



Hate Crime Laws

A Practical Guide

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Preface

The Organization for Security and Cooperation in Europe (OSCE) has taken a comprehensive approach to security since its inception in 1975, as the Conference on Security and Co-operation in Europe. Thus, the work of the OSCE includes not only the politico-military and economic aspects of security but also the *human dimension*. The human dimension includes the protection of human rights and fundamental freedoms, the promotion of the rule of law and democratic institutions, and tolerance and non-discrimination. The OSCE's Office for Democratic Institutions and Human Rights (ODIHR), based in Warsaw, is primarily concerned with matters falling within the human dimension.

Crimes motivated by intolerance towards certain groups in society are described as hate crimes. Such crimes have the potential to divide societies, and to create cycles of violence and retaliation. For this reason, a vigorous response to such crimes is necessary.

At the Ministerial Council meeting held at Maastricht in December 2003¹, the participating States of the OSCE collectively recognized the dangers posed by hate crimes and committed themselves to combating such crimes. Subsequently, OSCE participating States adopted a number of decisions that mandated ODIHR to work on hate crimes.² The participating States made a commitment to “*consider enacting or strengthening, where appropriate, legislation that prohibits discrimination based on, or incitement to hate crimes ...*”³ This guide has been developed as a tool to assist states in implementing that commitment.

Hate crime laws are important. By explicitly condemning bias motives, they send a message to offenders that a just and humane society will not tolerate such behavior. By recognizing the harm done to victims, they convey to individual victims and to their communities the understanding that the criminal justice system serves to protect them.

Laws — especially criminal laws — are an expression of society's values. Hate crime laws both express the social value of equality and foster the development of those values. But this process can only happen if laws are actually enforced. If

1 OSCE Ministerial Council Decision No. 4/03, Maastricht, 2 December 2003.

2 Ministerial Council Decision No. 12/04, “Tolerance and Non-Discrimination”, Sofia, 7 December 2004; Permanent Council Decisions No. 607, “Combating Anti-Semitism” and No. 621 “Tolerance and the Fight Against Racism, Xenophobia and Discrimination”, <www.osce.org/mc/documents.html>.

3 Permanent Council Decision No. 621 “Tolerance and the Fight Against Racism, Xenophobia and Discrimination”, <www.osce.org/mc/documents.html>.

hate crime laws are not used, it diminishes respect for all laws and weakens the rule of law.

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

It is hoped that this guide will serve as a practical tool in setting effective legislation. States are encouraged to disseminate the guide widely and, with ODIHR's assistance, to translate it. ODIHR continues to offer its assistance to States that wish to draft new legislation or are reviewing existing legislation, using this guide as a benchmark.

The development and drafting of this guide was shaped by the need to ensure its relevance to the many different legal systems in the OSCE region. A working method was developed that drew on the widely varying histories, traditions and legal frameworks and identified their common elements. This was achieved by first creating a Working Group of legal experts from countries both with and without hate crime laws. The Working Group discussed the scope and content of the guide, and provided detailed commentary on the drafts. Additionally, legal experts from a variety of OSCE countries were invited to contribute their comments and input on the process generally, either by participating in roundtables or by reviewing the drafts. These experts were drawn from a variety of disciplines and were professionally involved in the issue as prosecutors, judges, members of NGOs and policymakers. This process has helped to ensure that the drafts were scrutinized from many different perspectives.

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Introduction

Hate crimes are violent manifestations of intolerance and have a deep impact on not only the immediate victim but the group with which that victim identifies him or herself. They affect community cohesion and social stability. A vigorous response is therefore, important both for individual and communal security.

Hate crimes are distinguished from other types of crime by the motive of the perpetrator; since motive is usually irrelevant in proving the essential elements of a crime, it is rarely investigated in sufficient detail to bring out the real reason for the crime. If a criminal justice system does not use the concept of “hate crime”, the motive is not recognized as an essential element of the offence and the existence of hate crimes will therefore remain invisible.

In fact, hate crimes occur, to a greater or lesser extent, in all countries.⁴ Countries with effective data collection mechanisms usually show higher levels of hate crimes than countries that do not have effective data collection systems. However, in these countries data from social surveys, non-governmental organizations, and other monitors can show that there is a problem that is not being detected and addressed by the existing systems.

Whether or not states have passed separate laws to address hate crimes, these crimes do occur and have a significant impact on the victim and the victim’s community. If police, prosecutors, and judges can be trained to understand and respond to these crimes effectively, the damage caused by hate crimes can be lessened.

While there are many states in the OSCE with laws that could lead to increased penalties for hate crimes, their use is inconsistent. Legislation that is clear, concrete and easy to understand will enhance the likelihood that law enforcement officials will use it. Additionally, where effective laws exist they create a framework within which cases can be identified and data collected. Although legislation is only one part of the answer to the problem of hate crime, in combination with other tools it can be a powerful catalyst for changes in social attitudes.

⁴ See “Hate Crimes In The OSCE Region: Incidents and Responses Annual Report for 2007” (OSCE/ODIHR 2008) <<http://tandis.odihhr.pl>>, and individual country monitoring reports of the European Commission against Racism and Intolerance (ECRI), <http://www.coe.int/t/e/human_rights/ecri/1-ECRI/2-Country-by-country_approach/default.asp#TopOfPage>.

1. A Comprehensive Approach to Hate Crimes

Hate crime laws are only one of many tools that states can use in the fight against hate crimes.

There are many other aspects to a comprehensive national programme to combat bias-motivated violence, including education, outreach and training.

Specific steps would include:

- training criminal justice personnel on how to investigate hate crimes, work with victims, and prosecute cases;
- collecting accurate data on crimes with a bias motive, regardless of whether such crimes are prosecuted as hate crimes;
- providing for redress in civil anti-discrimination law;
- establishing anti-discrimination bodies with mandates to support victims of hate crime and discrimination;
- reaching out to communities and fostering relationships between law enforcement and community groups so that victims feel confident to report crimes; and
- educating the public (especially young people) on tolerance and non-discrimination.

ODIHR provides tools that can support states in each of these activities, and is able to assist in many ways to help make hate crime laws effective. Details of current assistance programmes are included in Part III, under “ODIHR’s Hate Crime Toolbox for participating States” and “ODIHR’s Hate Crime Toolbox for Civil Society”.

2. Why is This Guide Necessary?

There are many and varied international and regional instruments that urge improved responses to hate crimes. Laws to tackle such crimes must be drafted with an understanding of the practical consequences of legislative choices. But states that wish to review or amend their own legislation in this field will find few resources.

The purpose of this guide is to provide states with benchmarks for drafting hate crime legislation within a simple, clear and accessible document. While good practices are highlighted and risks identified, a prescriptive approach has been avoided. Hate crimes are specific to their social context, and legislation must recognize this. Additionally, national legal traditions will affect drafting choices.

In light of these factors, this guide:

- sets out the major questions to be addressed by legislators;
- gives examples of drafting choices made by different states;

- comments on the implications of different approaches;
- makes recommendations regarding issues (if such recommendations are sufficiently universal or fundamental to be useful); and
- provides details of further resources which can supplement the information given.

The guide will assist states who wish either to enact new legislation, or to review and improve their current legislation.

Recognizing the importance of legislation to combat hate crimes, participating States [of the OSCE] will ... where appropriate, seek ODIHR's assistance in the drafting and review of such legislation. — Ministerial Council Decision No. 4/03 Maastricht 2003

3. How to Use This Guide

Although some technical legal terminology is unavoidable, the guide has been written to be understood and used not only by legal experts; it is hoped that it will be used as a reference by policymakers, law enforcement officials and other interested persons.

- Part I sets out the rationales for hate crime legislation and introduces key issues. Many issues are only outlined in brief, because they are discussed in detail in Part II.
- Part II focuses on legislative drafting, with examples of state practice. It sets out the key policy questions for drafters, with commentary on the consequences of each decision. A summary of recommendations is given at the end of Part II.
- Part III provides a list of resources to enable further reading by interested readers; wherever possible, both online and print sources are given.

The guide does not assume any prior knowledge of this issue on the part of readers, and does not aim to provide a comprehensive review of the academic discussions about hate crimes. It does, however, give an overview of key points about the nature, purpose and rationale of such laws, so that readers are aware of common arguments for and against them.

4. Legislation in Context

This Guide repeatedly emphasizes the need to create legislation that is rooted in national experiences. This is most effective when the legislation is created after inclusive and extensive public debate. In this context, “public” should encompass both academic and popular discourse. This can elevate the terms of the debate and can itself lead to a transformation in attitudes. Further, dialogue and

discussion with civil society representatives can bring a different perspective to practical questions such as: “who are the most common victims?”; “what barriers to obtaining justice do victims face?”; and “what is the nature of offences being committed?” Such information can enrich the development of legislation by clarifying the social goals being sought. ODIHR urges legislators to draw upon the knowledge and expertise of civil society when preparing to draft or amend hate crime legislation.

The importance of this kind of dialogue, as well as other elements of good legislative technique, are set out in practice guides produced by international organizations such as the International Parliamentary Union and the Organization for Economic Co-operation and Development.⁵

5 “Parliament And Democracy in the Twenty-First Century: A Guide To Good Practice”, International Parliamentary Union <<http://www.ipu.org/dem-e/guide/guide-1.htm>>; “Law Drafting And Regulatory Management In Central And Eastern Europe”, SIGMA paper number 18, 1997, <http://www.sigmaweb.org/pages/0,3417,en_33638100_33638151_1_1_1_1_1,00.html>.



