them a subject of particular concern for national authorities and international organizations.

1.1 WHY SHOULD PROSECUTORS BE CONCERNED ABOUT HATE CRIMES?

Hate crimes attack fundamental rights. The principle of equal rights is a core principle in every democratic state and is usually enshrined within the constitution. Hate crimes are an extreme form of prejudice, since the victim is attacked because of his or her membership in a group. To the attacker, one member of that group is interchangeable with any other. Thus, hate crimes deny the human dignity and individuality of the victim and attack the principle that each individual is entitled to the equal protection of the law. As guardians of the rule of law and defenders of constitutional rights, prosecutors play an essential role in ensuring that fundamental

rights are given meaning. The effective prosecution of hate crimes upholds and protects democratic values.

Hate crimes are message crimes. Unlike victims of other criminal acts, hate crime victims are selected on the basis of *what* they represent rather than *who* they are. The victim is targeted because of his or her membership in a group. As such, hate crimes convey the message to both the victim and to their group that they are not welcome and they are not safe. This wider impact makes hate crimes more serious than the same crime without the bias motive.

Hate crimes seek to divide communities. Although not always the case, hate crimes are generally committed against groups that have already experienced some form of social discrimination. Members of marginalized groups (whether racial, ethnic, religious or other) who are victims of hate crimes may find that their experiences are not believed or are simply dismissed by law enforcement. The lack of an effective response from authorities encourages perpetrators to reoffend and further alienates the victim and her or his community. This, in turn, can undermine wider social cohesion, as communities are set against each other, and can provoke retaliatory attacks. At their most extreme, hate crimes can spiral into civil unrest if governments do not acknowledge and address them.

For individual prosecutors, these issues may seem remote. Hate crimes are unlikely ever to comprise more than a small proportion of the cases dealt with by any prosecutor, and many prosecutors will never have to prosecute such a case. However, unless prosecutors are equipped to recognize these cases and respond appropriately, there is a danger that when such cases do arise, the bias motivation will not be recognized. If hate crimes are not recognized or not properly addressed by the criminal justice system, both the victim and the wider community can lose confidence in the justice process.

1.2 CRIMINAL JUSTICE SYSTEM RESPONSE TO HATE CRIMES

Governments respond to hate crimes primarily through their criminal justice systems. Law-enforcement agencies and the judiciary are an integral part of that response. Hate crimes can be tackled effectively only where police, prosecution and courts work together.

Usually, the police are the first responders and, as such, are responsible for recording the crime, taking initial statements and investigating the crime further. In many jurisdictions, the prosecution supervises or leads the investigation, with police securing the evidence the prosecution needs for the trial. As such, the successful prosecution and sentencing in hate crime cases depends on police being trained to recognize and investigate hate crimes correctly, as well as to work with their victims, witnesses and affected communities.

The effective handling of hate crime cases requires close co-operation across the criminal justice agencies and not only at the operational level, but also at the policy level. Having a uniform definition of hate crimes and systems in place will ensure the smooth flow of case information across the criminal justice system and will facilitate co-operation.

While this guide is addressed primarily to prosecutors, it can also be used to increase the capacity of other branches of the law-enforcement system to address hate crime cases and to enhance co-operation throughout the criminal justice system.

1.3 AIMS AND GOALS OF THIS GUIDE

This guide aims to explain the impact of hate crimes by highlighting the specific features of hate crimes as compared with other crimes. It also presents the most common issues that arise for prosecutors in these cases, especially concerning evidence of bias motivation, the distinguishing factor in hate crimes.

Intended beneficiaries of this guide include:

- Front-line prosecutors, as well as investigators, police and judges, who may be required to collect evidence of bias motivation or to pass judgement on the sufficiency of evidence;
- Policymakers, for whom Chapter 4 of this guide is most relevant, as it introduces policies and programmes to help prosecutors become more effective in their duties;
- Members of civil society who may wish to understand hate crime prosecutions better for advocacy or public information purposes; and
- Representatives of communities that may be vulnerable to hate crimes and the general public, who will gain a better understanding of hate crimes and of the approach that prosecutors should take in address-

ing them, leading to increased confidence to and co-operation with the authorities.

The guide was written to be applicable for use in all types of criminal justice systems, both in terms of different legal models (civil or common law, or a combination thereof), different legislative frameworks and the different roles and functions of prosecutors in systems found across the OSCE region. Although drafted by legal experts, the guide has been written in a way that is accessible to those without a legal background, and reviewed by prosecutors from across the OSCE region. Concrete case examples are used throughout to illustrate key points.

1.4 WHAT IS IN THIS GUIDE?

Although prosecutors refer to national laws as their starting point, there sometimes exist ambiguities or gaps in legislation that fail to address many aspects of hate crimes. This guide examines those aspects and highlights strategies that can be applied to respond to them, regardless of the national legal framework in place. **Chapter One** introduces the concept of hate crimes and explains why these cases need to be taken seriously. **Chapter Two** provides a deeper understanding of hate crimes and the context for hate crime prosecutions. It discusses different types of legal frameworks and their impact on prosecutions. It also describes the international legal framework surrounding hate crimes. **Chapter Three** discusses the process of building a prosecution case, including recognizing indicators that a case might be a hate crime, proving motive, gathering key types of evidence and countering potential defences. **Chapter Four** explores the development of effective hate crime policies by governments and criminal justice actors that can contribute to improved responses, including the successful prosecution of hate crimes.

CHAPTER TWO

UNDERSTANDING HATE CRIMES

This chapter explores the concept of hate crime in greater detail and relates it to national legislation and other background information that will help prosecutors deal with hate crimes effectively.

A hate crime is any act which is:

- prohibited under criminal law (“the base offence”); and
- motivated by prejudice based on a specific characteristic of the victim (“the bias motivation”).

The *base offence* can be directed towards one or more persons or property. The *bias motivation* is the offender’s prejudice towards the victim based on a characteristic that represents a deep and fundamental part of a shared group identity, such as race, language, religion, ethnicity, nationality, gender or other characteristics.⁶

While national legislation will determine the exact elements of the offence, understanding the concept of hate crimes can help prosecutors use their national laws more effectively.

⁶ See *Hate Crime Laws: A Practical Guide*, (Warsaw: ODIHR, 2009), p. 16, <<http://www.osce.org/odihr/36426>> and *Preventing and Responding to Hate Crimes: A Resource Guide for NGOs in the OSCE Region*, (Warsaw: ODIHR, 2009), p. 16, <<http://www.osce.org/odihr/39821>>.

2.1 DEFINING HATE CRIMES

Hate crimes are criminal acts committed with a bias motive.⁷ The term “hate crime” does not define a specific legal offence; rather, it describes a concept.

2.1.1 *Hate crimes are criminal acts*

A hate crime is always based in a crime that is committed under a penal or other code provision that imposes some form of punishment for the prohibited conduct. Without that initial, criminal act, there is no hate crime.

Many countries distinguish between crimes and less serious infractions. These less serious offences are often contained in separate codes, and different jurisdictions apply various terminologies, such as “misdemeanours”, “minor offences” or “administrative offences”. In this guide, the “base offence” of a “hate crime” refers to all acts which constitute an offence under domestic criminal law.

2.1.2 *Hate crimes are motivated by bias*

A criminal act is a hate crime if it is motivated by bias or prejudice. The use of the word “hate” can mislead people into thinking that the defendant must hate the victim or the victim’s group for a criminal act to be considered a hate crime. This is not the case. The factor that turns an ordinary crime into a hate crime is the perpetrator’s selection of a victim based on a bias or prejudice about the group to which the victim belongs. The term “bias-motivated crimes” is, therefore, used in this guide interchangeably with “hate crimes”. The term “discriminatory crimes” can also be used to emphasize that hate crimes are an extreme form of discrimination. Hate crime laws use different terms to establish bias motives, and do not always use the word “hate”. Some laws refer to “motives of hostility”⁸; others do not refer to any emotional state of the defendant, but simply penalize crimes where the victim is *selected* due to their group characteristic. The evidence required to

⁷ This definition has been recognized by the OSCE participating States and is contained, inter alia, in OSCE Ministerial Council Decision No. 9/09, *op.cit.*, note 1.

⁸ See *Hate Crime Laws: A Practical Guide*, (ODIHR: Warsaw, 2009) which discusses and gives examples of different types of hate crime laws and the implications of different word choices, <<http://www.osce.org/odihr/36426>>.

prosecute a hate crime is determined by the type of law – the *hostility model* or the *discriminatory selection* model – that has been adopted in national legislation. These models are discussed further in Chapter 3.

2.1.3 *Characteristics commonly protected by hate crime laws*

Prosecutors and investigators need to be able to quickly identify cases that could be hate crimes. Hate crimes target one or more members of, or property associated with, a group that shares a common characteristic. These are referred to as *protected characteristics*.

Protected characteristics must:

- create a common group identity; and
- reflect a deep and fundamental aspect of a person's identity.

Group characteristics are often apparent or noticeable to others, such as language, gender or ethnicity, and are often immutable; they cannot be changed by a decision of the bearer.

Therefore, if an offender targets wealthy people for theft, such cases would not be recognized as hate crimes. This is because wealth is not a characteristic that creates a shared group identity, nor is it a deep and fundamental part of a person's identity in the same way as race or religion. By contrast, crimes that target victims because of their national origin, for example, would be hate crimes.

While acknowledging national differences as to which characteristics should be included in hate crime laws, this guide focuses on examples in which the protected characteristics are fundamental or unchangeable, such as shared ethnic, religious or other identities that are most often recognized in human rights law.

2.1.4 *Hate crime offences and offenders*

Hate crimes can also be committed against property. Where property is associated with a particular group and is targeted for that reason, an attack on it would be classified as a hate crime. Examples include neo-Nazi graffiti on the wall of a synagogue, or nationalistic symbols on a house belonging to a person from an ethnic minority. Such acts send a message that the entire community is not valued or wanted in local society.

Hate crimes can range from vandalism to serious physical abuse, including homicide. The most serious hate crimes are often characterized by extreme levels of brutality and cruelty. While these cases tend to garner headlines, it is important to recognize that they do not comprise the bulk of hate crimes. Most hate crimes are less serious offences committed against people or property.

There is no single type of hate crime offender. In some jurisdictions, hate crimes are addressed within the framework of extremist or politically motivated criminality. While there might be a tendency to focus on perpetrators who are members of extremist groups, bias-motivated crimes are often committed by ordinary people who have no ties or connections to extremist organizations, even if they share their prejudices. Hence, the assumption that all perpetrators of hate crimes are extremists can mean that the bias element is overlooked or minimized because the alleged perpetrator of a hate crime does not fit into that category.

2.2 RELATED ISSUES

2.2.1 *Hate speech*

Public expressions of hate, often referred to as hate speech, represent a serious concern, as they can create environments that are conducive to hate crimes and fuel broad-scale conflict.

Legal responses to hate speech need to be carefully balanced with the fundamental right to freedom of expression and opinion.⁹ While many OSCE participating States regulate hate speech to a greater or lesser degree, there

⁹ There are several recent resources that address the balance of freedom of expression and hate speech. The Council of Europe has published a useful reference guide on emerging principles on hate speech from the European Court of Human Rights, see Anne Weber, *Manual on Hate Speech* (Council of Europe Publishing: Strasbourg, 2009), <<http://book.coe.int/ftp/3342.pdf>>. For a factsheet issued by the Council of Europe on hate speech, see <http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf>.

is no consensus among states within the OSCE region as to whether forms of expression that do not incite violence should be criminalized.¹⁰

Most OSCE participating States criminalize speech that publicly incites hatred towards a group defined by shared characteristics. Some also outlaw insults against certain groups, speech denigrating a person's or a nation's honour or dignity and/or the public condoning, denial or gross trivialization of genocide, crimes against humanity and war crimes. Hate speech crimes are conceptually distinct from hate crimes, since the first element of the hate crime definition – the base offence – is missing.

All participating States have prohibitions on speech that constitutes an immediate threat or incitement to violence.¹¹ In contrast to classic hate speech offences, these prohibitions include both elements of the OSCE definition. Incitement to violence, regardless of motive, is a basic criminal offence and, when committed with a bias motivation, both elements of hate crime are present.

Prosecutors should understand the differences between the concepts of hate speech and hate crime, and should be aware of the risks involved in conflating these concepts in their prosecution practice. In line with human rights standards relating to the right to a fair trial, prosecutors should always seek the charge that best corresponds to the act that has been committed. Even in jurisdictions that do not provide for specific hate crime laws, prosecuting hate crimes under hate speech provisions is to be avoided.

¹⁰ Discussions on the issue are ongoing in international forums, with the prevailing opinion being that there is a high threshold for criminal prosecution of incitement to hatred. See the six-part test for prohibiting incitement to hatred in the "Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence", developed during the four regional expert workshops organized by Office of the United Nations High Commissioner for Human Rights (OHCHR) in 2011, and adopted by experts in Rabat, Morocco, on 5 October 2012, <http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf>.

¹¹ The international community seems to be also increasingly inclined to only prohibit speech that incites violence. For example, in UN Human Rights Council Resolution 16/18, which was adopted by consensus by the UN General Assembly, the only mention of criminal penalties for inciting religious hatred was in relation to "incitement to imminent violence based on religion or belief." See UN General Assembly Resolution No. 66/167, "Combating intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons, based on religion or belief", 19 December 2011, A/RES/66/167, <http://www.un.org/en/ga/search/view_doc.asp?symbol=%20A/RES/66/167>.

2.2.2 *Discrimination*

Discrimination refers to the less favourable treatment of individuals in areas such as education, employment and access to goods and services on the basis of group characteristics such as race, religion or ethnicity. Acts of discrimination are part of a spectrum of behaviours that can lead to hate crimes.

Discrimination is most frequently regulated under civil law, but in some countries there also exist provisions for criminal penalties in cases of discrimination. Such laws do not come within the definition of hate crimes because there is no base offence; in other words, there is no criminal act that exists independently from the bias element. Additionally, discrimination law is subject to different and very detailed legal principles and jurisprudence. As a consequence, while discrimination is a serious issue and can set the context for the commission of hate crimes, this guide does not address discrimination law.

2.2.3 *Genocide and other war crimes*

International law, as well as many national laws, prohibits genocide and other war crimes, such as crimes against humanity. Some of these crimes include the targeting of individuals because of their affiliation with a particular group. For example, the legal definition of genocide requires that there be an intention to destroy – in whole or in part – a national, ethnic, racial or religious group.¹² However, these types of crimes are qualitatively and quantitatively different from hate crimes, as they take place in the context of widespread, systematic acts of violence. While bias and prejudice may also underpin these serious and complex crimes, the legislative, investigative and prosecution issues arising from them are different. Therefore, such crimes are beyond the scope of hate crimes addressed in this guide.

¹² See Article 2 of the Convention on the Prevention and Punishment of Genocide, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx>>.

2.3 HATE CRIME LAWS

While specific hate crime laws serve to enshrine society's rejection of hate crimes and facilitate effective data collection, hate crime prosecutions can still be pursued in the absence of specific provisions.

All legal systems recognize that crimes that cause greater harm, or that are especially offensive to common values, should warrant heavier penalties. Crimes motivated by bias fulfil both of these criteria. They are more damaging both because of their effect on the wider community and because they offend the principles of equal rights and equal protection of the law.

Bias crimes, by nature, are criminal acts that are already penalized under the law, but criminal justice systems should ensure that the additional harm caused by a bias motivation is reflected in the judgment and the penalty. Hence, evidence of bias motive should be presented to the court so that this harm can be taken into account for conviction and sentencing.

Case Example **Sentencing a hate crime case in the absence of a specific hate crime law**

Two men were sitting in the park in a city in the Netherlands. The offender approached them and asked if they were gay. When one of the men confirmed this, the offender made a derogatory statement about gays and said "I will show you what we do with gays." The offender kicked one of the men in the head and started kicking and beating the other man. When the police arrived, the offender insulted the police and violently resisted arrest.