PART I

Understanding Hate Crime Laws

1. WHAT IS A HATE CRIME?

Hate crimes are criminal acts committed with a bias motive. It is this motive that makes hate crimes different from other crimes. A hate crime is not one particular offence. It could be an act of intimidation, threats, property damage, assault, murder or any other criminal offence.⁶

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

1.1 The Two Elements

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

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

The second element of a hate crime is that the criminal act is committed with a particular motive, referred to in this guide as “bias”. It is this element of bias motive that differentiates hate crimes from ordinary crimes. This means that the perpetrator intentionally chose the *target* of the crime because of some *protected characteristic*.

- The *target* may be one or more people, or it may be property associated with a group that shares a particular characteristic.
- A *protected characteristic* is a characteristic shared by a group, such as “race”, language, religion, ethnicity, nationality, or any other similar common factor.

Which characteristics should be included in a hate crime law is a complex issue that must be resolved by taking into account each State’s own history and circumstances. This question is one of the most significant policy decisions for legislators. The criteria for determining which protected groups to include in legis-

⁶ Many countries distinguish between crimes and less serious infractions, such as “misdemeanours”, although they are described in a variety of ways. In this guide, “offences” refers to all criminal law provisions; administrative infractions are therefore excluded.

lation are discussed in more detail in Part II under “Policy Question Two: Which Characteristics to Include”.

A hypothetical example

What does a hate crime look like?

A school is set on fire. Police initially decide it is a simple arson. However, the school is attended predominantly by Roma children, and investigations reveal that there have been previous incidents of graffiti on the school with anti-Roma slogans such as “Roma get out”.

The perpetrators are caught and admit they were responsible for the fire and the graffiti. They say they were motivated by a desire to “cleanse” their area of “aliens”.

The base offence is arson. But the bias motivation, on the grounds of “race” or ethnicity, makes this a hate crime.

1.2 Special Features

Hate crimes differ from ordinary crimes not only because of the motivation of the offender, but also because of the impact on the victim. The perpetrator selects the victim because of his or her membership of a group; this suggests that one member of such a group is interchangeable with any other. Unlike victims of many other criminal acts, hate crime victims are selected on the basis of *what* they represent rather than *who* they are. The message that is conveyed is intended to reach not just the immediate victim but also the larger community of which that victim is a member. Thus, they are sometimes described as symbolic crimes.

Hate crimes are designed to intimidate the victim and the victim’s community on the basis of their personal characteristics. Such crimes send a message to the victim that they are not welcome; they have the effect of denying the victim’s right to full participation in society. They also send a message to members of the community sharing the characteristic that they also do not belong, and could equally be a target. Hate crimes, therefore, can damage the fabric of society and fragment communities.

1.3 Bias or Hate?

Taken literally, the phrases “hate crimes” or “hate motive” can be misleading. Many crimes which are motivated by hatred are not categorized as hate crimes. Murders, for instance, are often motivated by hatred, but these are not “hate crimes” unless the victim was chosen because of a protected characteristic.

Conversely, a crime where the perpetrator does not feel “hate” towards the particular victim can still be considered a hate crime. Hate is a very specific and intense emotional state, which may not properly describe most hate crimes.

Hate crimes can be committed for one of a number of different reasons:

- the perpetrator may act for reasons such as resentment, jealousy or a desire for peer approval;
- the perpetrator may have no feelings about the individual target of the crime but have hostile thoughts or feelings about the group to which the target belongs;
- the perpetrator may feel hostility to all persons who are outside the group in which the perpetrator identifies himself or herself; or
- at an even more abstract level, the target may simply represent an idea, such as immigration, to which the perpetrator is hostile.

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

Case Highlight: Attack on mosque (USA)

Mosque symbolizes Al-Qaeda

On 13 September, 2001, in Seattle, USA, Michael Cunningham drove 25 miles from his home to a mosque, doused two vehicles parked outside with gasoline and attempted to ignite them in an effort to destroy the mosque. Upon being discovered by worshippers, Cunningham pulled out a pistol and shot at them, although none were harmed.

Police discovered that Cunningham acted because of anger at the terrorist attacks on September 11, 2001.

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

Case Highlight: Theo van Gogh murder (Netherlands)

Hate crime offender denies feeling “hate”

Theo Van Gogh was a well-known film-maker in the Netherlands who made films and public statements that were extremely critical of Islam. On 2 November 2004, Mohammed Bouyeri approached him in the street and shot him eight times and attacked him with a knife. Two knives were left implanted in his torso, one attaching a five-page note to his body.

In court Bouyeri stated that he did not hate his victim, and that this killing was motivated by his beliefs: “I did what I did purely out of my beliefs. I want you to know that I acted out of conviction and not that I took his life because he was Dutch or because I was Moroccan and felt insulted.”

He was convicted of murder and sentenced to life imprisonment. No enhancement for bias was applied; hence, the question of motive was never considered by the court.

When preparing hate crime laws, the drafting choices of legislators will determine whether the law requires the perpetrator to feel “hate”. Part II contains a detailed discussion of the consequences of different drafting choices relating to motive under “ Policy Question Three: Defining Motive – Hostility or Discriminatory Selection?”

2. WHAT SETS HATE CRIMES APART?

As described above, hate crimes are special in that the perpetrator is sending a message about the victim and their right to belong to that society. This means that hate crimes have consequences which set them apart from other crimes and which justify a different legal approach.

2.1 Human Rights and Equality

Hate crimes violate the ideal of equality between members of society. The equality norm is a fundamental value that seeks to achieve full human dignity and to give an opportunity to all people to realize their full potential. The status of the equality norm is evidenced by its constant reiteration in human rights documents. The first line of the UN Declaration on Human Rights refers to the “*recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family*”. It is a theme repeated in most UN human rights instruments, and in the core constitutional documents of almost every state in the world. The violation of these values and norms by hate crimes has a weighty practical and symbolic impact.

The Ministerial Council ... reiterate[s] that democracy and protection of human rights and fundamental freedoms are essential safeguards of tolerance and non-discrimination ... and that conversely, tolerance and non-discrimination are important elements in the protection of human rights ... — *OSCE Ministerial Council Decision No. 6, Porto, 2003*

2.2 Effect on Victim

By targeting a person's identity, hate crimes cause greater harm than ordinary crimes. The immediate victim may experience greater psychological injury and increased feelings of vulnerability because he or she is unable to change the characteristic that made him or her a victim. Hate crimes have a significantly deeper psychological impact on their victims, leading to feelings of depression and anxiety.⁷

2.3 Community Impact

The community that shares the characteristic of the victim may also be frightened and intimidated. Other members of the targeted group can feel not only at risk of future attack, they may experience the attack as if they were themselves the victim. These effects can be multiplied where a community has historically been victims of discrimination.

Social acceptance of discrimination against particular groups is an important factor in causing hate crimes to increase. Hence, although hate crimes can be committed against member of the majority population, it is the most marginalized communities who are disproportionately victims of hate crimes. Thus, in relation to such groups there is a particularly strong symbolic value to adopting and enforcing strong hate crime laws.

2.4 Security Issues

Hate crimes present potentially serious security and public order problems. Hate crimes affect a far wider circle of people than ordinary crime, and have the potential to cause social division and civil unrest. By creating or emphasizing existing social tensions, these crimes can have the effect of causing division between the victim group and society at large. Hate crimes can exacerbate existing intergroup tensions, and play a part in interethnic or social unrest. In internal conflicts, widespread hate crimes usually accompany the escalation phase. In sit-

⁷ "Hate crimes today: An age-old foe in modern dress", American Psychological Association position paper released in 1998, <http://209.85.135.104/search?q=cache:qHOGi3CfCR0J:www.apa.org/releases/hate.html+hate+crimes+impact+AMerican+Psychological&hl=en&ct=clnk&cd=1&lr=lang_en>.

uations where relations between ethnic, national or religious groups are already sensitive, hate crimes can have an explosive impact.

Case Highlight: Kondopoga riots (Russia)

From bar fight to ethnic riots

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

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

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

“Hate Crimes in the OSCE Region: Incidents and Responses”, Annual Report for 2006, OSCE ODIHR p. 20, <<http://tandis.odihr.pl>>; Claire Bigg, 6 September 2006, Radio Free Europe, <<http://www.rferl.org/content/article/1071116.html>>, “Racist Rioters Escape Jail”, 2 November 2007, Russia Today <<http://rusiatoday.ru/news/news/16374>>.

3. WHY HAVE HATE CRIME LAWS?

If hate crimes are treated like other crimes and are not recognized as a special category they are often not dealt with properly. This can manifest itself in ways such as: investigators disbelieving the victim or failing to properly investigate allegations of bias motive; prosecutors minimizing the offence when choosing charges; and courts failing to apply their powers to increase sentences to reflect the motives of the perpetrator.

Hate crimes do not occur in a vacuum; they are a violent manifestation of prejudice, which can be pervasive in the wider community. In cases of poor investigation, prosecution, and punishment of hate crimes, certain patterns can be discerned. Where the crime is committed against an individual who is a member of a stigmatized group (for instance if the group is stereotypically thought of as being involved in crime), this can affect the investigation by painting the victim as being somehow at fault.

It takes very few such cases for affected communities to become disillusioned with the response of law enforcement officials. By contrast, where a prosecution

and sentence takes account of the bias motive, such public acknowledgement reassures the victim that his or her experience has been fully recognized. This in turn can inspire trust in other members of the community that hate crimes will not go unpunished. Codifying the social condemnation of hate crimes into law is important to affected communities, can help build trust in the criminal justice system, and thus can repair social fissures.

3.1 Practical Arguments

The practical impact of passing hate crimes legislation can be significant. Ideally, legislation is passed after discussion within government, law enforcement authorities and society at large. This serves to focus attention and raise awareness of the extent and nature of the crimes. The process of passing legislation can thereby improve awareness of and responses to hate crime.

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

The existence of hate crime laws makes data collection more effective, which gives improved intelligence and policing information, enabling resources to be properly allocated. When hate crime cases are identified, the nature of the problem and the effectiveness of the response become clearer, allowing training and resources to be allocated to those areas most in need.