While there is no direct hate crime provision in the Dutch Criminal Code, when passing a sentence the judge nevertheless took into consideration the specific circumstances of the case. Based on the statements and insults made by the offender that demonstrated her/his bias motivation, the judge imposed an increased penalty.

Commentary: This case illustrates that the prosecution of hate crimes is not dependent on the existence of hate crime laws or even on the ability to label a criminal act a hate crime. Nearly any criminal justice system can impose a sentence based on the specific circumstances of the case and craft a penalty proportionate to the harm caused by the crime. In this case, the court recognized that the two individuals were targeted for assault because they admitted to being gay, and acknowledged the potential that such violence has to destabilize societies.

Source: Court of Appeal Amsterdam, the Netherlands, 15 December, 2011, no. 23-003278-11, National Jurisprudence Number (LJN): BU8317.

The following sections examine how laws can be used to prosecute hate crimes. Also discussed are the different types of laws and some of the commonly protected characteristics, as well as the application of hate crime laws to cases where victims are targeted because of their association with protected groups or because of the mistaken belief that they belong to such groups.

2.3.1 *Types of laws that address hate crimes*

All OSCE participation States have some legislation that can be applied to hate crimes.¹⁵ In general, there are two types of hate crime laws: substantive offences and penalty enhancements. However, general sentencing provisions can be applied to recognize bias motivation and to seek an appropriate sentence where there is an absence of specific hate crime legislation or where significant gaps exist.

¹⁵ For a comprehensive discussion on types of hate crime laws in the OSCE region and key points to consider when drafting legislation, please refer to *Hate Crime Laws: A Practical Guide* (Warsaw: ODIHR, 2009), *op. cit.*, note 8. ODIHR also maintains a database of legislation, including a database on current hate crime laws across the OSCE region at <<http://legislationline.org>>.

2.3.2 *Substantive hate crime laws*

A substantive hate crime law is a separate provision within the law that includes the bias motive as an integral element of the legal definition of the offence. Usually, this separate offence will carry a higher penalty than the same act without the bias motive. For example, in the United Kingdom, racially or religiously aggravated assault is a specific offence that is distinct from the offence of assault without a bias motivation.¹⁴

A second model of substantive hate crime provision is crime defined by violence or threats of serious injury against a group of people or an individual on the basis of a protected characteristic. Such provisions exist, for example, in the Czech Republic, Slovakia and Poland.¹⁵

With this type of law, the motive must be stated in the charge or indictment, and all the elements of the offence must be proven in order to support a conviction.

2.3.3 *Penalty enhancement laws*

A penalty enhancement is sometimes referred to as an “aggravating circumstances” provision. In simple terms, this involves increasing the penalty for a base crime when it is committed with a bias motive. The penalty enhancement may be general or specific.

A general penalty enhancement applies to all crimes in the penal code. For example, in Finland, grounds for increasing the punishment for a crime includes when “the crime has been motivated by race, colour, national or ethnic origin, religion or belief, sexual orientation or disability or by other comparable ground.”¹⁶ Provisions on the general enhancement of penalties are usually found in the general part of the code applicable to all crimes.

¹⁴ See Articles 28-32 of the Crime and Disorder Act 1998, <<http://www.legislationline.org/documents/action/popup/id/4200>>.

¹⁵ See Article 352 of the Czech Criminal Code, <<http://www.legislationline.org/documents/action/popup/id/15725>>, Article 359 of the Slovak Criminal Code, <<http://www.legislationline.org/topics/country/4/topic/4/subtopic/79>> and Article 119 of the Polish Penal Code, <<http://www.legislationline.org/documents/action/popup/id/15755>>.

¹⁶ See the Criminal Code of Finland, Section 5, <<http://www.legislationline.org/documents/action/popup/id/4136>>.

A specific penalty enhancement may only be applied to certain crimes, as defined by law. For example, in Ukraine, prison terms for intentional serious bodily injury are increased from five to eight years to seven to ten years when the crime is “motivated by racial, ethnic or religious intolerance.”¹⁷ The specific penalty enhancement is often contained in a section immediately following the provision defining the related base offence.

The majority of hate crime laws in the OSCE region fall within the category of penalty enhancement. The penalty enhancement can only be applied if a bias motivation has been substantiated before the court in the fact-finding phase of the case.

2.3.4 *General sentencing provisions*

States without express provisions to address bias motivation can use general sentencing principles to impose a proportionate sentence for hate crimes. There are several ways to prosecute hate crimes in jurisdictions that do not provide for specific hate crime legislation:

- **Motives of the perpetrator.** Some sentencing provisions, such as those of the German Criminal Code, specifically allow the “motives of the perpetrator” to be taken into account when imposing a sentence.¹⁸
- **Prosecution policies.** In some states, prosecution services have policies that allow them to seek a specific sentence increase for hate crimes. For example, in the Netherlands, the Guidelines of Criminal Procedure require prosecutors to seek a 50 per cent increase in the sentence for certain crimes, including physical assault, threats, vandalism and damage to property, motivated by bias against the protected grounds listed in its anti-discrimination provision.¹⁹
- **Other sentencing factors.** Some states allow the court to take into account other factors when sentencing hate crimes, such as the grave consequences of the crime, the exceptional cruelty of the act or the par-

¹⁷ See Article 121 of the Criminal Code of Ukraine of 5 April 2001, No. 2341-III with amendments and supplements, and as amended by the Law N 5284-VI (5284-17) of 18 September 2012, <<http://www.legislationline.org/documents/action/popup/id/18763>>.

¹⁸ See the Criminal Code of the Federal Republic of Germany, Article 46(2), available at <<http://legislationline.org/documents/section/criminal-codes/>>.

¹⁹ See *Guidelines for Sentencing Demands in Discrimination Case [Richtijn voor Strafvordering Discriminatie]* (1999R007) (amended 1 September 2009); See also the discrimination provisions of Sections 137c to 137g of the Criminal Code [*Wetboek van Strafrecht (WvSr)*].

ticular vulnerability of the victim. This can ensure that the increased harm caused by bias-motivated crimes is recognized within the criminal sanction.

To pass an increased sentence on the basis of one of the above conditions, the court must be presented with evidence of the bias motivation during the fact-finding phase of the case.

2.4 CHARACTERISTICS

Most hate crime laws list a limited set of protected characteristics. What constitutes a protected characteristic varies in different jurisdictions, but most laws penalize, at a minimum, crimes based on racial, national or religious bias. Other characteristics, such as gender, disability, sexual orientation and gender identity, are also frequently included in the list of protected characteristics.

Most of the characteristics included in hate crime laws have a clear meaning, but some, such as “race” or “ethnicity”, require a degree of interpretation, and are not always well understood. As such, in states where the national law does not contain definitions of these terms, it may be useful for prosecutors to make use of internationally accepted definitions. A few of the most commonly used and contentious terms are discussed below.

In some cases, hate crime targets are selected because of several protected characteristics. The different biases of the perpetrator may not be equally evident, however. It is important for prosecutors to be aware of this and to strive to identify all the biases underlying a hate crime. For example, gender bias is one cross-cutting motivation that is often easy to overlook in a hate crime prosecution involving other protected characteristics (see Section 2.4.5 below).

2.4.1 *Race and racism*

The word “race” is used to refer to groups of people who are considered distinct due to physical characteristics, such as skin colour. It is important to understand, however, that race is a social construct, and that the international community has rejected any doctrine of racial superiority or

theories that attempt to determine the existence of distinct human races.²⁰ Nevertheless, although the term “race” is not precise, it remains prevalent in international and national texts as an umbrella term that captures concepts such as ethnicity, skin colour and/or national origin.

If the word “race” appears in national legislation, but is not defined or broadly understood in national justice systems, it may be useful for prosecutors to refer to international instruments. These include Article 1 of the United Nations (UN) Convention on the Elimination of All Forms of Racial Discrimination²¹ (CERD), which defines the related term “racial discrimination” as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

2.4.2 *Ethnicity, national origin, nationality*

As discussed in the preceding section, terms related to “ethnicity”, “national origin” or “nationality” can overlap with the broader term “race”. However, in many national laws, these terms are also used in addition to the term “race” and take on more specific meanings.

An “ethnic” group is one which is distinguished by a collection of characteristics, such as a distinct religion, culture, geographical origin, history and language. A “national” group can have two meanings. In the narrow sense it refers to a legal concept linked to citizenship, or “nationality”, which reflects the legal bond between the state and the individual. It does not necessarily indicate ethnic origin. It may also have a wider meaning relating to “national origin”, which indicates cultural affiliation with a national group that may be linked to a country other than that of one’s citizenship.

²⁰ See The Durban Declaration and programme of action, World Conference against Racism, preamble, 2001, <<http://www.un.org/WCAR/durban.pdf>>.

²¹ All OSCE participating States are signatories to the CERD, but many have entered reservations in respect of, *inter alia*, the right to freedom of expression. The full text of the CERD is available at <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>>.

2.4.3 *Xenophobia*

Although hate crime laws most frequently refer to motives such as racism and ethnic hostility, such terms can also encompass the concept of xenophobia, if not otherwise stated. “Xenophobia” is generally defined as hostility towards those who are “foreign”. Offenders whose acts are based on xenophobic motives may target a wide range of groups, such as those who are seen by the offender as compromising their country’s unity or collective national identity. Hence, they may target racial, ethnic or religious minorities, as well as those seen to support such minorities.

In addition to having a bias motive, xenophobic crimes may also include a political element. When committed as part of a broader pattern of terror or on a large scale, they are more likely to be prosecuted under anti-terrorism laws than as hate crimes.²² Although hate crimes and terrorism overlap, terrorist crimes are usually aimed at exerting pressure on governments and political goals, while most hate crimes lack such objectives.

2.4.4 *Religion and belief*

Freedom of religion or belief is enshrined in a number of international and regional instruments.²³ It is one of three core protected characteristics, along with race and nationality that are included in nearly every hate crime provision in the OSCE region. In 2011, the UN General Assembly adopted resolution 66/167, which condemns acts of violence targeting persons or property

²² For example, on 22 July 2011, Anders Breivik bombed government buildings in Oslo Norway, leaving eight dead, before heading to a Labour Party youth camp where he opened fire on young participants at the camp, killing 69 people. He declared that his motive was to save Norway and Western Europe from being taken over by Muslims. His victims included Muslims and non-Muslims, immigrants and ethnic Norwegians. Breivik viewed anyone who supported liberal politics as a legitimate target. He was charged with terrorism-related crimes and convicted of these charges in August 2012.

²³ Freedom of religion or belief is a founding principle of the OSCE, contained in Principle VII of the Helsinki Declaration of 1975, and has been reaffirmed in subsequent OSCE commitments. This freedom is also enshrined in Article 18 of the Universal Declaration of Human Rights; Article 18 of the International Convention on Civil and Political Rights; Article 8 of the European Convention on Human Rights; and Article 12 of the American Convention of Human Rights, among other documents.

based on their religious association, and calls on states to protect religious sites subject to destruction and vandalism.²⁴

If there is no specific definition of religion or belief in national legislation, it may be helpful for prosecutors to examine General Comment 22 of the UN Human Rights Committee, which provides an authoritative interpretation of provisions included in the International Covenant on Civil and Political Rights (ICCPR).²⁵ The Committee has stated that the concept of freedom of thought, conscience or religion encompasses “theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief”, and that the terms “religion” and “belief” should be construed in the broadest terms to include both institutional and lesser-known belief systems.²⁶

2.4.5 Sex and gender

OSCE participating States have committed themselves to making equality between men and women an integral part of their policies.²⁷ Specifically, OSCE participating States have committed to “prevent and combat all forms of gender-based violence against women and girls”.²⁸ In addition, a number of OSCE participating States have included gender and/or sex as a protected characteristic in their hate crime laws or hate crime recording policies.²⁹

²⁴ “Resolution 66/167 adopted by the UN General Assembly: Combating negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons based on religion or belief”, A/RES/66/167, 19 December 2011,

²⁵ The full text of the ICCPR is available at <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>>.

²⁶ General Comment No. 22, Article 18 on freedom of conscience, thought or religion, para. 2. For further information on international standards with respect to freedom of religion or belief, see the ODIHR *Guidelines for Legislation on Freedom of Religion or Belief*, adopted by the European Commission for Democracy through Law (Venice Commission), 18-19 June 2004, <<http://www.osce.org/odihr/13993>>.

²⁷ OSCE Ministerial Council, Decision No. 14/04, “2004 OSCE Action Plan for the Promotion of Gender Equality”, <<http://www.osce.org/mc/25295>>.

²⁸ OSCE Ministerial Council, Decision No. 15/05, “Preventing and Combating Violence Against Women” Ljubljana, 6 December 2005, <<http://www.osce.org/mc/17451>>.

²⁹ Twenty-one OSCE participating States include sex, gender or gender identity as characteristics protected under their hate crime laws. Several states have included these characteristics in their hate crime recording policies, and, in 2012, 17 OSCE participating States reported in the ODIHR Annual Hate Crime Report that they collect data on hate crimes motivated by gender-based bias. See *Hate Crimes in the OSCE Region: Incidents and Response – Annual Report for 2012* (Warsaw: ODIHR, 2013), p. 79 <<http://tandis.odihr.pl/hcr2012>>.

“Sex” refers to male or female biological characteristics, while “gender” is a social construct and refers to socially accepted ideas of masculinity or femininity. Targeting a person because of their sex, or because their behaviour offends mainstream thinking with regard to how one should act according to one’s sex, constitutes a gender-based hate crime. Gender should, therefore, be systematically considered when prosecuting hate crimes.

Prosecutors should be aware of the intersection between gender and other protected characteristics in hate crimes. For example, in cases of attacks on Muslim women wearing headscarves, the attacks may be targeting both gender and religion.

2.4.6 Other groups

There is no consensus among OSCE participating States as to which groups should be included within the “protected characteristics” of hate crime laws. There is an emerging practice, however, of including a growing number of groups as protected characteristics.

Statistics and other materials published in the ODIHR annual report on *Hate Crimes in the OSCE Region: Incidents and Responses* show that hate crimes against lesbian, gay, bisexual and transgender (LGBT) persons are a serious issue throughout the OSCE area. Twenty participating States collect data on crimes motivated by bias against these protected characteristics, and ten also included transgender identity as a separate category.⁵⁰

The UN Convention on Rights of Persons with Disabilities⁵¹, which has been ratified by 46 OSCE participating States, recognizes state obligations to protect people with disabilities from violence. The ODIHR annual report on *Hate Crimes in the OSCE Region: Incidents and Responses* indicates that 16 OSCE

⁵⁰ *Hate Crimes in the OSCE Region: Incidents and Responses – Annual Report for 2012*, ODIHR, op. cit., note 29, p. 79. Within the UN community, there is also an emerging recognition that individuals should not be subjected to violence based on their sexual orientation or gender identity. See the Statement on behalf of the 62 United Nations members, including 41 OSCE participating States (UN General Assembly, *Statement on Human Rights, Sexual Orientation and Gender Identity*, 18 December 2008, available at: <<http://www.unhcr.org/refworld/docid/49997ae312.html>>).

⁵¹ See <<http://www.un.org/disabilities/convention/conventionfull.shtml>>.

participating States report collecting data on hate crimes on the grounds of disability.³²

2.5 MISTAKEN PERCEPTION

Another question to be addressed by prosecutors is how national law applies to situations in which a defendant is mistaken about the identity of a victim when committing a crime. For example, if a man wearing a turban is attacked under the mistaken belief that he is a Muslim, can the offender be prosecuted for committing an anti-religious hate crime? In the majority of OSCE participating States, national hate crime laws allow cases of mistaken perception to be prosecuted as hate crimes.

Most hate crime laws are qualified by the defendant's motive for choosing the victim. Under these laws, the prosecution must establish that the defendant believed the victim belonged to a certain group, and that the crime was committed because of a bias against that group. For example, Hungary's Criminal Code³³ describes an offender as "any person who assaults another person for being a member or a *presumed* member" (emphasis added) of a protected group. The inclusion of the word "presumed" means that mistakes of perception are covered by the law. Likewise, the Criminal Code³⁴ of Greece states that the commission of "an act of hatred committed for reasons of race, color of skin, religion, descent, national or ethnic origin or sexual orientation or gender identity" constitutes an aggravating circumstance. This wording means that if an offender assaults a person under the mistaken belief that he or she is a "foreigner", then the victim's actual nationality is irrelevant.

Where the law focuses on the victim's membership in a protected group, some jurisdictions have drafted laws that specifically cover instances of mistaken perception. For example, France's Penal Code³⁵ imposes increased penalties when "the offence is committed because of the victim's actual or

³² *Hate Crimes in the OSCE Region: Incidents and Responses – Annual Report for 2012*, ODIHR, *op. cit.*, note 29, p. 87.

³³ Article 216(2) of the Criminal Code of Hungary (2013), <<http://www.legislationline.org/documents/action/popup/id/15735>>.

³⁴ Article 79 of the Criminal Code of Greece, <<http://legislationline.org/documents/action/popup/id/16289>>.

³⁵ Articles 132-76 of the Penal Code of France, <<http://www.legislationline.org/documents/action/popup/id/18771>>.

supposed membership or non-membership of a given ethnic group, nation, race or religion.”

Even in jurisdictions in which national hate crime legislation focuses on victim membership rather than offender motivation, crimes involving mistaken perception can still be prosecuted as hate crimes. Most legal systems do not allow mistakes of fact of this type to negate criminal liability. In any event, bias motivation can be taken into account under general sentencing principles as discussed in Section 2.3.4 of this Guide.

2.6 VICTIMS BY ASSOCIATION

Some hate crimes involve the targeting of victims not because of their personal characteristics, but because of their association with a person or people against whom the perpetrator has a bias. Targets by association can include interracial couples and people who support minorities or human rights causes, including members of civil society groups and organizations working on human rights’ issues on behalf of minority groups, such as migrants or gays and lesbians. In such cases, it might be that the victim belongs to the same ethnic group, for example, as the defendant. The bias motivation for such crimes remains the same as for those in which the victim is a member of a different group than the perpetrator.

If hate crime provisions require that the prosecution needs only to prove the defendant’s subjective motivation for the crime to be considered a hate crime, then cases of victim by association can also be prosecuted under hate crime provisions. For example, under the Criminal Code of Ukraine³⁶, the prosecution has simply to prove that the defendant committed the crime “based on racial, national or religious enmity or hostility.” Under these circumstances, the victim’s membership in a particular racial, religious or national group is not relevant.

By contrast, if the law requires that the victim be a member of a protected group, victim by association cases can be prosecuted as hate crimes only if there is an express provision in the law. In such cases, however, prosecutors can rely on general sentencing principles to highlight a bias motivation.

³⁶ Article 67(3) of the Criminal Code of Ukraine, <<http://www.legislationline.org/documents/section/criminal-codes>>.

2.7 THE INTERNATIONAL AND REGIONAL FRAMEWORK

The concept of hate crime is grounded in the universal principles of equal rights, tolerance and democratic values that are reflected in a number of international treaties and instruments, as well as regional standards. National laws developed on these issues are often rooted in international standards and obligations.

2.7.1 *The United Nations*

The UN human rights framework requires states to guarantee equal rights and the equal protection of laws and to prevent discrimination. The Universal Declaration of Human Rights provides the framework for the principles of equal rights and non-discrimination, and was the first international instrument to affirm that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as “race”, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”³⁷

The ICCPR expands on these principles by providing specific treaty provisions. Articles 6 and 7 guarantee an individual’s rights to life and freedom from inhuman and degrading treatment, respectively, while Article 2 requires that states have sufficient legislative, judicial and other measures to ensure that a remedy is available in the event of treaty violations. The Human Rights Committee, which oversees the treaty’s implementation, has observed that states have an obligation to investigate violations committed by state and private actors against individuals.³⁸

In particular, Article 2 of the ICCPR contains provisions on the non-discrimination principle similar to those found in the Universal Declaration, while Article 26 goes into more detail on equality before the law, equal protection of the law and protection from discrimination. Thus, the ICCPR obligates states to investigate violence committed against individuals and to do so without discrimination.

³⁷ The Universal Declaration of Human Rights (UDHR), <<http://www.un.org/en/documents/udhr/>>.

³⁸ The United Nation Human Rights Council (UNHRC), General Comment 31: The Nature of the General Legal Obligations imposed by the Covenant, adopted on 29 March 2004, UN Doc CCPR/C/21/Rev.1/Add.13, paras.s 6-8.

The CERD is even more specific about state duties to investigate racist violence, requiring states to implement legislation prohibiting acts of violence and incitement to violence based on racism, in addition to certain forms of racist speech.³⁹ The CERD Committee, which oversees the treaty's implementation, has emphasized the "importance of prosecuting racist acts, including minor offences committed with racist motives, since any racially motivated offence undermines social cohesion and society as a whole."⁴⁰ The Committee has also recommended that, in order to assist victims of racism in bringing cases to court, states should ensure that victims are allowed to participate in criminal proceedings in accordance with jurisdictional rules, are kept informed about the progress of proceedings, are protected against reprisals or intimidation and that they have access to compensation and assistance, where available.⁴¹

As described in the box below, the Committee has underscored that it is the duty of the prosecution to ensure that a racist motivation is fully investigated. Failure to do so when there is *prima facie* evidence of bias motivation in connection with a serious crime is considered a violation of Article 6 (on effective remedies) and Article 2, paragraph 1(d) (on bringing an end to racial discrimination by all appropriate means) of CERD.⁴²

³⁹ Article 4(a) of CERD states: "States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and... inter alia: (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, 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, and also the provision of any assistance to racist activities, including the financing thereof...". See UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, <<http://www.refworld.org/docid/3ae6b3940.html>>. As there is no consensus as to when speech can be restricted without infringing the right to freedom of expression, many states have entered reservations to this provision.

⁴⁰ Committee on the Elimination of Racial Discrimination General Comment 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, Sixtieth Session, Supplement No. 18 (2005) UN Doc A/60/18, p. 103, para. 15.

⁴¹ *Ibid.*, pages 104-05, para. 17.

⁴² Committee on the Elimination of Racial Discrimination, Communication No. 46/2009, Opinion adopted by the Committee at its eightieth session, 13 February to 9 March 2012, CERD /C/80/D/46/2009, in the case of *Mahali Dawas and Yousef Shava v. Denmark*.

Opinion of the Committee on the Elimination of Racial Discrimination under article 14 of the CERD in the case of *Mahali Dawas and Yousef Shava v. Denmark*

The CERD Committee opinion in this case examined the state duty to take effective action against acts of discrimination under Article 2, and to provide effective remedies under Article 6 in relation to the adequate investigation and prosecution of hate crimes. In the case before the Committee, the petitioners were a family of Iraqi immigrants living in Denmark, who were repeatedly subjected to racist taunts and verbal abuse in their housing complex. At one point, a crowd of 35 neighbours tried to break down their door, shouting racist slogans after allegations that a family member took a necklace. The crowd gained entry into the residence, damaging windows and interior items and physically assaulting the two male petitioners. Although the police investigated the incident, when the prosecutor received admissions of guilt from the perpetrators regarding assault and property damage charges during early proceedings, the prosecutor amended charges and requested a summary hearing. By taking such action, the prosecutor failed to inquire into the potential bias motivations of the crime. The Committee was of the opinion that when investigating and prosecuting crimes with a potential bias motivation, the prosecution has a duty to ensure that racist motivation is fully investigated through the criminal proceedings. The Committee especially emphasized that the potential gravity of the event – during which 35 people stormed a house, using violence and shouting racial epithets – required a full investigation of the potential bias motivation under the obligations of the treaty.

Commentary: This case placed a strong burden on the prosecutor to ensure racist motivation was thoroughly investigated. The offensive comments made during the event and the clearly xenophobic statements of the perpetrators leading up to the event imposed a duty to fully consider the racist motivation of the crime. Even though there were other possible motives present in the incident (retaliation for an alleged theft and property damage committed by the victims' family) prosecutors are obliged not to automatically exclude racist motivation without a thorough investigation.

Although the UN framework does not require states to adopt specific hate crime laws, there is an emerging recognition of the duty to investigate, prosecute and punish hate crimes. As states regularly report to the UN on their progress in implementing the rights enshrined in the treaties to which they are States Parties, their records on hate crimes can come under scrutiny.⁴³

2.7.2 OSCE

Since 2003, when the term “hate crimes” was first officially used by the OSCE, the Ministerial Council has repeatedly asserted that hate crimes affect not only the individual, but that they also have the potential to lead to conflict and violence on a wider scale.⁴⁴ The 57 OSCE participating States have all actively agreed to abide by these commitments, which are developed and agreed on by consensus and are politically binding.

The 2009 Ministerial Council Decision on Combating Hate Crimes⁴⁵ remains one of the most comprehensive commitments by the international community concerning state obligations to address hate crimes. In this decision, participating States committed themselves to, *inter alia*:

- collect, and make public, data on hate crimes;
- enact, where appropriate, specific, tailored legislation to combat hate crimes;
- take appropriate measures to encourage victims to report hate crimes;
- develop professional training and capacity-building activities for law-enforcement, prosecution and judicial officials dealing with hate crimes; and
- promptly investigate hate crimes, and ensure that the motives of those convicted of hate crimes are acknowledged and publicly condemned by the relevant authorities and the political leadership.

⁴³ Committee on the Elimination of Racial Discrimination General Recommendation 7: Legislation to eradicate racial discrimination, article 4, 23 August 1985. Also General Recommendation 07 (General Comments), which requests states to submit information on legislation and its application in their periodic reports.

⁴⁴ See, OSCE Ministerial Council Decision No. 4/03, *op. cit.*, note 2. A full list of relevant OSCE commitments can be found in Annex 2.

⁴⁵ OSCE Ministerial Council Decision No. 9/09, *op. cit.*, note 1.

2.7.3 Council of Europe

Forty-seven of the 57 OSCE participating States are signatories of the Council of Europe's European Convention on Human Rights (ECHR).⁴⁶ As such, judgments passed by the European Court of Human Rights ("the Court"), which is the ECHR enforcement mechanism, are highly influential within the OSCE region. On a number of occasions, the Court has considered states' obligations under the ECHR in relation to crimes based on bias motives. These cases have all concerned Article 14 of the Convention, which contains the principle of non-discrimination, and can be invoked only if another, substantive right under the Convention is in issue.

A number of key principles have emerged from these cases. These principles build upon each other to create a coherent jurisprudence on the obligation of states to investigate bias-motivated crimes promptly and effectively, whether such crimes are committed by state actors or private individuals, and to ensure that bias motivation is identified and appropriately addressed by the criminal justice system. Court jurisprudence echoes and expands on the same legal interpretations of international standards included in the ICCPR and CERD.

The paragraphs below set out some of the core holdings of the Court with regard to investigating hate crimes and provide a short synopsis of the cases that led to those holdings.

States have the obligation to conduct prompt and effective investigations into violent crimes involving violations of the right to life and the right to be free from ill-treatment.

To give meaning to the right to life (Article 2) and the right to be free from ill-treatment (Article 3) under the ECHR, states have a "positive obligation" to undertake effective investigations into crimes that interfere with those rights.⁴⁷ This positive obligation includes two aspects: first, states are required to take measures to ensure that individuals within their jurisdic-

⁴⁶ For the full text of the ECHR, see <http://www.echr.coe.int/Documents/Convention_ENG.pdf>.

⁴⁷ *Nachova and Others v. Bulgaria*, Judgment of the European Court of Human Rights (Grand Chamber), 6 July 2005.

tions are not subjected to ill-treatment, whether by state actors or by private individuals. Second, states are required to conduct an official investigation within a reasonable timeframe.

Prosecution and investigation authorities must be impartial in their assessment of the evidence before them.

In the case of *Stoica v. Romania*, where the alleged ill-treatment by police of a 14-year-old Roma boy left him with permanent disabilities, the Court found that the military prosecutors had premised their findings on the statements of the police officials, who had reasons to wish to exonerate themselves and their colleagues from any liability. At the same time, the prosecutors had dismissed all statements by villagers, all of whom were of Romani ethnicity, on the grounds of an alleged bias in favour of the applicant. Additionally, the prosecutors had ignored statements by police officials that the villagers' behaviour was "purely Gypsy", a statement that in the eyes of the Court demonstrated the stereotypical views of the police.⁴⁸

While states do not need to pass specific hate crime legislation, the criminal justice system must be able to identify, recognize and appropriately punish racist-motivated crime.

In the case of *Angelova and Iliev v. Bulgaria*⁴⁹, the applicants alleged that the state had failed in its obligation to conduct an effective and prompt investigation into the death of a Roma man, and that the lack of legislation for racially motivated murder failed to provide adequate legal protection against such crimes. The Court held that a lack of direct hate crime laws did not hinder the ability of the authorities to pursue the racist motivation during the criminal process, and that the general legal framework allowed for an appropriate and enhanced punishment for these types of crimes. The Court's decision underscored that, although states are not required to have specific hate crime laws, crimes that are particularly egregious, includ-

⁴⁸ *Stoica v. Romania*, Judgment of the European Court of Human Rights, 4 March 2008.

⁴⁹ *Angelova and Iliev v Bulgaria*, Judgment of the European Court of Human Rights, 26 July 2007.

ing those causing increased harm to individuals and society, such as hate crimes, require proportionate punishment under the law.

In cases of deprivation of life and ill-treatment, state authorities have the duty to conduct effective and prompt investigations without discrimination. As such, any racist or anti-religious motivation must also be effectively and promptly investigated under reasonable circumstances.

In *Angelova and Iliev v. Bulgaria*, the Court also examined the role of authorities in uncovering a racist motivation. The police had identified the alleged assailants in the death of a Roma man, one of whom directly admitted the racial motivation for the crime. However, the police failed to conduct the necessary investigative proceedings within the statute of limitations for prosecutions against most of the suspects. The Court held that the domestic authorities had failed to conduct a prompt and effective investigation into the incident, especially “considering the racial motives of the attack and the need to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racial violence.”⁵⁰ Consequently, the Court found Bulgaria to be in breach of the procedural aspect of the right to life (Article 2) in connection with the principle of non-discrimination (Article 14) because the authorities failed to make the “required distinction from other, non-racially motivated offences, which constitutes unjustified treatment irreconcilable with Article 14.”⁵¹

In *Sesic v. Croatia*, the Court extended that same reasoning to violations of the investigative procedural aspect of the right to be free from ill-treatment (Article 3) in connection with Article 14. The applicant was a Roma man who was severely beaten by two individuals with wooden bats while they shouted racial abuse. Despite several leads, police failed to take reasonable investigative measures to find the perpetrators and bring them to justice. The Court held that state authorities have the duty, when investigating violent incidents, “to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence

⁵⁰ Ibid., para. 105.

⁵¹ Ibid., para. 117.

and brutality on an equal footing with cases that have non-racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.”⁵²

In *Milanovic v. Serbia*, the Court extended the same principles concerning crimes motivated by racism to crimes motivated by an anti-religious bias.⁵³ The applicant, a member of the Vaishnava Hindu, or Hare Krishna, religious community, was subjected to numerous physical attacks around the time of major Serbian Orthodox religious holidays. The state was held in breach of the procedural aspect of Article 3 (prevention of ill-treatment) in conjunction with Article 14 (non-discrimination principle) for failing to investigate effectively and promptly the religious bias motivation of the crimes. In particular, the Court noted that the police failed to take the victim’s case seriously, even though there was a pattern of targeting minorities around religious holidays. Instead, the police referred to the victim’s religion and “strange appearance”, which suggested that any investigative steps were *pro forma* and inadequately addressed the seriousness of the anti-religious bias motivation presented in the case.

The Court has, therefore, made clear that, in crimes involving bias on the grounds of race or religion, the state is held to a very high standard. Investigators and prosecutors must recognize and give additional weight to the bias element of crimes and take all reasonable steps to collect evidence of motive and bring offenders to justice. Prosecutors must, therefore, assess the evidence in a fair and unbiased manner and ensure that witness evidence is not dismissed on the basis of stereotypes. Where investigators appear to have applied stereotypes, prosecutors must be aware of the responsibility to challenge these and to question whether the investigation was thorough and effective.