An improved criminal justice response raises the confidence of affected communities. This leads to information and cooperation from communities who may otherwise be wary of the police. This leads to more investigations being resolved, not only in relation to hate crime but also into other matters in which police require community assistance.

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

3.2 Theoretical Arguments

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

First, the symbolic value of the law can and should be utilized to demonstrate society's rejection of crimes based on bias. The enactment of hate crime laws is a powerful expression of society's condemnation of certain offences as especially reprehensible, and deserving of greater punishment.

Second, criminal law penalizes the harm caused. As noted previously, hate crimes have a greater impact on the victim than ordinary crimes, and they also affect others who are members of the victim's group. The justification for increased sentences is therefore the additional harm caused both to the individual and the community.

Third, hate crime laws punish the greater culpability of the perpetrator.⁸ The perpetrator's motive makes the crime more serious than if the offence had been committed without such motive. The criminal law frequently imposes increased penalties for acts based not only on their outcome, but on the intent of the perpetrator. This argument therefore assumes that it is the intent of the perpetrator to cause disproportionate harm, or that they are reckless to the risk of additional harm.

3.3 Are Hate Crime Laws Discriminatory?

Some opponents of hate crime laws claim that they protect some groups more than others, and are therefore discriminatory. This is not the case. Although hate crimes are most often committed against members of minority communities, they can also occur against majority communities too.

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

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

⁸ See Frederick M. Lawrence, "The Hate Crime Project and Its Limitations: Evaluating the Societal Gains and Risk in Bias Crime Law Enforcement", in *Legal Decision Making in Everyday Life: Controversies in Social Consciousness* (Springer 2007).

Case Highlight: Murder of Kriss Donald (United Kingdom)

Hate crime laws apply to everyone

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

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

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

4. RELATED CONCEPTS

There are a number of concepts which are closely related to hate crime which are not included within this Guide.

Although genocide is a crime motivated by bias it has been excluded from this Guide, because it has certain special characteristics which make it very different from “ordinary” crimes.

Hate crime laws always prohibit conduct that is first and foremost criminal. And although hate speech and anti-discrimination laws are sometimes confused with laws dealing with hate crime they lack the essential element of a hate crime law: that the same conduct, without a bias motivation, could still be prosecuted as a crime.

4.1 Genocide

The international crime of genocide is sometimes included within discussions of hate crime laws. Although national law may prohibit genocide and other related crimes, such as crimes against humanity, they are not, in this context, described as hate crime laws. Genocide requires an intention to destroy — in whole or in part — a national, ethnic, racial or religious group.⁹ This is qualitatively and quantitatively different from hate crimes, as are all crimes under international law that require widespread, systematic acts of violence. The legislative, investigative and prosecutorial issues arising from such international crimes are very different

⁹ See Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide.

from those which arise in hate crimes. All such crimes are therefore outside the scope of this Guide.

4.2 Anti-discrimination Laws

Anti-discrimination laws are not hate crime laws. The concept of discrimination refers to less favourable treatment of a person on the basis of some prohibited consideration, such as racial or ethnic origin, or gender. Anti-discrimination laws, which exist in many but not all OSCE states, usually relate to workplace discrimination, or discrimination in the provision of goods and services. An act of discrimination such as paying one worker less than another for the same work is unlawful if it is based on discriminatory grounds. The same act without the discrimination would not be unlawful.

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

4.3 Hate Speech

There are laws that criminalize speech because of the particular content of that speech. The prohibited content differs widely: in some jurisdictions speech that incites hatred or is insulting about certain groups is penalized. Other common prohibitions are on speech which denigrates a person's or a nation's "honour" or "dignity". There may also be restrictions on specific historical subjects, the most notable being laws which prohibit Holocaust denial or glorification of Nazi ideology. This category of speech regulation is described as "hate speech". But in all these cases, the speech itself would not be a crime without that specific prohibited content. Therefore, hate speech lacks the first essential element of hate crimes. If the bias motive or content were removed there would be no criminal offence. For example, a rock concert featuring songs glorifying violent fascism or the Holocaust would be hate speech, and in some States would be a crime, but it is not a hate crime because there is no criminal base offense. The first essential element of a hate crime is missing.

Direct and immediate incitement to criminal acts is universally prohibited within the OSCE region. Where such incitement occurs with a bias motive it should be categorized as hate crime because there is a criminal base offence.

Although hate speech is an issue to which a great deal of public attention is paid, discriminatory or insulting speech has been excluded from the scope of this Guide.

Not only does it lack the element of a base offence, there are extreme variations between the hate speech laws of different countries. Different constitutional and philosophical approaches mean there is insufficient common ground for this guide to provide useful commentary.

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

A common criticism of hate crime laws is that they infringe freedom of speech or amount to a penalty for opinions or attitudes rather than actions. Because the majority of OSCE participating States already have in place laws that restrict certain forms of speech, those criticisms of hate crime laws are not discussed in this guide.

5. THE INTERNATIONAL AND REGIONAL FRAMEWORK

International organizations have made hate crime a priority.

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

Some instruments specifically call on states to criminalize certain acts. Article 4 of CERD imposes an obligation on states to take “*immediate and positive measures*”; paragraph (a) goes on to require that it should be an offence to “*disseminate 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*” (emphasis added).¹⁰ The committee overseeing CERD has called upon states to define offences with bias motives as specific offences and to enact legislation that enables the bias motives of perpetrators to be taken into account. The European Commission on Racism

¹⁰ Ten OSCE participating States have entered reservations or declarations to the requirements in Article 4 relating to speech to protect freedom of expression.

and Intolerance (ECRI)¹¹ has also called for the criminalization of such acts in its General Policy Recommendations.

The European Union Framework Decision on Racist and Xenophobic Crime was adopted on 28 November 2008.¹² The directive recognizes the differences across the EU in laws dealing with racist and xenophobic behaviour, and different approaches to prohibitions on speech. It aims to establish a common criminal law approach, punishable in the same way in all the Member States, and will require states to review whether their existing legislation is in conformity with the directive.

Many of the instruments described here, while condemning acts of racism, also call for legislation prohibiting certain forms of speech; but this is controversial, and OSCE participating States do not share a consensus position on this. Therefore, as noted earlier in this part, this guide deals only with hate crimes and not with “hate speech”.

In a series of recent decisions the European Court of Human Rights has held that states have positive obligations under the European Convention on Human Rights and Fundamental Freedoms to investigate the potential racial motivation of crimes. In the landmark decision of *Nachova and Others v. Bulgaria*,¹³ the Court held that there was a duty to investigate possible racist motives behind acts of violence by state authorities, and that Bulgaria’s failure to do so constituted a violation of the non-discrimination provision in Article 14 of the Convention.

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

*“... when investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.”*¹⁴

11 See especially General Policy Recommendation No. 7 on National Legislation To Combat Racism And Racial Discrimination, ECRI website, 13 December 2002, <www.coe.int/ecri>.

12 See the website of the French Presidency of the EU, <http://www.ue2008.fr/PFUE/lang/en/accueil/PFUE-11_2008/PFUE-27.11.2008/resultats_JAI>.

13 *Nachova and Others v. Bulgaria*, Judgement of the European Court of Human Rights (Grand Chamber), 6 July 2005, paragraphs 160-168, <<http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database>>.

14 *Secic v Croatia*, Judgement of the European Court of Human Rights, (Chamber Judgement), 31 May 2007, paragraph 66, <<http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database>>.

6. CONCLUSION

The essential issue is that when criminal cases are prosecuted, the hate motivation should be explicitly recognized and punished. Sometimes when cases of hate crime are prosecuted, the motivation for selecting the victim (such as the victim's "race", nationality or ethnic origin) is never mentioned. If this happens, the opportunity and potential for the perpetrator's punishment to have a deterrent effect on others is lost. The danger is that the message to the victim and the perpetrator is that the state does not view seriously the hate motive which caused the crime.

Victim Testimony: David Ritcheson

Testimony before the United States Congress, 17 April 2007

... I am here before you today asking that our government take the lead in deterring individuals like those who attacked me from committing unthinkable and violent crimes against others because of where they are from, the color of their skin, the God they worship, the person they love, or the way they look, talk or act ...

I was fortunate to live in a town where local law enforcement authorities had the resources, the ability — and the will — to effectively investigate and prosecute the hate violence directed against me. But other bias crime victims may not live in such places. I ask you to provide authority for local law enforcement to work together with federal agencies when someone is senselessly attacked because of where they are from or because of who they are. Local prosecutors should be able to look to the federal government for support when these types of crimes are committed. Most importantly, these crimes should be called what they are and prosecuted for what they are, "hate crimes"!

David Ritcheson, a Mexican-American teenager, was attacked on 22 April 2006 by two men who stripped him naked, burnt him with cigarettes, carved a swastika on his chest, and beat and kicked him before leaving him for dead. One of his attackers had been convicted of two previous racist attacks.



PART II

Drafting Legislation: Key Policy Questions

Introduction

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

Most of the legislation included can be found through ODIHR's online legislative database,¹⁵ which can also be accessed through its Tolerance and Non-Discrimination Information System.¹⁶ Although the most recent published versions of legislation are used, and were accurate at the time of writing, readers should be aware that legislation, and its interpretation by courts, changes over time. Additionally, not all the legislation which this guide cites is available in an official English translation.

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

The questions posed are:

Policy Question One: *Should the law create a new substantive offence or operate as a penalty enhancement for existing crimes?*

Policy Question Two: *Which characteristics should be included in the law?*

Policy Question Three: *How should motive be defined in the law?*

Policy Question Four: *How should association, affiliation and mistakes in perception be dealt with?*

Policy Question Five: *What evidence is needed and how much motive is required?*

¹⁵ <<http://www.legislationline.org>>.

¹⁶ <<http://tandis.odihr.pl>>.