2.7.4 European Union

The European Union (EU) Framework Decision on Combating Racism and Xenophobia⁵⁴ is one of the EU’s official responses to hate crimes. This deci-

⁵² *Secic v. Croatia*, Judgment of the European Court of Human Rights, 31 May 2007.

⁵³ *Milanovic v. Serbia*, Judgment of the European Court of Human Rights, 14 December 2010.

⁵⁴ Council Framework Decision of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, 2008/913/JHA.

sion binds all EU member states to review their legislation and ensure compliance with the decision. It is intended to harmonize criminal law across the EU and to ensure that states respond with effective, proportionate and dissuasive penalties for racist and xenophobic crimes.

Although much of the decision concerns speech crimes, which are outside the scope of this guide, Article 4 states that, in all other types of crimes, all states must “take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties.” Article 8 requires that the initiation of investigations or prosecutions of racist and xenophobic offences must not be dependent on a victim’s report or accusation.

Thus, while the decision does not require the enactment of any specific legislation, it does require criminal justice systems to recognize and appropriately sentence bias-motivated crimes, placing the responsibility on investigators and prosecutors to bring these cases before the courts.

With regard to the victims of hate crimes, the Victims Directive (2012/29/EU)⁵⁵ identifies hate crime victims as particularly at risk of secondary or repeat victimization. This risk needs to be assessed by law enforcement at the earliest possible stage of criminal proceedings as part of the individual assessment of the victim. Special protection measures provided for in the Victims Directive are to be applied where necessary, in addition to the protection accorded to a victim of any crime. The EU member states are required to bring their laws and policies in compliance with the Directive by 16 November 2015.

⁵⁵ 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.

CHAPTER THREE

BUILDING A CASE

3.1 OPENING THE FILE

The initial file received by the prosecutor will probably have been prepared by the reporting officer or the first responding officer to arrive at the scene. Some of the key evidence can be irretrievably lost if not collected and recorded promptly by the police. The early recognition of potential bias motivation by police can, thus, have a critical impact on whether enough evidence is gathered, enabling the successful prosecution of the case as a hate crime.

In order to develop the necessary co-operation between the police and prosecution in hate crime cases, a shared understanding of the concept of hate crime and of protected characteristics is required, as is good inter-agency communication. While separate training programmes for law-enforcement agencies and for prosecutors on hate crimes are beneficial, joint training should also be considered in order to foster co-operation.⁵⁶

Whether a full file of evidence has been provided or little more than an outline of facts and some key data, it is ultimately for the prosecutor to determine if the case should be prosecuted as a hate crime and if any additional

⁵⁶ For more details on ODIHR's Training against Hate Crimes for Law Enforcement (TAHCLE) and Prosecutors and Hate Crimes Training (PAHCT), see Annex 1.

evidence is needed to prove the elements of the crime and the bias motivation.⁵⁷ The following sections explain how to use available information to build a hate crime case.

3.1.1 Using bias indicators to identify a potential hate crime case

Sometimes, when a prosecutor first reviews a case file, the bias motivation is immediately evident, for example, when the facts of the offence involve the use of words or symbols that show bias, or when the defendant admits that the crime was bias-motivated.

In cases where the bias motivation is not obvious, *bias indicators* are an excellent tool to help identify whether a crime constitutes a hate crime. Bias indicators help guide investigators and prosecutors through the factors that normally point towards a bias motive. The presence of one or more of these indicators suggests the existence of a bias crime, and should result in further investigation into motive. Bias indicators provide objective criteria by which probable motives can be discerned, but do not necessarily prove that an offender's actions were motivated by bias. Many of them can be used to build circumstantial evidence of the motive behind the offence, as discussed further in this guide.

A decision to flag a case as a hate crime can be taken at different stages by either the police or the prosecution. Bias indicators are, therefore, relevant both at the crime scene and when reviewing evidence of a crime.⁵⁸ Some countries have developed their own list of bias indicators that police and prosecutors apply to all cases to help determine motive. The excerpt in the box below is taken from a leaflet on hate crimes for police officers provided by the Polish Ministry of Interior and lists the most important bias indicators.

⁵⁷ In legal systems where the ruling on guilt and sentencing happen at separate stages and the law provides for penalty enhancement, additional penalties can be handed out by the sentencing court independently, without the prosecutor having to propose the inclusion of an enhanced penalty in the charge. Even when this occurs, however, the crime must be marked as a hate crime and the evidence prepared for presentation in court.

⁵⁸ See also *Preventing and Responding to Hate Crimes: A Resource Guide for NGOs in the OSCE Region*, ODIHR, op. cit., note 6.

Excerpt from “Hate Crimes: General Information for Police”,
Polish Ministry of Interior

Example of bias indicators for first responders

The key to any investigation is to answer the seven golden forensic questions: what, where, when, how, with what, why and who did it?

ATTENTION! The effective detection and prosecution of hate crime perpetrators begins at the time of disclosure or notification of the event. To a large extent, success depends on the knowledge and actions taken by the first responding officer who initiates police activities, including police intervention, actions at the scene and interviews with the victim, among others.

Signs indicating hate crimes

Crime indicators that suggest prejudices are based on objective facts, circumstances or actions of the perpetrator that either independently, or in conjunction with other facts and circumstances, suggest that the crime was motivated by hatred.

The following are a list of potential indicators.

- **Circumstances connected with the victim:** a person belonging to a minority group (e.g., national, ethnic, religious or sexual), by her or his relationship with a person belonging to a minority or through her or his promotion of a minority group.
- **Circumstances connected with the target of the crime:** in the case of property, this includes the property’s function (e.g., as a place of worship, cemetery or place of assembly of persons of a particular racial group, nationality or religion, etc.).
- **Circumstances connected with the offender:** conduct that is known to law-enforcement authorities that is consistent with organized hate groups; or the offender has previously been involved in incidents of this kind or is a member of an organized hate group.
- **The conduct of the offender:** comments, gestures, written statements (occurring both in the course of committing a crime and preceding it), signs, symbols, graffiti and crime scene drawings (including featuring racial, ethnic, religious or gender-related content).

- **Circumstances of time and place of the crime:** for example, if the incident coincided with a holiday or date relevant to the victim group; if a number of crimes or incidents of hate had already taken place in the same location; or if the location of the crime is generally known or perceived as an area associated with a particular minority group.
- **The victim or witness to a crime perceived it as motivated by bias.**
- **There is an absence of other motives.**

Commentary:

This leaflet was given to all police officers by the Ministry of Interior. The list of bias indicators is designed to help investigators pursue any lines of inquiry that might suggest a hate crime has occurred.

3.1.2 *Brutality of the attack*

In the case of a violent attack that has no obvious other motive, and where there is a racial or other group difference between the victim and the perpetrator, the brutality of the crime is a strong indicator that the crime might have been motivated by bias. Anyone can be a victim of a hate crime, regardless of whether or not they are a member of a minority group. However, certain groups suffer disproportionately from hate crimes based on their religion, race, ethnicity, disability or sexual orientation. In some, albeit rare, cases, bias crimes demonstrate extreme, brutal violence that stems from the way in which perpetrators seek to dehumanize victims against whom they hold biased and intolerant views. Hence, if the victim belongs or appears to belong to such a minority, and there is no other obvious motive (for example, economic), a further investigation into the motive for the crime is warranted.

Case Example Brutality of the attack

On the night of 7 August 2007, four young men, two of whom were minors, saw a stranger with a non-Slavic appearance walking on one of the central streets in Omsk, the Russian Federation. The four men attacked and killed the stranger by striking him in the head and body with a metal pipe and glass bottles. The girlfriend of one of the defendants filmed the murder with a mobile phone. Immediately following this deadly assault, one of the defendants attacked another man with a non-Slavic appearance, but the second victim escaped.

All of the defendants were found guilty of murder committed by a group of persons by prior agreement and motivated by ethnic hatred or enmity, pursuant to article 105, paragraph 2(1) of the Criminal Code. The defendant who attacked the second victim was also found guilty of intentionally causing bodily harm, committed on the grounds of national hatred or hostility (article 115, paragraph 2(b) of the Criminal Code). In imposing sentences, the court did not find that the defendants deserved leniency, and the judgment specifically recognized the bias motivation of the crimes. The two adult offenders received prison terms of 17 and 15 years, respectively, and the two minors were each sentenced to eight years in a juvenile correction facility. The victim was also awarded compensation for moral and material damages.

Commentary: The brutality of the murder of a person completely unknown to the offenders and who bears a different ethnic appearance from that of the perpetrators is an obvious bias indicator. This brutality is characteristic of xenophobic hate crimes, in which victims are targeted not because they belong to a specific minority group, but because they do not belong to the majority group. The second attempted assault against another person with a different ethnicity from the perpetrators established a pattern of conduct. The filming of the attack demonstrated a desire to memorialize the attack in order to spread and glorify the bias-motivated violence.

Source: <<http://genproc.gov.ru/smi/news/news-63124/>>

3.1.3 Signs and Symbols

Hate crime perpetrators sometimes use signs and symbols to indicate their affiliation with far-right or nationalistic ideology. While the swastika and other Nazi symbols are familiar to most people, there are many other symbols that are not immediately evident to anyone outside a specific group. These include numerical sequences that reference letters of the alphabet or significant dates that represent hate groups; they can also consist of abstract designs or slogans that might not be obviously bias-related. Hence, police and prosecutors might need to avail themselves of expert evidence in potential hate crime cases that involve such symbols. At the earliest stage of the case, when assessing bias indicators, Internet searches and consultations with experts might help to identify a possible bias motivation.

If it appears that symbols were used during the crime that indicate a bias motive, expert evidence of the meaning of such symbols will be required. Testifying experts can usually be found in, or recommended by, the Ministry of Interior or other relevant authorities⁵⁹, as well as in some civil society organizations. Some civil society organizations also maintain online databases with signs and symbols, such as the Polish *Nigdy Wiecej* (“Never Again”) or the US-based *Anti-Defamation League*,⁶⁰ that have sections on their websites in which neo-Nazi symbols are collected.

3.2 TYPES OF EVIDENCE OF BIAS MOTIVATION

Before gathering additional evidence, the prosecutor determines whether the relevant provisions or law require proof of “hate” or hostility by the offender, or whether the law requires only that the offender target an individual because of her or his actual or presumed connection with a particular group. These two different approaches are known as the *hostility model* and the *discriminatory selection model* of legislation, respectively. The discriminatory selection model takes an objective approach, as the prosecution need prove only that the perpetrator selected the victim due to his or her membership in a particular group. The selection of the victim does not need to involve negative emotions on behalf of the perpetrator towards an in-

⁵⁹ For example, the German Ministry of Interior and the French Gendarmerie have databases and experts in extremist symbology.

⁶⁰ See <<http://nigdywiecej.org>>, <http://archive.adl.org/hate_symbols/default_graphics.html>.

dividual or a group. In other words, the question to be asked is “Was this victim selected because of their group identity (for example, race, ethnicity or religion)?” and not whether the perpetrator “hated” the targeted group. The discriminatory selection model would apply, for example, if a perpetrator admitted to targeting a migrant based on the belief that the migrant would not report the crime to the police because of her or his immigration status.

The hostility model takes a more subjective approach, which sometimes requires that additional evidence of animosity towards the victim group be provided. This could comprise the offender’s admission that the defendant wants all migrants out of her or his country because they take away jobs from citizens, or the use of xenophobic slurs directed at the victim. In some countries, hate crime laws explicitly provide for the *demonstration* of hostility to be regarded as sufficient evidence, making simple proof of such demonstration (for example, if slurs were shouted at the victim during the attack) sufficient, without the need to infer a hostile motive from such acts.

In practice, these legislative approaches mostly require similar types of evidence, since bias and prejudice are the drivers of hate crimes regardless of the model of legislation used. When building a hate crime case, prosecutors ask the same key questions irrespective of the model, even if their approaches to the question of sufficiency of evidence might differ.

3.3 WORKING WITH HATE CRIME VICTIMS AND WITNESSES

Hate crimes have some distinguishing features that prosecutors and investigators need to keep in mind when assessing evidence from victims and witnesses. Many victims of hate crimes are reluctant to come forward and tell the full story of their victimization for a variety of reasons. They are often members of marginalized communities and, as such, experience discrimination as a regular part of their daily lives. Authorities need to be aware that for some victims, approaching law enforcement can be a challenge in itself. The special needs of hate crime victims in criminal proceedings are acknowledged in regional legal instruments, such as the EU Victims Directive.

Gender is another important consideration when dealing with victims and witnesses to hate crimes. Gender bias can be a motive, or one of the motives, for hate crimes, in which case it needs to be identified and the case prosecuted accordingly. In their work with both victims and witnesses, pros-

ecutors should at all times consider the gender aspects of the case. Where possible, policies for addressing gender when prosecuting hate crime cases should be devised. Such policies may address certain procedural issues, for example, reconciling the needs of victims with rules governing the appearance of the victim or witness in court. Hate crimes victims generally, and victims of sexual violence or gender-based crimes in particular, often struggle to face the perpetrators in the courtroom.

3.3.1 Addressing issues of reluctance to report

Under-reporting is common in hate crime cases⁶¹. There are some common factors that may explain a victim's reluctance to report the crime to authorities, as set out below.

Fear of identification: Some victims fear identification, such as having their sexual orientation revealed to family and friends, or their status as an irregular migrant coming to the attention of authorities.

Lack of trust: Some ethnic, religious or racial minorities might have a history of negative experiences involving law enforcement, often including racial profiling or other forms of discrimination. It might be the case that the victim or a member of the victim's community have in the past reported a bias-motivated case that was not pursued or was not pursued as a hate crime ("under-recording"). Police might even have tried to dissuade the victim from reporting the case as bias-motivated, leading to the victim to doubt whether the authorities will do enough to investigate and prosecute the case in question. For these reasons, victims might be distrustful of investigators and prosecutors and appear to be uncooperative.

Secondary victimization: Members of a minority community might have routinely experienced discrimination and hostile treatment from their neighbours, and even from the authorities. They might feel that they will

⁶¹ "European Union Minorities and Discrimination Survey, Main Results Report", European Union Fundamental Rights Agency, (Vienna: 2009). Under-reporting is also frequently reported during focus groups with civil society representatives, organized by ODIHR in preparation for the delivery of in-country training on hate crimes for law-enforcement officials. While no international survey has been conducted to measure the level of under-reporting specifically in gender-based hate crime, cases of violence against women are among the most under-reported.

experience similar mistreatment if they ask authorities for assistance. In addition, the first response of the authorities to the victim's report might not have been sensitive to the victim's physical and psychological state, discouraging her or his further involvement with the authorities. Such fears can perpetuate the lack of trust between community groups and authorities.

Security concerns: Although there is a notion that hate crimes are usually random attacks, many hate crimes occur within small communities and involve neighbours. Victims might fear repercussions if the perpetrator knows where they live or work. In cases involving organized hate groups, a victim might feel especially threatened. In such cases, prosecutors can consider the practicality and availability of seeking special witness-protection measures, such as the use of screens or video evidence in court, and can work with the local police to address security concerns at the victim's home. The availability of these measures varies across jurisdictions, but they are likely to be applied only in more serious cases and where the prosecutor can show that the interests of justice are served by adopting such measures.

Since the victim is the most important witness in most cases, being aware of these issues and taking steps to reassure victims (to the extent possible) is an important part of building a case. Prosecutors should ensure that victims' concerns are addressed at the earliest opportunity, either directly or through the police or other agencies, and should apply for the appropriate protection measures in their jurisdiction, using both criminal and civil means, as applicable. Attention should be paid to the particular position of women as victims and witnesses in this regard. Being aware of cultural differences and building trust with local communities can be a time-consuming process, but it can help prosecutors and other law-enforcement officials to greatly increase witness and victim co-operation.⁶² This point is discussed in more detail in Section 4.3.

3.3.2 Assessing credibility without bias or prejudice

Another aspect of working with victims is being aware of applying stereotypes when assessing a witness's credibility. Some witnesses and victims might appear uncooperative for reasons mentioned above. Others, in

⁶² See, for example, *Preventing and Responding to Hate Crimes, a Resource Guide for NGOs in the OSCE Region*, ODIHR, *op. cit.*, note 6, p. 29.

the opinion of law-enforcement personnel, might not be credible. Such opinions must not be based on stereotypes or bias. In *Stoica v. Romania* and in *Milanovic v. Serbia*, for example, the European Court of Human Rights found that the states concerned were in breach of their obligation to investigate cases involving bias motivation effectively. In those cases, the Court emphasized that the stereotyped views of the investigators and prosecutors towards the victims contributed to the Court's decision that failure to investigate was partly due to racial discrimination in breach of Article 14 of the ECHR.

In dealing with the complex issues surrounding victims at the initial identification phase of a case, prosecutors can utilize any existing partnerships with victim and/or witness services, civil society organizations or community groups.

3.3.3 *Addressing conflicts with victims*

Sometimes there can be a conflict between the victim's interests and the interests of justice. The victim may want to drop the case or seek mediation or other forms of settlement, while the prosecutor may feel the seriousness of the crime demands a prosecution. In other instances, the victim may insist on prosecution, while the prosecutor may not have the evidence needed to pursue a potential bias motivation. The key to addressing conflicts is communication with the victim and developing an understanding of the victim's perspective.

In jurisdictions where the prosecution does not require the victim's consent to prosecute a crime (referred to as "public crimes" in some civil jurisdictions), the prosecutor should be sensitive to the possible reasons why the victim is reluctant to pursue prosecution and attempt to mitigate this where possible. Conversely, where there is insufficient evidence to successfully prosecute a potential bias motivation of a crime, the prosecutor should inform the victim of other avenues of legal redress, such as private prosecution or civil actions. Prosecutors should also be equipped to refer victims to appropriate support services provided by the government and civil society organizations, such as medical and psychological counselling, legal counselling or victim-support services.

3.3.4 *Co-operating with victim counsel or victim advocates*

In jurisdictions that allow civil party claims or other forms of legal representation for victims, communication with the victim's counsel can be helpful to the prosecution. Where a victim's lawyers have full participation rights in the proceedings, they may be better suited to asking the victim questions because of their closer professional relationship. Moreover, they may be able to suggest useful enquiries that the prosecution could pursue based on their knowledge of hate crimes within the victim's community, of which police and prosecutors may not be aware. In that way, a victim's counsel is in a position to help the case by providing a fuller account of the impact and context of the crime for sentencing purposes.

Case Example

Working with victims who have special needs

Disability hate crimes can be especially difficult cases for prosecutors. Not only must the prosecutor prove that the perpetrator was motivated by a bias against disabled persons, but the case might also involve victims for whom the trial process can present inordinate difficulties. In the United Kingdom, a 41-year-old man with learning disabilities was getting into his car when he was approached by a 15-year-old youth who he knew well. His so-called "friend" accused the man of owing him money and threatened to assault the man if he did not give him the chain that he was wearing. At the prosecutor's request, an intermediary sat with the victim in the witness box throughout the trial. During the trial, the victim had difficulty with the order of events and remembering specific details. However, the victim provided sufficient testimonial evidence that the perpetrator targeted him because he knew the victim was disabled and believed that the victim was incapable of going through a trial. The offender received a 12-month sentence.

Commentary: In the United Kingdom, sentencing disability hate crimes requires proof that the offender "demonstrated hostility" towards a person's disability before, during or immediately after the incident, or was otherwise motivated by hostility towards a person's

disability. In this case, the prosecutor was able to prove the demonstrated hostility by evidencing the perpetrator's intent to take advantage of the victim's learning disability, based on a prejudice that his learning disability would prevent him from successfully testifying against the offender. The prosecutor's application for special measures – the use of an intermediary – was a key to achieving a successful outcome in the case.

Source: <http://www.cps.gov.uk/news/successes_of_the_month/successes_of_the_month_-_november_2012/#p01>.

3.4 PREPARING THE EVIDENCE

Once the prosecution is satisfied that a case could be bias-motivated, the next step is to ensure that there is sufficient evidence of the bias motive and, if not, to gather more. While the need to prove a bias motive distinguishes hate crimes from other offences, this distinction should not be exaggerated. Prosecutors regularly have to prove a defendant's mental state, such as intent, recklessness or negligence. As with these other mental elements, motive can be inferred from the words, actions and circumstances surrounding the incident. As pointed out earlier in this chapter, the prosecution may want to revisit the bias indicators when establishing the evidence in a hate crime case.

Because hate crimes are message crimes, perpetrators often leave clear indications of their motives, which can be identified by looking in the right places. Hate crime prosecutions often rely on the defendant's statements or admissions. In the absence of admissions, the prosecution can rely on inferences drawn from circumstantial evidence within the totality of the evidence.

3.4.1 Admissibility

In adversarial proceedings, the types of evidence that can be admitted will depend on national criminal procedures. While evidence of previous bias-motivated acts or prejudiced beliefs about a specific group may be used to

demonstrate the defendant's bias tendency, such evidence is often inadmissible. The closer in time and relevance to the offence itself, the more likely it is that the evidence will be admitted.

In inquisitorial proceedings, evidence of the defendant's bias will be taken into account within the totality of the evidence, but the investigator or prosecutor must ensure that the evidence is made available to the court. In hate crime cases, this can require preparing a more detailed file to address issues that otherwise would not arise without the bias motivation.

3.4.2 Common types and sources of direct evidence

Because hate crimes are message crimes, offenders often want others to know their motives. Therefore, they sometimes make offensive statements to the victim or leave hateful words and symbols as graffiti on property. The offender may also boast about the crime to friends, family or in public settings. They often make admissions to police and investigators about their bias.

The key is finding out when, where and to whom the suspect admitted her or his motives. Identifying where the suspect was immediately before and after the incident or the places that the suspect regularly frequents is a good starting point to finding witnesses who might have heard the suspect's admissions. Evidence of words said immediately before or after the crime will always be easier to use than those expressed long before or after the event. Even if words used further in time from the incident are not used in the case, they can still be useful for intelligence purposes or to direct the investigation. For example, they may provide sufficient grounds to seek judicial authorization for more intrusive investigative steps, such as searching the suspect's home, place of employment and personal belongings, including cell phones and computers.

Case Example

Statements of defendants before the crime

In 2006 in Ukraine, two individuals, S. and K., were drinking alcohol with two minors and discussing the harm caused to their country by African immigrants. They believed that Africans came illegally to their country to take jobs, build sectarian churches, deal drugs and cause other harm to their country. While discussing this, one of the minors saw a man of African descent walking down the street and shouted, "Look, a Negro!" The four individuals all ran after him and ambushed him. Defendant S. began to beat the victim first and then the others joined in. Defendant S. stabbed the victim in the back four times, killing him. Witnesses who tried to stop defendant S. reported that he said, "Why are you touching me? I am defending Ukraine."

When the four individuals were apprehended by police, they all admitted that their crime was motivated by hatred of people of African descent. They also stated that they all understood that when one of the minors pointed out the man on the street, it was a call to take action against him. Later, defendant S. denied any racist motivation. Defendant K. admitted his hate motivation, but claimed it was based not on prejudice but on "personal experience".

However, one of the minors confirmed the discussions and statements that occurred before the crime, and stated that they all agreed that the purpose was to attack the black victim when they saw him.

Defendant S. was given an enhanced sentence of 11 years for murder, taking into account the bias motivation of the criminal act. The appeals court upheld that sentence.

Commentary:

The court relied on evidence that placed the incident in context, especially noting the discussions immediately preceding the attack that demonstrated the racist beliefs of the perpetrators. The evidence provided by one of the participants, a minor, was crucial to the case, including his admission that as he understood it, the actions of the group were motivated by bias.

Defendant K.'s denial of general prejudice while basing his hatred on "personal experience", demonstrated a lack of understanding of what prejudice means. Classifying all persons belonging to a group according to one's limited interactions with a few people is, in fact, a form of stereotyping and demonstrates bias.

While S. admitted bias motivation upon arrest, he later denied it. Witnesses testified that defendant S. made comments at the time of the incident that reflected his desire to "protect" his country from foreigners, providing evidence of his xenophobic attitudes. This and other objective evidence already before the court negated S.'s denial.

Source: Supreme Court of Ukraine, Chamber on Criminal Cases, Judgment of 20 October 2009 (Cassation Appeal on the District Court Judgment of 17 April 2008).

Some hate crime offenders make a recording of the incident to post on the Internet or to show to friends. Websites hosting Internet forums are used to organize, or boast about, bias crimes. There are examples of cases in which such recordings have proved important in establishing the motive and provided essential intelligence, enabling investigators to gather evidence that led to a conviction. Such extensive investigative steps may not be appropriate in all cases, as the amount of resources dedicated to the investigation will likely depend on the seriousness of the crime at issue. In serious cases, however, it is likely that the crime was not the suspect's first hate crime, and an investigation into the offender's background may reveal evidence of other incidents.

This guide does not focus on the techniques available to investigators, including prosecutors who occupy that role, on how to interview suspects and/or their associates in a manner geared towards obtaining confessions. Such interviews can be challenging, and prosecutors and investigators may be advised to seek guidance from experts before questioning suspects. Further, many investigating authorities conduct undercover operations or make use of co-operating witnesses within known hate groups. These can be sensitive tactics and it would be inappropriate to explore them as part of this guide.

Type of evidence	Potential sources
Statements made before the event that indicate planning	Suspects, co-perpetrators, the victim or victims of and witnesses to the incident
Offensive statements towards the victim during the incident	The victim or victims, co-perpetrators, the suspect's associates, witnesses. The suspect's mobile phone, including photographs and/or videos stored on the phone, and computer and Internet usage
Statements of admission after the event	The suspect, co-perpetrators, the suspect's associates, friends and family, and other witnesses. The suspect's mobile phone, including photographs and/or videos stored on the phone, and computer and Internet usage
Statements of direct admission	First responders to the crime scene, witnesses, police/prosecution investigators and co-perpetrators
Connections to an organized hate group	The suspect's magazines, posters, books and leaflets, etc., obtained during a house search. The suspect's mobile phone, including photographs images and/or video stored on the phone, and computer and Internet usage

3.4.3 *Circumstantial evidence*

Apart from the types of direct evidence described above, there can be many other circumstantial factors that suggest bias motivation. The admissibility of evidence that is not closely tied to the event itself, and the measure of its reliability, will vary according to the jurisdiction in question. Such evidence can include information relating to the defendant's background. Although circumstantial evidence is weaker than direct statements made by the defendant, the cumulative impact of circumstantial evidence combined with direct evidence can be persuasive. Many bias indicators are also examples of circumstantial evidence of motive, and include the following:

- The suspect is associated with organized hate groups;
- The incident occurs on a day, time or place that is significant for the target community;
- The incident occurs on a day, time or place that commemorates an event or is symbolic for the offender, such as Hitler's birthday;
- The attack is particularly brutal, although lacking in motives other than bias motivation; and
- A pattern of similar incidents using sufficiently similar methods is detected, suggesting the strong likelihood of a link between the events.

Case Example:

Using circumstantial evidence to prove bias motivation

In the early hours of 19 April 2009, a group of four men threw Molotov cocktails into the home of a Roma family in Vitkov, the Czech Republic. At the time of the attack, several people, including children, were sleeping in the house. The residents managed to escape, but the parents were partially burned and their two-year-old daughter suffered burns over more than 80 percent of her body.

A witness reported that on the night of the attack he had overheard a woman receiving a telephone call from her boyfriend and then telling her friends that her boyfriend was "going for Gypsy." Using this information, police identified suspects, but the witness refused to give evidence for fear of retaliation. The police obtained wiretap evidence and arrested four men. All four had ties to extreme right-wing organizations, and significant material relating to neo-Nazi ideology or groups supporting such ideology was secured by the police during searches of the suspects' homes.

Three of the four suspects made statements denying knowledge that people were in the residence or that they were targeting Roma, while the fourth remained silent. The prosecutor argued that the offenders committed the crime in commemoration of Adolf Hitler's upcoming birthday. One of the defence lawyers argued that his client was not a member of a far-right group, and unsuccessfully argued to have the case tried as bodily harm under the Criminal Code instead of as a racially motivated attempted multiple homicide. In an attempt to rebut the accusation of racist motivation, many witnesses for the defence stated that the defendants had, in the past, been on good terms with their Roma schoolmates. In October 2010, the court convicted the four defendants of multiple charges of racially motivated attempted homicide and property destruction, sentencing three of them to 22 years of imprisonment and one to 20 years. The convictions were upheld on appeal.

Commentary

There were key steps to successfully prosecuting this case:

- While witness evidence may not have been sufficient on its own, it was used as intelligence to establish grounds for seeking judicial authorization for a wiretap.
- Searching the suspects' homes elicited materials and identified the defendants' past associations with far-right groups, enabling the prosecutor to draw the inference that this was a racist attack.
- The totality of the inferential evidence, including the unprovoked, brutal nature of the attack, showed the defendants' racist views.

Sources: <<http://romove.radio.cz/en/article/23320/limit#kw>>; and <<http://www.cnn.com/video/#/video/international/2010/06/28/wus.scars.of.racism.hatred.bk.a.cnn?iref=allsearch>>.

3.4.4 More than one motivation: mixed motives

Hate crimes, like other types of crimes, may have more than one motive. This often arises in crimes where there is an economic element in the crime in addition to the bias motivation. Many jurisdictions have hate crime laws that specifically allow for the consideration of mixed motives, where an offence is committed wholly or partly due to bias, while others specifically require the bias motivation to be a substantial motive in the crime. It is most common, however, for legislation to be drafted broadly, in a way that does not exclude the possibility of more than one motive, including bias. Prosecutors need to be vigilant and pay attention to a possible bias motivation even where it is not immediately evident.

3.4.5 Presenting the impact on victims: physical and psychological

In many jurisdictions, medical documentation outlining the nature, seriousness and impact of a victim's injuries is necessary for the legal qualification of physical injury charges. If medical documentation is part of the evidence, prosecutors should also ensure that the medical records reflect the severity of the injuries suffered by the victim and make necessary follow-up inquiries if they do not. Because hate crimes can reflect patterns of discrimination experienced by marginalized groups, the victim may have been unable to access proper treatment or may have experienced further discrimination when seeking assistance.

Specialized victim-support services are useful partners to the prosecution at this stage: first, because the victim may have shared the extent of her or his injuries with them more willingly than with the authorities; and second, as a result of their experience in dealing with and identifying common patterns of victimization. For example, a female victim may be more willing to trust a civil society organization that assists women victims than she would the police.

It might not be necessary to present evidence of the psychological injury suffered by the victim if, for example, the charge relates to minor bodily injury or damage to property. There is evidence to suggest, however, that the psychological impact on victims of relatively minor bias crimes can

be greater than that of more serious non-bias motivated crimes.⁶⁵ In cases where evidence of psychological injury is not available, the prosecutor should still seek to demonstrate the many negative impacts of a bias crime on the victim. This can be done by providing the victim with an opportunity to present the full impact of their experience of the crime in the manner most appropriate in the local jurisdiction.

3.5 CHARGING A HATE CRIME CASE

3.5.1 *Alternative charges and initial legal qualification*

While the prosecution should always seek the most appropriate charges to the offence from the start of proceedings, different jurisdictions have different approaches. Where alternative charging is an option, a prosecutor might choose, for example, to include both assault and racially motivated assault in the initial charging instrument, and continue to seek more evidence of bias motivation to support the elevated offence. The lesser offence of assault is then available in the event that there is insufficient evidence of bias motivation.

In most civil jurisdictions, however, the court can determine the appropriate charge based on all the evidence, irrespective of the initial legal qualification of the offence. In order to allow the court to do this for hate crimes, the prosecution may need to include objective evidence of bias motivation during the initial filing. In those cases, the prosecutor can either wait for further objective evidence or amend the initial charges to include bias motivation as the evidence becomes available.