Each policy question must be answered in isolation, but their combined effect should also then be considered. Individual policy decisions that are justifiable and reasonable in themselves could, in combination, produce laws that are unworkable if the cumulative effect is to create laws which are either too narrow or too broad.

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

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

1. POLICY QUESTION ONE: SUBSTANTIVE OFFENCE OR PENALTY ENHANCEMENT?

1.1 Substantive Offences

A “substantive offence” is a separate offence that includes the bias motive as an integral element of the legal definition of the offence. Within the OSCE region, this kind of hate crime law is relatively rare. The United States (both at the federal and state levels), the Czech Republic and the United Kingdom have created specific offences that incorporate a bias motive. Most other countries have not.

Examples of Substantive Offences —the Czech Republic and the United Kingdom

Art. 196(2) of the **Czech Republic's** Criminal Code provides for punishments ranging from six months to three years' imprisonment for "using violence against a group of inhabitants or against an individual, or to threaten them with death, injury to health or infliction of serious injury because of their political conviction, nationality, race, creed, or lack of creed."

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

1.2 Penalty Enhancements

Penalty enhancements, which are sometimes referred to as "aggravating sentencing clauses" or "aggravating circumstances clauses", can also be used to create a hate crime law.¹⁷ Simply put, they increase the penalty for a base offence when it is committed with a bias motive. The majority of hate crime laws in the OSCE region fall within this description.

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

- *General penalty enhancements.* Enhancement provisions that apply to a wide range of criminal offences are described as general penalty enhancements. Within the OSCE region, 23 countries list some form of bias motive as a factor that can lead to a penalty enhancement for all crimes.

¹⁷ These terms are not used in this guide in order to avoid confusion with "racially aggravated offences" in the United Kingdom, which are substantive offences.

Examples of General Penalty Enhancements — Andorra, Tajikistan, and the United Kingdom

Article 30.6 of **Andorra's** Criminal Code provides for penalty enhancements if crimes are committed for "racist and xenophobic motives or reasons related to ideology, religion, nationality, ethnic origin, sexual orientation, disease or physical or mental disability of the victim."

Art. 62(1)(f) of **Tajikistan's** Criminal Code provides for penalty enhancements, including "crimes with a motive of national or religious hostility."

Section 153 of the **United Kingdom's** Powers of Criminal Courts (Sentencing) Act 2000 provides that if an offence is racially aggravated, the court "shall treat that fact as an aggravating factor (that is to say, a factor that increases the seriousness of the offence); and shall state in open court that the offence was so aggravated."¹⁸

- *Specific penalty enhancements.* Specific enhancements apply increased penalties only to some criminal offences. Twenty-five countries list some form of bias motive as a factor that can lead to a penalty enhancement for specific crimes.

Some penalty enhancement laws specify the degree of increased sentence. Other penalty enhancement laws leave the decision to the discretion of the court. Some laws also require the court to state explicitly the reasons for applying or failing to apply the penalty enhancement. In most jurisdictions there is a duty on prosecutors to investigate anything that might increase the sentence and bring such facts to the attention of the court, although the extent to which this occurs in cases of hate crime is debatable. For example, the Metropolitan Police Force in Copenhagen has issued a directive that in all cases of violence with a possible racist motive, the prosecutor must ask the court to consider this as an aggravating circumstance under the general penalty enhancement provision of the Criminal Code. In the United Kingdom, the Crown Prosecution Service requires prosecutors to place admissible evidence of racial or religious aggravation before the court.

¹⁸ This applies only if the offence is not charged as a substantive racially aggravated offence under sections 28–32 of the Crime and Disorder Act 1998.

Examples of Specific Penalty Enhancements — Belgium, the Federation of Bosnia and Herzegovina and Turkmenistan

Articles 33-42 of **Belgium's** Law of 10 May 2007 provide that “hatred against, contempt for, or hostility to a person on the grounds of his so-called race, color of skin, descent, national or ethnic origin, nationality, sex, sexual orientation, marital status, birth, age, wealth, belief or philosophy of life, current and future state of health, disability, language, political conviction, or physical or genetic characteristic or social origin” are aggravating circumstances that can double the penalty of the following specified crimes: indecent assault and rape; manslaughter and intentional injury; non-assistance to a person in danger; violation of personal liberty and of the inviolability of private property; ambush or lying in wait; libel; arson, and destruction of personal possessions or property.

Article 166(2) of the **Federation of Bosnia and Herzegovina's** Criminal Code provides that murder committed on “racial, national, or religious grounds” is punishable by a minimum term of 10 years' imprisonment; without the penalty enhancement the minimum period is five years.

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

1.3 Commentary

There are certain advantages to enacting a law making hate crime a substantive offence. Because part of the importance of hate crime law — for both the individual victim and society at large — is the symbolic value of labeling the offence, a substantive hate crime law explicitly condemns the prohibited bias motive. When hate crimes are enacted as substantive offences, the crime usually has greater visibility and hate crime data is easier to collect. Thus, a substantive hate crime law fulfills the expressive function of criminal law.

Substantive offences pose challenges as well. A substantive hate crime offence requires motive to be proved in order for the accused to be convicted. Prosecutors may be reluctant to press charges regarding a substantive offence if they believe it will be harder to prove. In some jurisdictions there is the additional problem that courts can only consider the offence with which the accused is indicted. Hence, a substantive hate crime indictment may not allow the court to convict of the base offence if the bias element is not proven. This is a disadvantage of substantive offences, and can cause prosecutors either to avoid using the hate crime laws, or to accept a guilty plea to the base offence in order to ensure the offender is convicted. Training for prosecutors and investigators as to the indicators of motive is an important aspect of overcoming such problems.

Potential problems with alternative charges?

A 2002 study of racially aggravated offences in the United Kingdom found that offenders often plead guilty to the base offence to avoid being found guilty of the racially aggravated offence. The study found that the structure of the legislation invited “pleas of not guilty to the aggravated version of offences; and the offer of a guilty plea to the underlying substantive offence.” Prosecutors were sometimes “blamed for accepting these offers too easily.”

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

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

One significant disadvantage with a penalty enhancement law, however, is that a court’s decision to enhance the penalty on the basis of a bias motive might not be part of the public record. In states such as Germany, the reasons for enhancement cannot be recorded publicly. A consequence is that an accused’s criminal history cannot be used to determine whether he or she has a past history of bias-motivated crimes. Moreover, in some states, previous convictions for bias crimes, even if publicly recorded, may only under very limited conditions be allowed as evidence in a later case.

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

For both substantive offences and penalty enhancements, the success of the case will be closely connected to the quality of the investigation and the development of evidence of motive. General questions of evidence and proof of bias motive will be considered further in Section 6 – “Policy Question Five: What evidence is needed and how much motive is required.”

Finally, a combination of approaches is always possible. Some states have specific substantive crimes requiring a bias motive and also have general penalty enhancement statutes for other crimes. For example, both the United Kingdom and the United States have chosen this path. To combat hate crimes effectively, a state can choose to adopt a range of provisions.

1.3.1 Related Considerations

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

- *Should the enhancement be stated on the record?* Requiring courts to consider any evidence of bias motive and state on the record the reasons for applying or not applying an enhancement is good practice. It ensures a record is kept of the court's decision-making process so any history of bias-motivated offending can be known to law enforcement authorities. It can also operate as a means to focus the court's attention on the issue, and reassures victims that the court has taken into account the motive for the crime.
- *If the substantive offences approach is used, what base offence or offences should have the bias element?* This requires some legislative fact-finding concerning what kinds of offences are frequently motivated by bias in that particular society. It may be both impractical and more difficult to create a large number of new substantive offences. Legislatures should focus on those crimes where creating a new substantive offense will have the most impact. For example, the penalties for harassment or property damage are usually quite low, but the impact of such offences when motivated by bias can be significant.
- *If the penalty enhancement approach is used, should the law apply to all offences or only particular ones? Should it specify the amount of increase in the sentence?* Specifying the amount of increase might be necessary if there is a perception that courts are unwilling to sentence hate crime offenders more severely. In some countries, however, constraining the court's discretion in that manner would not be permissible. It will not always be necessary to add a penalty enhancement for a bias motive. If the base offence is already subject to the maximum penalty available in law, enhancement will be meaningless.

2. POLICY QUESTION TWO: WHICH CHARACTERISTICS TO INCLUDE?

All hate crime laws define protected characteristics, but different states protect different characteristics. Thus, all hate crime laws in the OSCE region include "race" as a protected category. Some include categories such as "gender," "sexual

orientation,” and “disability.” Less commonly, some hate crime laws protect such characteristics as “education”, “profession”, “political affiliation” or “ideology.”

This section will first outline the criteria for determining protected characteristics. It will then list and comment on those characteristics which are found in OSCE participating States’ laws, in order of frequency.

Of the 37 countries within the OSCE that have some kind of hate crime law, almost all cover bias “motivated by religious or racial hatred”, while provisions extend to sexual orientation in 11 countries and to disability in only seven countries.

2.1 Criteria for Inclusion of Protected Characteristics

The choice of protected characteristics is one of the most important aspects of hate crime laws. There is no precise answer as to which characteristics should be included, but they are usually ones that are apparent or noticeable to others and thus more easily targeted by offenders. The decision must be made with regard to the needs of each state, but it must be based on a proper assessment of a number of factors, which are as follows.

2.1.1 *Immutable or Fundamental Characteristics*

Hate crime is an identity crime. This is what renders it different from ordinary crimes. Hate crimes target an aspect of a person’s identity that is unchangeable or fundamental to a person’s sense of self. Such markers are usually evident, such as skin colour. But not all immutable (i.e. unchangeable) or fundamental characteristics are markers of group identity. When determining the protected characteristics to include in a hate crime law it is necessary to identify characteristics that function as a *marker of group identity*. For example, blue eyes may be described as an immutable characteristic, but blue-eyed people do not usually identify together as a group, nor do others see them as a cohesive group, and eye color is not typically a marker of group identity.