⁶⁵ Paul Iganski and Sporidoula Lagou, "How Hate Crimes Hurt More: Evidence from the British Crime Survey" in Barbara Perry and Paul Iganski (eds.), *Hate Crimes: The Consequences of Hate Crime*, Vol. 2 (Westport: Praeger, 2009), pp. 1-13.

Case Example

The importance of efficient prosecution charging for crimes resulting from escalating hate incidents

In 2012, several incidents were reported in which the Hungarian Jewish community in Budapest was subjected to anti-Semitic insults and prejudice. A former chief rabbi was insulted in public by a man who told him, "I hate all Jews." In a separate incident, a man repeatedly shouted anti-Semitic remarks through the door of a Jewish prayer house in the south of Budapest.

On 5 October 2012, these low-level incidents turned into actual violence. The man mentioned above returned to the Jewish prayer house to repeat his anti-Semitic remarks; and was photographed by the president of the Budapest Jewish Religious Community. The man kicked the Jewish man in the chest and hit him in the head, while shouting "you rotten Jews will die." The attacker and his friend ran from the scene, but the victim followed them to a house, where the police responded and arrested them. The offender was tried in fast-track proceedings on a specific, bias-motivated charge of committing violence against a member of a community, as well as causing minor physical injury. He was sentenced to a two-year prison term.

Commentary: A common theme in hate crime cases is the escalation of events. What might start out as minor, but offensive, non-criminal incidents, can escalate into more serious violence. In its General Recommendation No. 31, the CERD Committee has noted the importance of prosecuting even low-level offences. The offender in this case had a history of harassing the Jewish prayer house and, when confronted, responded with violence. There was also an emerging pattern of public displays of anti-Semitism against individuals in the community. This particular incident could be viewed as an attempt to target the entire community, as the remarks were directed at a community building and towards anyone and everyone inside. Prosecutors took this case as a serious matter, in part because of its potential for escalation, and responded swiftly and with serious charges to send a message to the community and wider society.

Source: <<http://www.politics.hu/20121008/budapest-jewish-leader-assaulted-outside-synagogue-police-arrest-attackers/>>.

3.5.2 *Plea bargains or mediation*

In jurisdictions where plea bargaining or negotiation is possible, prosecutors will find that defendants often agree to plead guilty to the “base offence” but contest the bias motive. When deciding whether to accept such a plea, it is important to consider the wishes of the victim in conjunction with the available evidence. Victims often report feeling betrayed by decisions involving plea bargains and negotiation, as it can make the bias motive seem either irrelevant or not believed by prosecutors. While this consideration should not override the prosecutors’ professional judgement, the victim’s perception should be a factor in deciding how to proceed.

Case Example

Efficiently using guilty pleas to recognize bias motivation

In the United Kingdom, two women, one originally from Sudan and the other from Congo, were sitting on a park bench in a playground when they heard racist remarks. Two other women, an aunt and her 15-year-old niece, attacked the women sitting on the bench. The aunt struck the woman from Congo, who was five months pregnant at the time, by punching her on the head and pushing her. The woman from Sudan, who was wearing a hijab, stated she was going to call the police on her phone when the attackers demanded her phone and struggled for it. In the struggle she fell to the ground and the attackers repeatedly punched her head and body, pulled off her hijab and stole her phone. Operators of the closed-circuit television surveillance who observed the incident alerted the police. Both victims suffered minor injuries. Both offenders pleaded guilty to racially aggravated assault, and the adult offender received a jail sentence of two years and six days.

Commentary: This incident reveals that bias and prejudice can be more complex than a single bias. Although the incident began with racist insults, the women’s hijab was later pulled off, suggesting that the offenders were also targeting the women’s expression of being a Muslim. Under the legislation of the United Kingdom, the crime of racially or religiously aggravated assault can be prosecuted if “during, before and immediately after the incident” the offender demonstrated or was motivated wholly or partly by hostility towards the person

based on her or his race or religion. As this case was processed as a guilty plea, the prosecutors chose to base the charge and conviction on the most clearly evidenced hostility: the racist statements that immediately preceded the assault.

Source: <<http://www.icare.to/articleHC.php?id=43742@lang=en>>.

3.5.3 *Countering defence arguments*

The sub-sections below describe a number of common defence strategies applied in hate crime cases. The defence often seeks to downplay the defendant's bias or hostility as the real motivation behind the crime. While the defendant may point to alternative explanations for the crime, prosecutors can use all the available evidence in the case to emphasize the bias motive and rebut this form of defence.

“Just a fight”

Many hate crimes occur during incidents that might originally have had other triggers, such as “road rage” or a dispute between neighbours over property boundaries or noise. These motivations can change during the course of the incident(s) into a racial or other bias-motivated crime. Similarly, inter-group violence may be a regular feature of some communities, where gangs – often ethnically-based – clash frequently. Law-enforcement agencies sometimes have a tendency to overlook or dismiss the bias motivation in such cases, which is usually demonstrated by the use of offensive words or slurs about the victim's group identity (see Chapter 3.4.4, which discusses mixed motives).

In other cases, hate crime offenders may taunt the victim into a fight. In these cases, the taunting may or may not begin with racist or offensive slurs, but there are usually multiple offenders against a single victim. During the fight itself, offensive statements about race, ethnicity, religion, gender or sexual orientation are often used. The combination of these factors usually points to some planning or intent to target a victim for assault from the beginning.

A common defence in such cases is that the incident was “just a fight” rather than a bias-motivated crime. The defence may point to provisions in the criminal code that seem to accurately describe the act in question, but which do not take bias motivation into account (e.g., “hooliganism”).

Case Example

A hate crime murder – not just a fight

On 12 July 2009, six high school students on the sports team from a small town in Pennsylvania, the United States, were drinking alcohol in a central shopping district. As recounted in press reports, the students made some inappropriate remarks to a 15-year-old girl who was in the company of a Mexican immigrant. When the man objected to the students' comments, they started shouting racial abuse at him, telling him to "go back to Mexico" and that he "didn't belong in their town". A fight broke out between the man and the high school students. All six students punched and hit the victim while continuing to shout abuse. Two of them did most of the beating, kicking the victim in the head several times and leaving him lying on the sidewalk. The group ran from the scene, with one of the group leaders shouting to a bystander as he left to "tell your...Mexican friends to get... out of Shenandoah or you will be lying next to him." The victim died from his injuries two days later in the hospital.

The two leaders of the attack were charged with numerous crimes in Pennsylvania State Court, including murder, aggravated assault and hate crime-related charges. The primary argument from the defence at trial was that this was just a fight gone wrong, fuelled by alcohol and young male aggression, and not a racist attack. A jury found them not guilty on the most serious charges and convicted them of simple assault, which received only a probationary sentence.

Federal prosecutors also began investigating the case under their authority to investigate and prosecute racially based hate crimes. Their investigation revealed that some members of the local police department intimidated witnesses, coached the high school students on how to lie, helped dispose of evidence and wrote false police reports. Several of them had ties to the students' families.

Under the principle of dual sovereignty, the federal prosecutors were able to charge the two lead students with murder-related hate crime charges in a federal court. The jury rejected the "just a fight" defence and convicted both of murder as a hate crime. They were sentenced to nine-year prison terms. The verdicts and sentences were upheld on appeal.

Commentary: The case highlights a common theme in hate crime cases, in which victims often come from marginalized communities. It is important to recognize the role that independent government institutions can play in providing oversight in controversial cases. It also highlights common defence strategies that cite alcohol or the “just a fight” argument to minimize behaviour that has a devastating impact.

Sources: <http://www.nytimes.com/2010/10/15/us/15scranton.html?_r=2>;
<<http://www.pennlive.com/midstate/index.ssf/2012/06/hate-crime-verdicts-upheld-in.html>>.

“My words are not racist”

Defendants sometimes deny bias motivation by claiming that the words they used are simple statements of fact and not abusive in themselves. Many words can be used in both a factual and an abusive way. For example, the words “immigrant” or “Gypsy” can be used in ways that are not intentionally offensive. However, if these words are used in a hostile context, such as during an argument or in graffiti, they are clearly not intended as statements of fact but are being used in a racist or xenophobic manner.

Defendants may also claim that their words were not intended to be insulting and that they do not have any negative feelings towards the group to which a victim belongs. The full context of events, including other statements made during the incident, usually provides the totality of evidence that can make a defendant’s claims less believable.

The same arguments can be applied to symbols. For example, a symbol of national or religious pride may not in itself be a representation of hate. However, if a particular symbol is put on the house of a migrant along with other neo-Nazi symbols or statements telling the migrant to “go away”, then the nationalist symbol provides further evidence of the nationalistic ideology and bias motivation of the perpetrator.

Defendant’s relationships

The fact that a defendant has relationships with people from a similar background as the victim does not automatically exclude that bias and prejudice motivated her or his criminal conduct in the case at issue. Bias and prejudice are complex phenomena. Very often, prejudiced people know and like individuals from groups they would not normally trust, but view that person as

an exception rather than a negation of their stereotypes. It is important to assess the defendant's behaviour within the incident with which he or she is charged to assess the bias and prejudice of a particular action.

Case Example

Looking at the defendant's conduct, not excuses

The victim and three of his friends were waiting for a taxi after finishing their shifts late at night in Burnaby, Canada. The victim was the only African-Canadian in the group; the others were Caucasian. As they were waiting, an older vehicle went by, about which the victim commented.

The car stopped around the corner, and the passenger and driver exited and started jeering at the victim as they approached him. The victim did not know them. The passenger was carrying a beer bottle. The driver was carrying a foot-long metal bar concealed behind his forearm. The driver and the passenger hurled racial slurs at the victim in angry voices. The victim said he did not want trouble. The passenger spit in the victim's face and the driver struck the victim on the forehead with the metal bar. The victim fell backwards on the ground and then got up. The passenger threw the beer bottle at the victim but missed. The passenger was never identified. The driver made a threat to the victim's family, again using the same racial slurs used previously.

The victim's wound required 23 stitches and months to heal, and he suffered migraine headaches up to the time of trial. The defence offered evidence that: the accused driver had a troubled family history; he had his own alcohol and drug problems; he had not shown previous racist attitudes; and one of his friends was an African Canadian who had never heard a racist remark from him. A defence expert testified that the accused's behaviour could be explained without a racial motivation. Nevertheless, on the basis of the totality of the evidence, the judge convicted the driver of the hate-motivated offence and imposed a sentence of nine months in custody and three years' probation.

Commentary: The Canadian provision for hate crimes is in an aggravating circumstance provision that allows the court to take into account “evidence that the offence was motivated by bias, prejudice, or hate based on” a list of protected characteristics. This has been interpreted by the courts to mean that the provisions for sentencing hate crimes can be taken into account when the crime was motivated, *in whole or in part*, by bias, prejudice or hate. Under that reasoning, the judge concluded that the prosecution’s evidence of the racial slurs used during an incident that had no other apparent motive proved that the offender was, in whole or in part, motivated by bias, prejudice or hate based on the victim’s race or colour.

Source: <http://www.ag.gov.bc.ca/prosecution-service/pdf/EndHateCrimes_booklet.pdf>.

Defendant is from the same background as the victim

This type of claim is typically used in cases where a defendant targets an individual of the same race or religion. For example, an individual may target someone of her or his own race or religion for associating with people from a different race or religion. Since most hate crime laws are based on the offender’s bias motivation, not on the actual membership of the victim in a particular group, such cases can be prosecuted as hate crimes.

However, if the law applies the discriminatory selection model, then the prosecution must determine whether the defendant selected the victim on the grounds of a protected characteristic (for example, ethnicity). Thus, proving a hate crime does not necessarily require hostility, nor does it require the victim to be an actual member of the group. All that is required is that the defendant was motivated by a bias against a certain group and targeted the person or property because of that bias.

3.6 SENTENCING HATE CRIME CASES

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, including references to the international standards outlined in Section 2.7.

3.6.1 Restitution and compensation

In many jurisdictions, the court can order at the sentencing stage that the victim receive financial restitution. This requires evidence of expenses incurred as a result of the crime (such as medical care, travel to court, the repairing of damaged property or clothing). Compensation orders allow money to be levied from the defendant in recognition of the suffering of the victim. Usually, this is not a large amount, but it is something about which prosecutors should remind the court whenever appropriate.

If the prosecutor intends to pursue financial restitution, the victim should be informed early on to keep receipts for all expenses incurred as a result of the crime, and to submit them to the appropriate authority.

3.6.2 Other orders

In addition to appropriate sentencing punishments, prosecutors may want to consider available measures to protect the victim and community as part of sentence conditions. For instance, if a defendant targeted a mosque, the prosecutor could consider seeking an order that the defendant keep a minimum distance from any mosque or Islamic community centre.

As a general rule, the needs of the victim should be taken into account when proposing a sentence. Victims may, for instance, not be inclined to meet with or to accept anything from the perpetrator, including restitution or compensation, as part of the sentencing.

3.6.3 Dealing with minors

Dealing with hate crimes committed by minors can be more difficult than those committed by adults. While the approach to minors in the justice system varies widely among jurisdictions, it is always different from that of adults. The increased penalties associated with hate crimes, if available,

may not be appropriate in these cases. Instead, working with young offenders can provide an opportunity to address their biases. However, bearing in mind the escalating nature of hate crimes, a prosecutor has a very important decision to make in regard to how to deal with minors who commit these offences. Rather than dismiss such cases as “just” childhood bullying, it is important to make certain that steps are taken to ensure appropriate rehabilitation and that there is some element of recognition that the crime and the bias motive are unacceptable.

CHAPTER FOUR

POLICIES AND PROCEDURES

While individual prosecutors may have the skills and knowledge to prosecute hate crimes within their own legal frameworks, policies implemented at local, regional and national levels that provide guidance, expertise and structures to support prosecutions can have a long-term impact in improving hate crime prosecutions.

This section highlights some good practices implemented by prosecutors' agencies and governments in the OSCE region that are aimed at building the capacity of prosecutors and the wider criminal justice system to respond to and prevent hate crimes.

4.1 SPECIALIZED GUIDANCE AND TRAINING

One of the keys to investigating and prosecuting hate crimes is learning to recognize and understand the common experiences of discrimination shared by many targeted communities. While there are some common types of hate crimes across the different countries of the OSCE region, local history and social composition can contribute to specific issues at the local level, especially the types of groups or property most frequently targeted. Thus, many states have developed specialized written policies and accompanying training to help police, investigators and prosecutors better understand and identify potential hate crime cases.

ODIHR has developed the Prosecutors and Hate Crimes Training (PAHCT) programme that complements this guide and that can be implemented in co-operation with a participating State to incorporate the relevant local laws and issues.⁶⁴

Written prosecution guidance

The Crown Prosecution Service of England and Wales in the United Kingdom (CPS) has produced written guidance for its prosecutors on prosecuting hate crimes. This guidance is seen as a core decision-making and procedural description of how hate crime cases are prosecuted and what victims can expect from the process. The CPS publishes this information on its website, in keeping with its commitment to transparent procedures for case-handling.

The CPS has specific guidance tailored to different types of hate crimes, including racist and religious hate crimes (http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/), homophobic and transphobic hate crimes (http://www.cps.gov.uk/publications/docs/htc_guidance.pdf) and disability hate crimes (http://www.cps.gov.uk/publications/docs/disability_hate_crime_guidance.pdf). While these documents are ultimately designed to help the public understand how hate crime cases are prosecuted, they also set out the prosecution policy that prosecutors are obliged to follow.

Strengthening prosecution skills and knowledge of hate crimes through training: Community Relations Service in the United States Department of Justice

In 2009, new federal hate crime legislation was passed in the United States that broadened and simplified federal jurisdiction and, for the first time, recognized certain violent acts directed at individuals

⁶⁴ See PAHCT programme description, <<http://www.osce.org/odihhr/pahct>>.

because of their actual or perceived sexual orientation or gender identity as federal hate crimes. As part of this legislation, Congress authorized an agency within the United States Department of Justice (the agency responsible for federal prosecutions) to develop the capacity for better responses and prevention of hate crimes.