Conversely, there are a few characteristics which are changeable but are nevertheless fundamental to a person’s sense of self. For example, even though it is possible to change one’s religion, it is a widely-recognized marker of group identity that a person should not be forced to surrender or conceal.

2.1.2 *Social and Historical Context*

The process of determining which characteristics to include requires an understanding of current social problems as well as potential historical oppression and discrimination. Characteristics that have been the basis for past attacks should be included, as should characteristics that are the basis for contemporary

incidents. To return to the example of the previous paragraph, blue-eyed people have not experienced historical or contemporary subjugation. Because criminal law attempts to deal with social issues, a legislature considering enactment of a hate crime law must understand just what those issues are.

It is in this context especially that dialogue and consultation will benefit the legislative process. Whilst legislators and policymakers are likely to be from majority communities, the question of current and past discrimination and victimization can be effectively represented by non-governmental organizations, ombudsmen, and community groups representing minority communities.

The characteristics that ought to be included are those that implicate societal fissure lines – divisions that run deep in the social history of a culture.

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

2.1.3 Implementation Issues

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

2.2 Excluded Characteristics

Failing to include a particular characteristic in a hate crime law does not mean that there are no criminal sanctions. In most jurisdictions, attacks on police officers or members of the military are serious crimes. They just do not fall within the concept of hate crime. Similarly, the sexual assault of a child is punished more severely than the sexual assault of an adult. This does not mean that the former should be considered a hate crime.

Decisions about what characteristics to include will have an impact on how the law is used and what kinds of crimes are classified as hate crimes. If a hate crime law protects a long list of characteristics, it will be a very broad law and will apply to a wide range of situations and offences. It may become too general for the

law to be enforced effectively. Conversely, if a hate crime law protects relatively few characteristics, it risks excluding groups that are commonly victims of hate crimes. Legislators, therefore, need to strike a balance between a comprehensive law and one that is too broad to be enforced effectively.

2.3 The Most Commonly Protected Characteristics

Within the OSCE region, “race”, national origin, and ethnicity are the most commonly protected characteristics, closely followed by religion. These characteristics were the ones recognized during the early period of hate crime lawmaking.

Further, some religious groups may also be described in terms of “race”, and an individual may be victimized on the basis of more than one protected characteristic. Indeed the perpetrator may not make a distinction between the “race” and the religion of his or her victim.

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

Examples of Commonly Protected Characteristics — Azerbaijan and Hungary

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

Under Section 174/B of **Hungary’s** Penal Code, a person who “... assaults somebody else because he belongs, or is believed to belong, to a **national, ethnic, racial, or religious group** ... commits a felony and shall be punishable with imprisonment of up to five years.”

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

2.3.1 Race

Despite its prevalence in hate crime laws, “race” is a social construct that has no basis as a scientific concept.¹⁹ The point was made as early as 1950 in the UNESCO Statement on Race, which was compiled after meetings with leading biologists, anthropologists and scientists from other disciplines. The Statement noted that “[i]t would be better when speaking of human races to drop the term ‘race’ altogether and speak of ethnic groups.” The International Union of Anthropological and Ethnological Sciences, in its Race Statement, proposed that the UNESCO Statement be updated, and reiterated that “[p]ure races in the sense of genetically homogeneous populations do not exist in the human species, nor is there evidence that they have ever existed in the past history of the human family.”²⁰ The term “race”, because of its lack of clarity, can also cause problems of interpretation for courts and law enforcement. For these reasons, when drafting legislation it is preferable to utilize alternative terms such as “ancestry”, “national origin” or “ethnicity.”

Although many international organizations, and some states, now avoid using the term “race”, the use of related words such as “racism” and “racial discrimination” persists. As the European Union Agency for Fundamental Rights noted, “there is no term that, as yet, can effectively encapsulate ethnic discrimination in the same way that ‘racism’ continues to capture a range of discriminatory ideologies and practices.”²¹ The use of “racial” in the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD) explicitly incorporates “race”, colour, descent and national or ethnic origin. Article 1 of the Convention provides that:

[T]he term “racial discrimination” shall mean any distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The European Commission against Racism and Intolerance (ECRI) has also adopted a broad definition of “racism,” defining it as the “belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin

19 The word “race” is placed in quotation marks in this guide to indicate that underlying racial theories are not accepted.

20 See IUAES website, <<http://www.leidenuniv.nl/fsw/iaes/index.htm>>.

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

justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.”²²

Case Highlight: The Trial of Jan P (Slovakia)

A Narrow Interpretation of “Race”

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

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

2.3.2 National Origin/Ethnic Origin/Ethnicity

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

One definition describes “ethnic group” as “a collectivity within a larger population having real or putative common ancestry, memories of a shared past, and a cultural focus upon one or more symbolic elements which define the group’s identity”.²³ “National origin” can sometimes be used to mean “citizenship” (see “Nationality”, below), but it can also mean cultural affiliation to a national group, which may be linked to a state other than that of which the person is a citizen, or to no state at all. The United Nations and the Council of Europe both recommend that such definitions be determined by their national context.

22 ECRI General Policy Recommendation No. 7, <www.coe.int/t/e/human_rights/ecri/1-ecri/3-general_themes/1-policy_recommendations/Recommendation_N7>. Paragraph 35 of the Explanatory Memorandum states that ECRI rejects theories based on the existence of different “races”, but that the term is used in this Recommendation “in order to ensure that those persons who are generally and erroneously perceived as belonging to ‘another race’ are not excluded from the protection provided for by the legislation”.

23 “Ethnic statistics and data protection in the Council of Europe Countries,” ECRI 2007, p. 27, <www.coe.int/t/e/human_rights/ecri/1-ecri/Ethnic%20statistics%20and%20data%20protection.pdf>.

2.3.3 Nationality

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

2.3.4 Religion

A hate crime law that includes religion as a characteristic should protect members of all religions and should also protect those who do not follow any particular religion. In fact, some hate crime laws specify that “religion” includes the lack of any religious belief. Atheists or non-believers are thus protected. In Belgium, for example, the term “religion” refers to religious or philosophical convictions related to the existence or non-existence of a god.²⁴ In Malta, Section 222A of the Criminal Code provides for enhanced penalties for crimes against racial or religious groups and states that “religious group means a group of persons defined by reference to religious belief or lack of religious belief.” Article 192(2) of the Criminal Code of the Czech Republic includes a reference to “creed or lack of creed.”

2.4 Frequently Protected Characteristics

Gender, age, mental or physical disability, and sexual orientation are quite frequently protected characteristics. Eleven OSCE participating States have hate crime laws relating to sexual orientation, seven relating to disability, and six relating to gender.

Examples of Frequently Protected Characteristics — Canada and France

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

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

24 “RAXEN Focal Point for Belgium, National Analytical Study on Racist Violence and Crime”, EUMC 2003, p. 20, <<http://fra.europa.eu/fra/material/pub/RAXEN/4/RV/CS-RV-NR-BE.pdf>>.

The terms in this category are more easily defined than “race” and the analogous terms discussed above. In many countries, such terms exist already either in constitutional documents or in anti-discrimination provisions. Where the terms are unambiguous or have already been interpreted by courts, there appears no need to define the characteristic again in hate crime legislation. Legislation can, of course, cross-reference terms and definitions appearing in other laws. Nevertheless, some hate crime statutes offer explicit definitions. For example, in the state of Delaware, United States, the hate crime legislation defines “sexual orientation” as heterosexuality, bisexuality or homosexuality.²⁵ In the United Kingdom, section 146 of the Criminal Justice Act 2003 defines “disability” as “any physical or mental impairment.”

2.5 Rarely Protected Characteristics

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

Examples of Less Frequently Protected Characteristics — Croatia, Russia, Spain, and the District of Columbia (United States)

Art. 89, para. 36 of **Croatia’s** Criminal Code provides that “[h]ate crime shall refer to every criminal act contained in this Law, committed out of hatred against a person due to his/her race, skin colour, gender, sexual orientation, language, religion, political or other belief, national or social origin, **property, birth, education, social position**, age, health status, or other characteristics.”

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

Art. 22.4 of **Spain’s** Criminal Code defines aggravating circumstances as situations in which a crime is committed on racist, anti-Semitic, or other discriminatory grounds related to the victim’s **ideology**, religion, or beliefs or his/her belonging to an ethnic group, race, nation, gender or sexual orientation or his/her suffering from an illness or handicap.

Section 22-3701 of the **District of Columbia** Code defines

“bias-related crime” as a designated act that demonstrates an accused’s prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, **personal appearance**, sexual orientation, **family responsibility**, physical disability, **matriculation [i.e. educational status]**, or **political affiliation** of a victim of the designated act.

²⁵ 11 Del. Code § 1304(a)(2).

2.6 Commentary

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

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

- historical conditions;
- contemporary social problems; and
- the incidence of particular kinds of crime.

In addition, a legislature should assess the practical implication of including or excluding certain characteristics. For example, some of the “rarely protected characteristics” would not meet the criteria of a history of discrimination. Other characteristics might pose implementation problems for law enforcement officials. For example, the hate crime law of the District of Columbia, quoted in section 2.5, includes matriculation (educational status) as a protected characteristic. It would be difficult for investigators to show that a crime was committed for such a motive, since educational status is not a characteristic which is evident unless the victim is known to the perpetrator. Additionally, matriculation is not generally a strong marker of group identity, nor does it usually carry with it a history of discrimination.