The Community Relations Services (CRS) is a non-enforcement and non-prosecutorial component of the United States Department of Justice, originally formed as part of the 1964 Civil Rights Act to help mediate issues in communities involving racial discrimination. It focuses much of its work on hate crime training and conferences, working with United States Attorneys in multiple districts to hold hate crime summits and conferences to share information and best practices, to discuss victims' rights and to provide training for local law-enforcement agents and prosecutors. It conducts two-day training programmes that provide state and local law-enforcement officers with skills and knowledge critical to addressing hate crimes. The programme was designed to familiarize participants with best practices in identifying, reporting, investigating and prosecuting hate crimes. The programme also covers effective strategies to educate the public about hate crimes and their significance.

Source: <<http://www.justice.gov/crs/about-crs.htm>>.

Prosecution agencies will usually also benefit from tools that help them to mainstream gender considerations into their work. Such gender mainstreaming can be included as part of general prosecutors' guidelines. Ultimately, however, in order to ensure that gender is taken into consideration effectively, each prosecutor will have to recognize and understand the issue and to take action accordingly.

4.2 SPECIALIZED UNITS

Some prosecution agencies develop a cadre of specialists as a means to respond to crimes which are particularly challenging to detect and prosecute, and which have a particularly serious impact on victims and society. For example, many jurisdictions have specialized units for domestic violence, child abuse or human trafficking. This concentration of expertise allows authorities to maximize their resources and knowledge. Prosecution agencies have deployed specialist hate crime prosecutors either as part of a separate hate crimes unit or as focal points

within their area. For example, the Dutch Prosecution Service on Discrimination and the Hate Crime and Discrimination Service of the Barcelona Public Prosecution have specialized offices that can either prosecute hate crime cases directly or provide support to prosecutors. These units also work closely with police.

The Service for Hate Crimes and Discrimination in the Office of the Prosecutor of the province of Barcelona

In October 2009, the Office of the Prosecutor of the province of Barcelona opened a specialized Service for Hate Crimes and Discrimination. The Service is tasked with co-ordinating the prosecuting hate crimes and discrimination cases – which are criminalized under the Spanish Criminal Code – either by providing assistance to trial prosecutors or by handling complex cases directly.

In 2010, the Office was assigned a full-time co-ordinator and initiated the issuance of a Protocol on “procedure in criminal acts motivated by hatred or discrimination”, which instructs police officers on how to identify and record hate crimes, recommends that police officers inform the Service of hate crime cases and ensures that victims receive proper referrals to services, if needed.

Following this successful model, since early 2013, similar services responsible for hate crimes and discrimination and for establishing contact points have been developed in all the Provincial Prosecutor’s Offices of Spain (50). The activities of these offices are co-ordinated by a national delegate appointed by the state attorney general.

In this way, the Prosecutors’ Office is trying to make the fight against hate crimes across Spain more coherent by:

- establishing common criteria on the interpretation of the penal code;
- co-ordinating investigations and activities;
- collaborating with police forces and other multi-level agents; and
- improving recording and publishing of statistics on judicial procedures.

Source: Submissions of Spain’s National Point of Contact on Combating Hate Crimes for ODIHR’s Hate Crimes in the OSCE Region: Incidents and Responses – Annual Reports for years 2009-2013.

4.3 PUBLIC AWARENESS CAMPAIGNS AND OUTREACH WITH COMMUNITY GROUPS AND CIVIL SOCIETY

Public engagement builds public confidence. Prosecutors should not wait for a high-profile hate crime case to start building contacts in the community. Regular communication and consultation with community groups can yield positive results by improving the willingness of victims and witnesses to co-operate with law-enforcement agencies and increasing understanding about what is happening in the community. These contacts can also ensure that when tensions arise between communities, police are better able to calm the situation and know when to step up police presence to address community concerns.

Possible outreach activities in which prosecutors could participate include:

- organizing meetings with various groups and criminal justice officials to discuss current issues in the community and provide updates in accordance with appropriate legal procedure rules;
- acting as public ambassadors by giving public talks about hate crimes, including in schools, churches and community centres; and
- developing awareness-raising materials about hate crime.

ODIHR's work with OSCE Missions to produce booklets on understanding hate crimes

Since 2010, ODIHR has worked with OSCE Field Operations in South Eastern Europe to develop hate crime awareness booklets for distribution among local communities. The publications aim to help police, prosecutors, judges, legislators, the local authorities and civil society organizations better understand the problem of hate crimes. These booklets contain both general information on hate crimes, as well as examples of local cases and legislation, and are produced in local languages. To date, publications have been produced in co-operation with the OSCE Mission to Bosnia and Herzegovina, the OSCE Mission in Kosovo, the OSCE Mission in Skopje and the OSCE Presence in Albania.

For more information, please see:

- OSCE Mission to Bosnia and Herzegovina: <http://www.osce.org/odihr/104165>
- OSCE Presence in Albania: <http://www.osce.org/odihr/104164>
- OSCE Mission in Kosovo: <http://www.osce.org/odihr/104166>
- OSCE Mission in Skopje: <http://www.osce.org/odihr/104168>

Engaging with communities also means making sure they are informed of their rights and protection under the law. Many victims assume that law enforcement will not treat cases of bias crime seriously, especially those crimes that are less serious and do not result in extensive injury or property damage. Raising public awareness of hate crimes can encourage more victims to come forward, increase the appreciation in society that such crimes exist and must be combated and send a message to would-be perpetrators that these crimes are given serious attention.

Communication tools that prosecutors could produce to inform the public include brochures or website information on hate crimes designed for the local community, information on how to report hate crimes on prosecutors' websites and links to available online international standards and prosecution guidelines, where these exist.

Working with communities: Community Relations Service in the United States Department of Justice

As part of its mandate, the Community Relations Service (CRS) facilitates co-operation between civil society and government officials in responding to and preventing hate crimes. Civil society is seen as an important partner in addressing criminal manifestations of discrimination. The CRS uses the principles of “educate, communicate, conciliate, mediate and facilitate” to guide its work.

More specifically:

- CRS assists willing parties and explores opportunities to develop and implement local strategies that can help law enforcement, local officials, civil rights organizations and interested community groups respond to alleged hate crimes and find ways to prevent future incidents.
- State and local law-enforcement officials and community leaders can contact CRS to request assistance in improving communication between law-enforcement and community members in the aftermath of a hate crime.
- CRS can help facilitate dialogue between law-enforcement and community members to increase mutual understanding about the investigative and prosecutorial process, as well as to address the concerns of people in the community.

- CRS improves community response mechanisms by developing community capacity to prevent hate crimes, in particular by providing services and programmes, including on conciliation, mediation, training, technical assistance and other tension-reduction techniques.
- CRS can introduce the community to representatives of agencies that respond to hate crimes, including federal, state and local law-enforcement officials, as well as inform them of local government resources.

Source: <<http://www.justice.gov/crs/pubs/hate-crimes-prevention-act.pdf>>.

4.4 MEDIA STRATEGIES

The media can have a positive or negative impact on the public's perception of how hate crime cases are addressed. For this reason, prosecutor's offices sometimes establish protocols for dealing with the media in relation to ongoing cases. While the foremost concerns should be protecting the victim and her or his right to privacy, maintaining the integrity of the investigation and respecting a defendant's right to a fair trial, co-ordinating with the media can help ensure that appropriate information about a case is disseminated to the community.

One widespread practice that prosecutor's offices should avoid when informing the public of the status of a case is to exclude the possibility of bias motivation from the beginning. Authorities sometimes deny the existence of a bias motivation even before the evidence has been gathered, based on the belief that this will calm potential community tensions. The problem with this approach is that it rarely succeeds; instead, it leaves victims and their communities with the impression that the investigation will not examine the motive in a thorough and effective way. By the same token, it may be dangerous to publicize a bias motivation solely based on a victim's or another's perception before first establishing evidence to substantiate the bias element. To do so may produce unrealistically heightened expectations.

In countries where hate crimes are frequently under-reported, leading to low numbers of hate crime prosecutions, authorities may want to emphasize to

the media that an increase in hate crime prosecutions is, in fact, a positive indication that more members of affected communities trust authorities to handle their cases seriously.

Highlighting notable hate crime prosecutions and convictions on public websites

In the Russian Federation, the General Prosecutor's Office highlights significant cases on its newsfeed and regularly includes successful examples of hate crime prosecutions. The public website contains information on cases from regional courts, with links to the regional prosecutor's offices.

Source: <<http://genproc.gov.ru/>>.

4.5 CONTRIBUTING TO DATA COLLECTION AND MONITORING AND PUBLIC REPORTS

Collecting data on hate crime prosecutions is an important way to track effective prosecutions and to monitor possible reasons why some prosecutions were unsuccessful. OSCE participating States have committed to collect data on hate crimes and to make the information publicly available, including through ODIHR's annual report on *Hate Crimes in the OSCE Region – Incidents and Responses*.⁶⁵ Comprehensive data can increase the ability of authorities to understand better the problem of hate crimes and to monitor the effectiveness of programmes designed to address them. A comprehensive approach includes collecting data and statistics on the number of cases reported to law enforcement, the number of cases prosecuted and the number of cases sentenced. Disaggregation of that data by types of crimes and bias motivation can also prove useful in analysing patterns of hate crimes.

⁶⁵ See, for example, *Hate Crimes in the OSCE Region – Incidents and Responses: Annual Report for 2012*, ODIHR, *op. cit.*, note 29. As of 2014, ODIHR reports on hate crimes online, at <<http://hatecrime.osce.org/>>.

Annual report on prosecution of hate crime cases from Crown Prosecution Service in the United Kingdom and press releases

In October 2012, the United Kingdom's Crown Prosecution Service (CPS) released its fifth annual "Hate crimes and crimes against older people report", which covered prosecutions between 2011 and 2012. The report examines statistics of successfully prosecuted hate crimes, including statistics on racially and religiously aggravated hate crimes, homophobic and transphobic hate crimes and disability hate crimes. In addition to statistics, the report highlights positive case studies, lessons learned and programmes implemented to improve prosecution responses to hate crimes.

As part of its media strategy, the CPS uses the launch of the report to highlight the data and numbers in a way that educates the public. For example, when the 2012 CPS report showed a decline in hate crime prosecutions, it emphasized that the decline was not positive, as it reflected that the victims are backing out of cases rather than continuing to stay engaged in the criminal justice process.

Sources: <http://www.report-it.org.uk/files/cps_hate_crime_report_2012.pdf>; <<http://www.independent.co.uk/news/uk/crime/hatecrime-cases-failing-in-court-says-cps-8215804.html>>.

Prosecution offices can work towards developing a data-collection policy for recording hate crimes, as well as collaborating with other government agencies to develop a cohesive and consistent approach to data collection to be adopted by all relevant agencies. As many states already compile some form of hate crime statistics, many of these procedures for doing so could be adapted and tailored to the specifics of hate crime prosecutions.⁶⁶

⁶⁶ The ODIHR publication, *Hate Crime Data Collection and Monitoring Mechanisms: a Practical Guide*, outlines a detailed approach to establishing an effective national system to collect data on hate crimes, *Hate Crime Data Collection and Monitoring Mechanisms: a Practical Guide* (Warsaw: ODIHR, 2014).

Croatia Hate Crime Protocol

In January 2010, Croatia instituted a multi-agency working group on hate crimes, co-ordinated by the Office for Human Rights and Rights of National Minorities. As part of its work, the working group was involved in introducing comprehensive amendments to hate crime legislation that were then adopted in 2011 as part of the revision of the Criminal Code. Furthermore, the working group has created a cross-government protocol on Rules of Procedure in Hate Crime Cases, which was adopted by the Government in April 2011. The excerpts relating to prosecutors are included below, and instruct prosecutors to give hate crime cases priority, to ensure that they are properly recorded and traced through the criminal justice system and to make sure that adequate support is provided to victims.

Article 8.

In matters related to hate crimes, the judicial bodies (criminal and misdemeanor courts and/or State Attorney's Office) shall act urgently and with special attention.

Article 9.

Judicial bodies shall mark cases in connection with hate crimes in a specific way.

Judicial bodies shall keep records on hate crimes and submit them to the Ministry of Justice.

Article 10.

After filing charges, the State Attorney's Office shall proceed in conformity with obligations arising from the internal legislation of the State Attorney's Office of the Republic of Croatia regarding hate crime cases.

Article 11.

As the Penal Code defines the concept of the hate crimes, the State Attorney's Office shall keep records of all cases in which hatred, for the reasons stated in Article 89 § 36 of the Penal Code, represents the motive of the crime.

As an authority competent for keeping special records on hate crimes, the State Attorney's Office will collect the following information:

- The number of cases, the number of suspects and an indication of a criminal offense;
- The decision of the State Attorney's Office; and
- The final judgment.

Article 12.

During court proceedings, measures shall be provided to protect the physical integrity of the victim and to prevent her or his further victimization. Departments for providing support to victims and witnesses shall be involved in the protection of victims and witnesses in judicial proceedings.

Source: Office for Human Rights of the Government of the Republic of Croatia, Working Group for monitoring of hate crime

4.6 PUTTING THE PIECES TOGETHER: A COMPREHENSIVE APPROACH TO COMBATING HATE CRIMES

The individual steps described in the preceding sections will have a more significant impact on preventing and responding to hate crimes if they are undertaken simultaneously. They should form pieces of an overall strategy to combat hate crimes that involves police, prosecutors and civil society, and that encompasses awareness raising, public outreach, professional training and monitoring. While an independent judiciary may not be able to take part in such an official strategy, judicial training institutes can be encouraged to include hate crimes as part of their programmes and to stimulate discussion about sentencing approaches within the judiciary.

Sweden: Cross-agency strategies and skill development in responding to hate crimes

The Stockholm Police Department has taken a number of initiatives since 2007 to develop the capacity of all law-enforcement actors to respond to hate crimes, including by co-operating with prosecutors.

- **Training:** All front-line officers and others who come into contact with hate crimes, including dispatch and front desk intake officers, receive training on responding to hate crimes.
- **Action card:** A Standard Operating Procedure card is issued to all officers, listing bias indicators and steps to identify and respond to hate crimes.
- **Specialized police hate crime units:** Contact points have been appointed in all of the policing districts of Stockholm, and are responsible for developing working methods and co-ordinate hate crime investigations and training in the department.
- **Community policing:** In each of the four policing districts of Stockholm, an officer is designated as the “hate crime police officer”. In addition to her or his other responsibilities, the hate crime police officer is responsible for actively seeking out and working with community associations to encourage reporting of hate crimes, and also for working with schools.
- **Prosecutor assigned to hate crime unit:** A specially assigned prosecutor works closely with investigating police on developing methods on how to assess and investigate hate crimes for a successful prosecution.
- **Development of a police website with information on hate crimes:** The website provides public information and contacts, with the aim of increasing hate crimes reporting.

Source: Submissions of Sweden’s National Point of Contact on Combating Hate Crimes for ODIHR *Hate Crimes in the OSCE Region: Incidents and Responses*, annual reports from 2009 to 2012

Annex 1: ODIHR programmes and resources to combat hate crimes

Training on hate crimes:

- PAHCT (Prosecutors and Hate Crimes Training): ODIHR's training programme for prosecutors is designed to improve the skills of prosecutors in understanding, investigating and prosecuting hate crimes. Each training session is tailored to the specific needs and concerns of legal professionals in a particular OSCE participating State and includes case studies and hate crime legislation from the target jurisdiction. The training programme is delivered in the local language, and can be integrated into the broader curriculum of a prosecutorial or judicial training academy. For more information, see <http://www.osce.org/odihr/pahct>.
- TAHCLE (Training against Hate Crimes for Law Enforcement): ODIHR's training programme for law enforcement is designed to improve police skills in recognizing, understanding and investigating hate crimes, interacting effectively with victim communities and building public confidence and co-operation with other law-enforcement agencies. For more information, see <http://www.osce.org/odihr/tahcle>.
- Training on Hate Crimes for Civil Society Organizations: ODIHR helps raise awareness of hate crimes among civil society and international organizations by providing information about hate crime characteristics and the impact of hate crimes on the stability and security of the community, as well as by supporting the efforts of civil society to monitor and report hate crimes. The Office also supports efforts by CSOs to reach out to communities and foster relationships between community groups and law enforcement so that victims will feel confident to report crimes. Finally, ODIHR assists civil society in advocating for better hate crime laws.