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

Some categories are confusing. For instance, where a term such as “social group” is used without a clear definition, there are dangers that the law can fail to achieve its ends. If a law includes characteristics that are not immutable or in some manner essential to a person’s sense of self and shared by persons who as a group have experienced discrimination, exclusion or oppression, it can be discredited as a hate crime law. Further, it can fail to protect those groups which are in fact victimized. People protected under the term “social group” might include members of the police or politicians, neither of whom is typically perceived as an oppressed group or as sharing fundamental bonds of identity. Indeed, if a law includes protected characteristics that are too far away from the core concept of hate crime it may no longer be seen as a hate crime law.

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

Some states, such as Canada and Croatia, have opted for open-ended lists. In other words, they leave open the possibility that the law could apply to crimes based on characteristics beyond those already named in the law. In Croatia, this is achieved through including the phrase “or other characteristics” in the law. Although there are some advantages to this approach in that it allows the law to be developed over time, there are also problems. First, a legislative judgement about which characteristics are important to include and which groups are especially vulnerable is essentially a value judgement. Open-ended lists take away from the legislature the decision regarding when to increase the categories of those crimes which are hate crimes. Second, open-ended lists may be problematic for the same reason as are vague laws: they can fail the test of legal certainty and be difficult to implement in a way that reflects the social reality of hate crimes.

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

In the popular conception of a hate crime, the offender acts out of hatred or hostility toward a particular characteristic of the victim, such as the victim’s skin colour or ethnic or national origin or religion. Sometimes, the offender targets property associated with people who share that characteristic, such as a place of worship. This is not, however, a requirement of all hate crime laws. Some hate crime laws only require that the offender intentionally chose the victim because of some protected characteristic of that victim. In this guide, these two different forms of hate crime legislation are referred to as the “hostility” model and the “discriminatory selection” model.

As with other choices in drafting a hate crime law, the words used in the law may make a significant difference to the categorization of offences as hate crimes. Many states may have drafted their legislation without deliberately choosing either model. It is important also to bear in mind the impact the choice of model can have on investigatory and prosecutorial resources. For this reason, the commentary highlights the particular forms of words which cause a statute to be a hostility model or a discriminatory selection model.

3.1 The Hostility Model

In the hostility model, the offender must have committed the offence because of hostility or hatred based on one of the protected characteristics. Some OSCE participating States have laws that specifically require hatred, hostility, or enmity.²⁶ They require evidence that the offender acted out of some kind of hostility towards the victim.

In the United Kingdom, for example, Section 28 of the Crime and Disorder Act 1998 requires that the offender either “demonstrate” or be “motivated” by hostility, but the law provides no definition of “hostility”. A 2002 study found that people involved in all sectors of the criminal justice system wanted more guidance on the mental state required for an offence to be motivated by hostility on grounds of “race.”²⁷

A statute that requires evidence of an offender’s racist or hostile motive may conform to the popular idea of what a hate crime is, but it might also present obstacles to implementation. Whether a person actually feels “hate” is a highly subjective question, and can be hard to prove in a court of law. The difficulty is compounded by the fact that almost no other criminal offences require proof of motive as an element of the offence.

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

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

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

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

²⁶ See, e.g., Art. 63 of the Russian Federation’s Criminal Code; Art. 62 of Tajikistan’s Criminal Code; Art. 58(1)(f) of Turkmenistan’s Criminal Code; Art. 67 of Ukraine’s Criminal Code; Art 63 of Armenia’s Criminal Code; Art. 61 of Azerbaijan’s Criminal Code.

²⁷ Elizabeth Burney & Gerry Rose, “Racist offences – how is the law working?”, Home Office Research Study 244, 2002, at p. xvii, Home Office Website, <<http://www.homeoffice.gov.uk/rds/hors2002.html>>.

3.2 The Discriminatory Selection Model

In the discriminatory selection model, the offender deliberately targets the victim because of a protected characteristic, but no actual hatred or hostility is necessary to prove the offence. An offender who attacks an immigrant, thinking that the immigrant is less likely to report the crime to the police, would fall within the discriminatory selection category. Another form of discriminatory selection crime would be an offender who assaults a homosexual man because “gay-bashing” is common in his peer group and will gain him status and acceptance among his friends.

Many states do not mention hatred or hostility at all in their hate crime laws. Instead the law requires that the offender acted “because of” or “by reason of” the victim’s protected characteristic. In other words, the law requires a causal link between the characteristic and the offender’s conduct, but the exact emotion is not specified.

Examples of Statutes that do not specify hostility — Bulgaria, Denmark and France

Article 162(2) of **Bulgaria’s** Criminal Code penalizes those who apply violence against another or damages another’s property **because of** his nationality, race, religion, or political conviction with imprisonment of up to three years.

Section 81(vi) of **Denmark’s** Criminal Code provides the basis for a penalty enhancement if it is shown “... that the offence **is rooted in** the others’ ethnic origin, religion, sexual orientation or the like.”

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

3.3 Commentary

The difference between these two models is important. A discriminatory selection law is broader because it reaches those offenders who harbored no hostility but selected their victims based on prejudices or stereotyped information about victim vulnerabilities. For several reasons, a discriminatory selection law is both easier to apply in practice and may do a better job of addressing the kind of harm that hate crime laws are intended to prevent.

First, a discriminatory selection law does not require that hate be proven as an element of the offence. When a hate crime law requires “hostility,” it requires law enforcement to make an assessment of an offender’s mental state — an exercise that may be difficult and one for which most law enforcement are not trained.

Case Highlight: *People v. John Fox et al (United States)*

No Hate Required?

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

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

Second, the impact on the victim and members of the victim’s community is usually the same, regardless of whether the offender acted out of hate or some other emotion. A victim who is targeted because the offender assumes that some protected characteristic of the victim makes him/her especially vulnerable to crime is likely to experience the same trauma as a victim who is targeted because the offender actually hates that characteristic. From the victim’s perspective, what matters is that he/she has been chosen because of an immutable or fundamental aspect of his/her identity.

Where an existing hate crime law requires “hate” or “hostility,” guidance and training for law enforcement and courts as to what evidence is necessary and sufficient to prove this emotion would be useful.

4. POLICY QUESTION FOUR: ISSUES OF ASSOCIATION, AFFILIATION AND (MISTAKES IN) PERCEPTION

Some crimes are committed against individuals because of their connection with a particular group. This connection might take the form of membership in or association with a particular group. Or it might take the form of an affiliation with a member of a particular group, such as a personal relationship, friendship or marriage. International and regional instruments protect the right to freedom of association and the right to respect for one’s private life.

4.1 Association and Affiliation

Some hate crime victims are chosen not because they themselves share a particular protected characteristic, but because of their association with others who do. Examples of such targeting are numerous. Belgium’s hate crime law was first used against Hans van Themsche, who used a hunting rifle to shoot: a Turkish woman wearing a headscarf; Ouelamata Niangadou, a woman of African descent;

and the child for whom she was caring. The child, Luna Drowart, was of the same ethnicity as van Themsche but was shot because of the identity of her carer.²⁸

The United States has a well-documented pattern of crimes directed at interracial couples and families. Similarly, a study in Finland found that one-fifth of hate crime cases involved victims who were ethnically Finnish “in the company of a person of foreign extraction” or whose “spouse was of foreign extraction.”²⁹

4.2 Mistakes in Perception

An offender may also select the victim because of a mistaken belief about the victim’s membership in a particular group. For example, in the Czech Republic, a Turkish man who was mistaken for a Roma was attacked and killed by skinheads.³⁰ In Germany, Marinus Schoberl, a 16-year old boy, was tortured and killed by assailants who believed he was Jewish. His body was discovered buried in a cesspit four months later.³¹ In the United States, following the terrorist attacks of 11 September 2001, a wave of “backlash” crimes occurred against Muslims. Included among the victims were Sikhs, Hindus, and Latinos because the offenders thought they were Muslim.³² Similar cases of mistaken identity happened in London after the 7 July 2005 bombings.³³

4.3 Commentary

Hate crime laws and monitoring systems that require the victim to actually be a member of the protected group will not capture these categories of crimes. In Finland, for example, police are required to record as “racist cases” any crimes that are committed against someone who “differs from the perpetrator with regard to race, color of the skin, nationality, or ethnic background.”³⁴ The Police College of Finland has objected that this instruction “excludes those cases in which an individual was victimized because of his or her *perceived* membership in a minor-

28 “Two Die in Belgium ‘Race Killing’” BBC News Website 11 May 2006, <<http://news.bbc.co.uk/1/hi/world/europe/4763655.stm>>; “Belgian man sentenced to life in prison for racially motivated attack”, International Herald Tribune Website, 11 October 2007, <<http://www.ihf.com/articles/2007/10/11/america/belgium.php>>.

29 “Hate Crime Report Card”, Human Rights First, 2007, at n. 87, <<http://www.humanrightsfirst.org/discrimination/hate-crime/index.asp>>.

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

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

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

33 Fauja Singh, “Danish Sikhs feel backlash of London bombing,” The Panthic Weekly, 17 July 2005, <www.panthic.org/news/124/ARTICLE/1553/2005-07-17.html>.

34 “Hate Crime Report Card”, Human Rights First, 2007, p. 22 <<http://www.humanrightsfirst.org/discrimination/hate-crime/index.asp>>.

ity group, as well as those incidents involving attacks on individuals or groups motivated by their association with or support for members of minorities.”³⁵

Examples of legislation related to Association, Affiliation, and (Mistakes of) Perception — the United Kingdom, France, and Hungary

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

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

Art. 174/B of **Hungary’s** Penal Code provides that any person who assaults another person for being part of a protected group, **“whether in fact or under presumption”** commits a felony.

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

For similar reasons, “mistakes of fact” (i.e. a mistaken belief about the victim’s identity) about the victim’s actual identity should not prevent an offence being categorized and prosecuted as a hate crime. Most hate crime laws are drafted in terms of the offender’s motives and not in terms of the victim’s actual status. Failure to include such categories of victims would weaken the value of a hate crime law and undermine effective enforcement.

5. POLICY QUESTION FIVE: WHAT EVIDENCE IS NEEDED AND HOW MUCH MOTIVE IS REQUIRED?

5.1 What Evidence of Motive?

As with all criminal offences, the decision as to whether or not to press charges under a certain provision of the penal code depends on the availability of evidence. Whether or not to press charges in respect of a hate crime depends on whether there is sufficient evidence to prove the bias motive. The nature of the crime, the quality of the law enforcement investigation, and any constitutional or statutory provisions regarding evidence will all affect the ultimate decision.

³⁵ Ibid.

In some crimes, the very nature of the attack shows that it was motivated by bias. For example, vandals who defaced Muslim graves in a military cemetery in northern France left behind insulting graffiti about Islam and also hung a pig's head from one of the headstones.³⁶ Often hate crime suspects make statements, either during or immediately after an attack, that reveal their motive.

Case Highlight: Stabbing of Schoolgirl (Russia)

The attackers had enough time to paint a swastika

On 25 March 2006, nine-year old Lilian Sissoko was stabbed in the neck and ear by two men as she was entering her apartment building. Lilian, who is of mixed Russian-African parentage, was hospitalized but survived the attack. Her mother said that the attackers “ had enough time to paint a swastika and graffiti that read, “Skinheads ... we did it.” In May 2006, members of a neo-Nazi gang were arrested in connection with the stabbing of Sissoko and a number of other violent hate crimes.

Source: Paul LeGendre, “Minorities Under Siege: The Case of St. Petersburg,” Human Rights First, 26 June 2006, p. 6.

In other cases, the bias motive is less immediately apparent and will require deeper investigation. Police might seek to learn about the offender's statements or admissions to friends and neighbors, association with members of skinhead or neo-Nazi groups, and even his offender's taste in magazines, books, music, movies, and Internet sites.

Some states have hate crime laws that describe the kind of evidence that can be used to establish the bias motive and impose temporal restrictions.

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

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

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

³⁶ “Vandals desecrate Muslim graves in northern France”, International Herald Tribune website, 6 April 2008 <<http://www.iht.com/articles/2008/04/06/europe/france.php>>.

Case Highlight: Crown v. Paul Taylor (United Kingdom)

Murder Weapon Used to Carve Swastikas

On the night of 28 July 2005, Anthony Walker and his cousin, both teenagers of Afro-Caribbean ancestry, were chased through a park in Merseyside, England, by two men. One of the men, Paul Taylor, drove an ice axe deep into Anthony's skull, killing him. At trial, the cousin testified that the men had taunted them with racist slurs. The manager of a nearby pub testified that he had earlier seen Taylor brandishing a knife and saying, "Someone's going to get this tonight." An examination of the pub revealed that swastikas and Taylor's nickname had been scratched into the pub sign with the same axe that killed Anthony. The court found that the attack had been racially motivated. Taylor was sentenced to 23 years in prison and his co-conspirator, who initiated the attack and supplied the murder weapon, was sentenced to 17 years.

Sources: "Severe sentences for 'poisonous' racist killing", *Times* website, 1 December 2005; "Walker killing: prosecution case", BBC, 16 November 2006.

Case Highlight: The Murder of Tibor Berki (Czech Republic)

Must there be Racist Slurs during the Attack?

On 13 May 1995, a Roma man named Tibor Berki was fatally beaten in his home by a group of skinheads wielding a baseball bat. The attackers had been previously heard saying that they would "go for some Gypsy". The trial court ruled that there was no racial motive because the attackers did not utter any racial slurs during the actual attack. The judge stated: "Throughout the attack, the [lead perpetrator] was silent, and did not yell any abusive words from which a racist motive could be discerned." On appeal, the appellate court found that a racial motive did exist and increased the main perpetrator's sentence to 13 years.

Sources: "Second Periodic Report of States parties due in 1996: Czech Republic," CERD/C/289/Add.1 para. 41-42; "Roma in the Czech Republic: Foreigners in their Own Land," Human Rights Watch, 1 June 1996.

5.2 Mixed Motives

In addition to general problems in proving motive, hate crimes often present special questions of mixed motive. A mixed motive means that the offender may have had more than one reason for acting.

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

towards the target group.”³⁷ In a 2004 study of racist offenders in Greater Manchester, United Kingdom, the researchers found that although “racism certainly formed part of the motivation for the offence ... it was very rarely the sole motive, as it is in the classic version of racist violence as a type of hate crime.”³⁸

Case Highlight: Murder of Mohammad Parvaiz (United Kingdom)

Racist abuse combined with other motives

In July 2006, Mohammad Parvaiz, a taxi driver originally from Pakistan, was pulled from his vehicle and then stoned and beaten to death by six white teenagers, who shouted racial abuse during the attack. The killing was planned as revenge for an incident a few weeks earlier, when Parvaiz had driven a group of Asian men to the site of a dispute between two rival gangs. During that earlier argument, a scooter belonging to one of the perpetrators was damaged. The prosecutor, noting that this was a case “motivated principally by revenge and payback,” nevertheless charged the men with racially aggravated murder. Four of them were convicted of racially aggravated murder and two others of violent disorder.

Sources: “Murdered cabbie ‘payback victim’”, BBC News website, 21 November 2006; “Teenage Gang Convicted of Murder,” Crown Prosecution Service website, 27 January 2007; “Men jailed for taxi driver murder,” BBC News website, 20 February 2007.

In U.S. case law, a number of courts have adopted the requirement that the bias motive be a “substantial factor” behind the offence. Incidental use of racist language is generally not considered sufficient. The substantial motive requirement, however, does not exclude the possibility of multiple motives. In other countries, by contrast, the bias motive is required to be dominant. The danger of such a requirement is that it is very difficult, in respect of mixed motives, to calculate exact proportions or percentages.

A related mixed motive problem concerns classification. In Canada, a study found that police forces employed widely different standards when it came to classifying offences as hate crimes. The largest police force in Toronto used an “exclusive definition,” whereby only acts based *solely* on a victim’s protected characteristic were classified as hate crimes. Other police agencies defined hate crimes as ones where the act was motivated in whole or part by bias.³⁹

³⁷ See Lu-in Wang, “The Complexities of Hate”, Ohio State Law Journal, Vol. 60, 1999, at p. 807.

³⁸ Larry Ray, David Smith, Liz Wastell, “Shame, Rage and Racist Violence”, British Journal of Criminology, Vol. 44, May 2004, at pp. 354-55.

³⁹ “Everyday Fears: A Survey of Violent Hate Crimes in Europe and North America” Human Rights First, September 2005, at p. 30; Julian Roberts, “Disproportionate Harm: Hate Crime in Canada. An Analysis of Recent Statistics”, 1995, <http://www.justice.gc.ca/eng/pi/rs/rep-rap/1995/wd95_11-dt95_11/index.html>.

Examples of Mixed Motive Laws – Belgium, the United Kingdom and California (United States)

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

Section 146 of **United Kingdom’s** Criminal Justice Act 2003 provides for an increase in sentences for aggravation related to disability or sexual orientation if the offence is motivated (**wholly or partly**) (i) by hostility towards persons who are of a particular sexual orientation, or (ii) by hostility towards persons who have a disability or a particular disability. **“It is immaterial whether or not the offender’s hostility is also based, to any extent, on any other factor not mentioned in that paragraph.”**

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

5.3 Commentary

Investigations into motive require substantial police work — interviews with friends, neighbors and co-workers of the suspect, the use of search warrants to obtain evidence from the suspect’s residence, subpoenas to Internet service providers, and surveillance to determine the suspect’s membership in or association with hate groups. Procedures for obtaining and admitting evidence vary within OSCE participating States, which will, of course, affect the investigation. Sometimes the clue to motive lies in a careful crime scene search or forensic analysis.

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

Some hate crime laws explicitly permit multiple motivations. The exact language may differ, but the effect of these laws is to acknowledge all offences committed with a bias motive. Given the difficulties of proving motive and the reality that many offenders have multiple motives, hate crime laws should allow for mixed motives. To require that bias be the sole motive would drastically limit the number of offences that could be charged as hate crime or to which a hate crime penalty enhancement might apply. Furthermore, a law that does not directly

address issues of mixed motive may produce varying interpretations on the part of police and prosecutors. This could lead to significant differences in the number of crimes categorized and prosecuted as hate crimes.

Case Highlight: People v. Schutter (United States)

Road Rage or Racism?

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

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

6. KEY POINTS FOR LEGISLATORS

As has been emphasized throughout this guide, hate crime laws will differ from country to country, and should be drafted with close attention to national history and experiences. However, there are some key points which are necessary to a well-functioning hate crime law. These have been discussed in the policy questions set out in this part, and can be summarized with a few key points for legislators to apply when drafting hate crime laws.

KEY POINTS:

- Hate crime laws should recognize that either people or property can be victims.
- Hate crime laws should be symmetrical in their application.
- Courts should be required to consider evidence of motivation.
- Courts should be required to state on the record reasons for applying or not applying a penalty enhancement.
- States should consider a combination of substantive offences and penalty enhancements.
- Hate crime laws should include characteristics that are immutable or fundamental to a person’s identity.
- Hate crime laws should recognize social and historical patterns of discrimination.
- Hate crime laws should include characteristics that are visible or readily known to the offender.

- Hate crime laws should avoid using vague or undefined terminology.
- Hate crime laws should use a combination of terms such as “race”, ethnicity, national origin and nationality in order to ensure broad coverage.
- Hate crime laws should not require a specific emotional state, such as “hate” or “hostility.”
- Hate crime laws should protect victims who are associated or affiliated with persons or groups having protected characteristics.
- Hate crime laws should include offences where the offender was mistaken about the victim’s identity.
- Hate crime laws should recognize that offenders sometimes act with multiple motives.