Hate crime reporting:

- Hate Crime Reporting website: <http://hatecrime.osce.org/>
- Hate Crimes in the OSCE Region: Incidents and Responses – Annual Reports (also available on the ODIHR Hate Crime Reporting website):
 - 2012 Annual Report: <http://tandis.odihr.pl/hcr2012/>

- 2011 Annual Report: <http://tandis.odihhr.pl/hcr2011/>
- 2010 Annual Report: <http://tandis.odihhr.pl/hcr2010/>

Other hate crime publications:

- Hate Crime Laws: A Practical Guide:
<http://www.osce.org/odihr/36426>
- Hate Crime Data-Collection and Monitoring Mechanisms: A Practical Guide: <http://www.osce.org/odihr/datacollectionguide>
- Prosecuting Hate Crimes: A Practical Guide:
<http://www.osce.org/odihr/prosecutorsguide>
- Preventing and responding to hate crimes: A resource guide for NGOs in the OSCE region: <http://www.osce.org/odihr/39821>

Regional handbooks:

- Understanding Hate Crimes: A Handbook for Bosnia and Herzegovina:
<http://www.osce.org/odihr/104165>
- Understanding Hate Crimes: A Handbook (Skopje edition):
<http://www.osce.org/odihr/104168>
- Understanding Hate Crimes: A Handbook (Kosovo edition):
<http://www.osce.org/odihr/104166>
- Understanding Hate Crimes: A Handbook for Albania:
<http://www.osce.org/odihr/104164>

Educational and prevention efforts:

- Teaching Materials to Combat Anti-Semitism
<http://www.osce.org/odihr/73714?download=true>
- Teaching Materials to Combat Anti-Semitism – Part 1: Anti-Semitism in Europe up to 1945 <http://www.osce.org/odihr/24567>
- Guidelines for Educators on Countering Intolerance and Discrimination against Muslims: Addressing Islamophobia through Education in the Classroom) <http://www.osce.org/odihr/84495>

Annex 2: OSCE Ministerial Council Decisions on hate crimes

Participating States have committed to:

- “collect, maintain and make public, reliable data and statistics in sufficient detail on hate crimes and violent manifestations of intolerance, including the numbers of cases reported to law enforcement, the numbers prosecuted and the sentences imposed. Where data-protection laws restrict collection of data on victims, States should consider methods for collecting data in compliance with such laws” (MC Decision No. 9/09);
- “enact, where appropriate, specific, tailored legislation to combat hate crimes, providing for effective penalties that take into account the gravity of such crimes” (MC Decision No. 9/09);
- “take appropriate measures to encourage victims to report hate crimes, recognizing that under-reporting of hate crimes prevents States from devising efficient policies. In this regard, explore, as complementary measures, methods for facilitating the contribution of civil society to combat hate crimes” (MC Decision No. 9/09);
- “introduce or further develop professional training and capacity-building activities for law-enforcement, prosecution and judicial officials dealing with hate crimes” (MC Decision No. 9/09);
- “in co-operation with relevant actors, explore ways to provide victims of hate crimes with access to counselling, legal and consular assistance as well as effective access to justice” (MC Decision No. 9/09);
- “promptly investigate hate crimes and ensure that the motives of those convicted of hate crimes are acknowledged and publicly condemned by the relevant authorities and by the political leadership” (MC Decision No. 9/09);
- “ensure co-operation, where appropriate, at the national and international levels, including with relevant international bodies and between police forces, to combat violent organized hate crime” (MC Decision No. 9/09);
- “conduct awareness raising and education efforts, particularly with law enforcement authorities, directed towards communities and civil society groups that assist victims of hate crimes” (MC Decision No. 9/09);

- “nominate, if they have not yet done so, a national point of contact on hate crimes to periodically report to the ODIHR reliable information and statistics on hate crimes” (MC Decision No. 9/09);
- “consider drawing on resources developed by the ODIHR in the area of education, training and awareness raising to ensure a comprehensive approach to the tackling of hate crimes” (MC Decision No. 9/09);
- “calls on participating States to increase their efforts, in co-operation with civil society to counter the incitement to imminent violence and hate crimes, including through the Internet, within the framework of their national legislation, while respecting freedom of expression, and underlines at the same time that the opportunities offered by the Internet for the promotion of democracy, human rights and tolerance education should be fully exploited” (MC Decision No. 10/07);
- “collect and maintain reliable data and statistics on hate crimes and incidents, to train relevant law enforcement officers and to strengthen co-operation with civil society” (MC Decision No. 10/07);
- “collect and maintain reliable data and statistics on hate crimes which are essential for effective policy formulation and appropriate resource allocation in countering hate motivated incidents” (MC Decision No. 13/06);
- “facilitate the capacity development of civil society to contribute in monitoring and reporting hate-motivated incidents and to assist victims of hate crime” (MC Decision No. 13/06);
- “promote capacity-building of law enforcement authorities through training and the development of guidelines on the most effective and appropriate way to respond to bias-motivated crime, to increase a positive interaction between police and victims and to encourage reporting by victims of hate crime, i.e., training for front-line officers, implementation of outreach programmes to improve relations between police and the public and training in providing referrals for victim assistance and protection” (MC Decision No. 13/06);
- “[s]trengthen efforts to collect and maintain reliable information and statistics on hate crimes and legislation, to report such information periodically to the ODIHR, and to make this information available to the public and to consider drawing on ODIHR assistance in this field, and in this regard, to consider nominating national points of contact on hate crimes to the ODIHR” (MC Decision No. 10/05);
- “[s]trengthen efforts to provide public officials, and in particular law enforcement officers, with appropriate training on responding to and preventing hate crimes, and in this regard, to consider setting up programmes that provide such training, and to consider drawing on ODIHR expertise in this field and to share best practices” (MC Decision No. 10/05);

- “consistently and unequivocally [speak] out against acts and manifestations of hate, particularly in political discourse” (MC Decision No. 10/05);
- “[c]ombat hate crimes which can be fuelled by racist, xenophobic and anti-Semitic propaganda in the media and on the Internet, and appropriately denounce such crimes publicly when they occur” (MC Decision No. 12/04);
- “condemn publicly, at the appropriate level and in the appropriate manner, violent acts motivated by discrimination and intolerance” (MC Decision No. 4/03);
- “Enact[ing] or strengthen[ing], where necessary, legislation and policy measures to address discrimination and bias-motivated crime against Roma and Sinti” (MC Decision No. 4/13);
- “Build[ing] the capacity of law enforcement agencies and personnel to identify, collect data, investigate and prosecute hate crimes against Roma and Sinti” (MC Decision No. 4/13).

ODIHR has been tasked to:

- “explore, in consultations with the participating States and in co-operation with relevant international organizations and civil society partners, the potential link between the use of the Internet and bias-motivated violence and the harm it causes as well as eventual practical steps to be taken” (MC Decision No. 9/09);
- “follow closely anti-Semitic incidents” and “incidents motivated by racism, xenophobia, or related intolerance, including against Muslims”, and “report its findings to the Permanent Council and the Human Dimension Implementation Meeting and make these findings public” (MC Decision No. 12/04);
- “continue its close co-operation with other relevant inter-governmental agencies and civil society working in the field of promoting mutual respect and understanding and combating intolerance and discrimination, including through hate crime data collection” (MC Decision No. 13/06);
- “continue to serve as a collection point for information and statistics on hate crimes and relevant legislation provided by participating States and to make this information publicly available through its Tolerance and Non-Discrimination Information System and its report on Challenges and Responses to Hate-Motivated Incidents in the OSCE Region” (MC Decision No. 13/06);
- “strengthen, within existing resources, its early warning function to identify, report and raise awareness on hate-motivated incidents and trends and to provide recommendations and assistance to participating States, upon their request, in areas where more adequate responses are needed” (MC Decision No. 13/06).

Annex 3:

List of key international instruments and jurisprudence

International and regional human rights treaties

Universal Declaration of Human Rights:

<http://www.un.org/en/documents/udhr/>

International Covenant on Civil and Political Rights:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

Convention on the Elimination of all Forms of Racial Discrimination:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

Convention on the Rights of Persons with Disabilities:

<http://www.un.org/disabilities/convention/conventionfull.shtml>

European Convention on Human Rights:

http://www.echr.coe.int/Documents/Convention_ENG.pdf

International documents

United Nations, Human Rights Committee, General Comment 22:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.4&Lang=en

United Nations, Human Rights Committee, General Comment 31:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en

United Nations, CERD Committee, General Recommendation 31:

[http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f60%2f18\(SUPP\)&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f60%2f18(SUPP)&Lang=en)

United Nations, CERD Committee, General Recommendation 34:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fGC%2f34&Lang=en

Mahali Dawas and Yousef Shava v. Denmark: Opinion of the CERD Committee under article 14 of the CERD (eightieth session): Communication No. 46/2009 CERD/C/80/D/46/2009.

http://www2.ohchr.org/english/bodies/cerd/docs/jurisprudence/CERD-C-80-D-46-2009_en.pdf

Combating negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons based on religion or belief, UN General Assembly resolution A/RES/66/167.

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/468/84/PDF/N1146884.pdf?OpenElement>

Regional documents

EU Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law;

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0055:0058:en:PDF>

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;

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0029&from=en>

ECRI general policy recommendation N°1: Combating racism, xenophobia, antisemitism and intolerance (1996)

http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N1/Reco1en.pdf

ECRI general policy recommendation N°2: Specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level (1997)

http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N2/Reco2en.pdf

ECRI general policy recommendation N°3: Combating racism and intolerance against Roma/Gypsies (1998)

http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N3/Rec03en.pdf

ECRI general policy recommendation N°7 on national legislation to combat racism and racial discrimination (2002)

http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N7/ecri03-8%20recommendation%20nr%207.pdf

ECRI General Policy Recommendation N°8 on combating racism while fighting terrorism (2004)

http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N8/recommendation_N°_8_eng.pdf

ECRI general policy recommendation N°9 on the fight against anti-Semitism (2004)

http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N9/Rec.09%20en.pdf

ECRI General Policy Recommendation N°11: Combating racism and racial discrimination in policing (2007)

http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N11/e-RPG%2011%20-%20A4.pdf

European Court of Human Rights Cases

Nachova and Others v. Bulgaria (2004)

<http://echr.ketse.com/doc/43577.98-43579.98-en-20040226/view/>

Angelova and Illiev v. Bulgaria (2007)

<http://echr.ketse.com/doc/55523.00-en-20070726/view/>

Šečić v. Croatia (2007)

<http://echr.ketse.com/doc/40116.02-en-20060615/view/>

Milanović v. Serbia (2010)

<http://echr.ketse.com/doc/44614.07-en-20101214/view/>

Stoica v. Romania (2008)

<http://echr.ketse.com/doc/42722.02-en-20080304/view/>

Annex 4: INTERNATIONAL ASSOCIATION OF PROSECUTORS

**STANDARDS OF PROFESSIONAL RESPONSIBILITY
AND STATEMENT OF THE ESSENTIAL DUTIES
AND RIGHTS OF PROSECUTORS ADOPTED
BY THE INTERNATIONAL ASSOCIATION OF PROSECUTORS
ON THE TWENTY THIRD DAY OF APRIL 1999**

WHEREAS the objects of the International Association of Prosecutors are set out in Article 2.3 of its Constitution and include the promotion of fair, effective, impartial and efficient prosecution of criminal offences, and the promotion of high standards and principles in the administration of criminal justice;

WHEREAS the United Nations, at its Eighth Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba in 1990, adopted Guidelines on the Role of Prosecutors;

WHEREAS the community of nations has declared the rights and freedoms of all persons in the United Nations Universal Declaration of Human Rights and subsequent international covenants, conventions and other instruments;

WHEREAS the public need to have confidence in the integrity of the criminal justice system;

WHEREAS all prosecutors play a crucial role in the administration of criminal justice;

WHEREAS the degree of involvement, if any, of prosecutors at the investigative stage varies from one jurisdiction to another;

WHEREAS the exercise of prosecutorial discretion is a grave and serious responsibility;

AND WHEREAS such exercise should be as open as possible, consistent with personal rights, sensitive to the need not to re-victimise victims and should be conducted in an objective and impartial manner;

THEREFORE the International Association of Prosecutors adopts the following as a statement of standards of professional conduct for all prosecutors and of their essential duties and rights:

1. PROFESSIONAL CONDUCT

Prosecutors shall:

- a) at all times maintain the honour and dignity of their profession;
- b) always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession;
- c) at all times exercise the highest standards of integrity and care;
- d) keep themselves well-informed and abreast of relevant legal developments;
- e) strive to be, and to be seen to be, consistent, independent and impartial;
- f) always protect an accused person's right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial;
- g) always serve and protect the public interest;
- h) respect, protect and uphold the universal concept of human dignity and human rights.

2. INDEPENDENCE

2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.

2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be:

- a) transparent;
- b) consistent with lawful authority;

- c) subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.

2.3 Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

3. IMPARTIALITY

Prosecutors shall perform their duties without fear, favour or prejudice. In particular they shall:

- a) carry out their functions impartially;
- b) remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;
- c) act with objectivity;
- d) have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
- e) in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect;
- f) always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.

4. ROLE IN CRIMINAL PROCEEDINGS

4.1 Prosecutors shall perform their duties fairly, consistently and expeditiously.

4.2 Prosecutors shall perform an active role in criminal proceedings as follows:

- a) where authorised by law or practice to participate in the investigation of crime, or to exercise authority over the police or other investigators, they will do so objectively, impartially and professionally;
- b) when supervising the investigation of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights;
- c) when giving advice, they will take care to remain impartial and objective;

- d) in the institution of criminal proceedings, they will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence;
- e) throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence;
- f) when, under local law and practice, they exercise a supervisory function in relation to the implementation of court decisions or perform other non-prosecutorial functions, they will always act in the public interest.

4.3 Prosecutors shall, furthermore:

- a) preserve professional confidentiality;
- b) in accordance with local law and the requirements of a fair trial, consider the views, legitimate interests and possible concerns of victims and witnesses, when their personal interests are, or might be, affected, and seek to ensure that victims and witnesses are informed of their rights; and similarly seek to ensure that any aggrieved party is informed of the right of recourse to some higher authority/court, where that is possible;
- c) safeguard the rights of the accused in co-operation with the court and other relevant agencies;
- d) disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial;
- e) examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained;
- f) refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment;
- g) seek to ensure that appropriate action is taken against those responsible for using such methods;
- h) in accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, and particularly those involving young defendants, from the formal justice system, with full respect for the rights of suspects and victims, where such action is appropriate.

5. CO-OPERATION

In order to ensure the fairness and effectiveness of prosecutions, prosecutors shall:

- a) co-operate with the police, the courts, the legal profession, defence counsel, public defenders and other government agencies, whether nationally or internationally; and
- b) render assistance to the prosecution services and colleagues of other jurisdictions, in accordance with the law and in a spirit of mutual co-operation.

6. EMPOWERMENT

In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled:

- a) to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability;
- b) together with their families, to be physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their prosecutorial functions;
- c) to reasonable conditions of service and adequate remuneration, commensurate with the crucial role performed by them and not to have their salaries or other benefits arbitrarily diminished;
- d) to reasonable and regulated tenure, pension and age of retirement subject to conditions of employment or election in particular cases;
- e) to recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedures;
- f) to expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards;
- g) to objective evaluation and decisions in disciplinary hearings;
- h) to form and join professional associations or other organisations to represent their interests, to promote their professional training and to protect their status; and
- i) to relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics.