Even the most comprehensive and coherent law will fail to achieve the aims of the legislature if it is not enforced. Once a hate crime law is enacted, its use should be monitored and assessed. Are hate crimes being prosecuted? Are defendants being convicted? What are the problems in actual practice? Are potential victims and potential offenders aware of the law?

An increased sentence for a hate crime only comes at the end of a long sequence of events. In order for an offender to be subject to a hate crime law, a victim must be willing to report the crime, the police must investigate it carefully, the prosecutor must file a hate crime charge, and the court must convict. Any misstep in the sequence means a lost opportunity to combat hate crime.



PART III

RESOURCES

OSCE

ODIHR is able to assist in many ways to help make hate crime laws effective. A range of tools to support states and civil society to combat hate crimes, intolerance and discrimination are listed below, and can also be found on <http://tandis.odihr.pl>.

ODIHR's Hate Crimes Toolbox for participating States

Tool	Description
Law enforcement officer training on combating hate crime	Training for police officers, focusing on methods for identifying and investigating hate crimes, as well as skills for sharing intelligence and working with prosecutors and affected communities; designed and delivered <i>by</i> police officers <i>for</i> police officers. Works with local police experts to tailor the training to local needs.
Prosecutor training (under development)	This training is tailored to the specific needs and concerns of legal professionals and has been developed and delivered by international prosecution experts in hate crime. Two modules are available: initial awareness-raising “expert roundtables” and “advanced-level training. Local legislation, case studies and international legal frameworks are integrated into both modules.
Country-specific resource books on Muslim communities	This project seeks to support the development of a series of country-specific resource books on Muslim communities within the framework of its educational capacity-building and awareness-raising activities. It aims to promote an increased understanding of Muslim communities living across the OSCE region and to provide a more complete overview of their role and contribution in society. The resource books are designed as practical tools for journalists, policymakers, public officials and educators.

<p>Guidelines and assessment of educational approaches on education on the Holocaust and anti-semitism</p>	<p>A comprehensive study was produced (<i>Education on the Holocaust and on Anti-Semitism: An Overview and Analysis of Educational Approaches</i>) that evaluates existing approaches and identifies good practices to support future efforts by OSCE participating States and civil society. It also identifies gaps and areas where teaching about the Holocaust and about anti-Semitism needs to be strengthened. With its comprehensive recommendations, it provides a framework for the development of curricula on Holocaust education and on education about anti-semitism.</p>
<p>Guidelines for educators on Holocaust commemoration</p>	<p>The document “Preparing Holocaust Memorial Days: Suggestions for Educators” offers suggestions to educators on how to prepare for Holocaust memorial days by identifying and presenting best practices from 12 OSCE participating States. It is available in 13 languages.</p> <p>Developed in co-operation between ODIHR, Yad Vashem, and education experts from 12 countries: Austria, Croatia, Germany, Hungary, Israel, Lithuania, the Netherlands, Poland, the Russian Federation, Sweden, Ukraine and the United Kingdom.</p> <p>Available on ODIHR’s website in: Croatian, Dutch, English, French, German, Greek, Hungarian, Italian, Lithuanian, Polish, Russian, Serbian and Spanish.</p>
<p>Overview of governmental activities on Holocaust memorial days</p>	<p>In cooperation with the Task Force for International Cooperation on Holocaust Education, Remembrance and Research, ODIHR developed a country-by-country overview of governmental activities on Holocaust memorial days. The document contains information about different forms of commemoration that take place in OSCE participating States and is designed to facilitate the exchange of good practices among public officials.</p> <p>The document is available in English on ODIHR’s website.</p>

<p>Educational materials to teach about anti-Semitism</p>	<p>Teaching materials have been developed for seven OSCE participating States. The materials were developed in close co-operation with the Anne Frank House and experts from each of the seven states. Country-specific adaptations, based on the historical and current situation in each country, have been developed and piloted. The materials come in three parts: Part 1 is on the history of anti-semitism, Part 2 on contemporary forms of anti-semitism; and Part 3 puts anti-Semitism into perspective with other forms of discrimination. A teacher's guide will accompany the materials.</p> <p>The teaching materials are currently being adapted for three additional participating States.</p>
<p>Guide for Educators on Addressing Anti-Semitism: Why and How?</p>	<p>In co-operation with Yad Vashem and experts from various OSCE participating States, ODIHR developed a guide that provides educators with an overview of contemporary manifestations of anti-Semitism. It also provides suggestions on how to respond to expressions of anti-Semitism in the class room.</p> <p>The document is available in English on ODIHR's website and will be translated into other languages in the course of 2008.</p>
<p>Enhancing public participation of Roma through civil registration</p>	<p>The "Equal Opportunities for All" project was launched with the objective of increasing the participation of Roma living in the former Yugoslav Republic of Macedonia in public and political life by assisting Roma in obtaining civil documents. The aim is to stimulate civic responsibility among Roma groups and to facilitate the development of models of cooperation at the local level between Roma and local authorities responsible for civil registration.</p>

Tolerance and Non-Discrimination Information System (TANDIS)	<p>A public website was launched in October 2006 with one-point access to:</p> <ul style="list-style-type: none"> • information received from OSCE states, NGOs and other organizations; • country pages providing access to country initiatives, legislation, national specialized bodies, statistics and other information; • thematic pages with information related to different key issues; • international standards and instruments; • information from intergovernmental organizations, including country reports and annual reports; and • information about upcoming events related to tolerance and non-discrimination issues.
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ODIHR's Hate Crimes Toolbox for Civil Society

Tool	Description
Facilitator's curriculum on hate-motivated violence and network of trainers and experts	<p>Finalization of resource guide for civil society on hate-motivated violence; organization of training seminar for civil society on how to prevent and respond to hate crime throughout the OSCE region.</p>
Complaints bureaux for hate-motivated violence and hate speech on the Internet	<p>ODIHR supports NGOs in initiating monitoring activities and establishing complaints bureaux on hate-motivated violence and hate speech on the Internet.</p>
NGO meetings and roundtables	<p>ODIHR hosts and facilitates thematic roundtables and preparatory meetings for NGOs to give civil society representatives the opportunity to draft recommendations for the OSCE and participating States.</p>
Access to relevant NGO information	<p>ODIHR has a strategic partnership with HURIDOCs⁴⁰ in order to provide access to findings and reports from human rights NGOs via HuriSearch, which indexes more than 4,500 human rights NGO websites. HuriSearch is an integrated part of ODIHR's TANDIS (Tolerance and Non-Discrimination Information System) website, <http://tandis.odihr.pl>.</p>

40 Human Rights Information and Documentation Systems International, <<http://www.huridocs.org>>.

Support for networks and the creation of coalitions

ODIHR supports the development of civil society **networks** and the creation of new **coalitions** on issues related to ODIHR's mandate.

Other OSCE Resources

1. OSCE Ministerial Council Decisions Nos. 4/03, 12/04, 13/06:
<www.osce.org/mc/documents.html>
2. OSCE Permanent Council Decision Nos. 607 and 621:
<www.osce.org/pc/documents.html>
3. OSCE-ODIHR's legislative database
in English: <<http://www.legislationline.org>>
in Russian: <<http://www.legislationline.org/ru>>
4. OSCE High Commissioner on National Minorities:
<<http://www.osce.org/hcnm>>
5. "Hate Crimes in the OSCE Region: Incidents and Responses, Annual Report 2007", OSCE-ODIHR, 2008:
<http://www.osce.org/documents/odihr/2008/10/33851_en.pdf>
6. "Hate Crimes in the OSCE Region: Incidents and Responses, Annual Report 2006", OSCE-ODIHR, 2007:
http://www.osce.org/odihr/item_11_26296.html
7. "Combating Hate Crimes in the OSCE Region: An Overview of Statistics, Legislation, and National Initiatives", OSCE-ODIHR, 2005:
http://www.osce.org/odihr/item_11_16251.html

International and Regional Instruments

1. International Convention on the Elimination of all Forms of Racial Discrimination: <www2.ohchr.org/English/law/cerd.htm>
2. Committee on the Elimination of Racial Discrimination (CERD): <www2.ohchr.org/English/bodies/cerd>
3. General Recommendations of the Committee on the Elimination of Racial Discrimination (especially General Recommendation 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system and General Recommendation 15 on organized violence based on ethnic origin): <www2.ohchr.org/English/bodies/cerd/comments.htm>
4. International Covenant on Civil and Political Rights: <www2.ohchr.org/English/law/ccpr.htm>
5. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: <www2.ohchr.org/English/law/religion.htm>
6. European Convention for the Protection of Human Rights and Fundamental Freedoms: <<http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>>
7. Council of Europe's Framework Convention for the Protection of National Minorities: <<http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm>>
8. European Commission against Racism and Intolerance (ECRI) General Policy Recommendations Nos. 1-11 (especially No. 7 on national legislation to combat racism and racial discrimination and No.11 on combating racism and racial discrimination in policing): <www.coe.int/t/e/human_rights/ecri/1-ecri/3-general_themes/1-Policy_Recommendations/_intro.asp#TopOfPage>
9. European Union Framework Decision (28 November 2008) on combating certain forms and expressions of racism and xenophobia by means of criminal law: <<http://register.consilium.europa.eu/pdf/en/08/st16/st16351-re01.en08.pdf>>
10. American Convention on Human Rights: <www.hrcr.org/docs/American_Convention/oashr.html>

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3. "Annual Report 2008", European Union Agency for Fundamental Rights, available at http://fra.europa.eu/fra/material/pub/ar08/ar08_en.pdf
4. "Analytical Country Reports on Racist Violence," EUMC, available at http://fra.europa.eu/fra/index.php?fuseaction+content.dsp_cat_content&catid+425e247c33486
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15. "Hate Crime Laws", Anti-Defamation League, available at <www.adl.org/99hatecrime/print.asp>
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