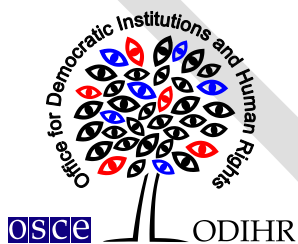


PROSECUTING HATE CRIMES: A Practical Guide



IAP

International Association of Prosecutors

TABLE OF CONTENTS

Preface

Acknowledgements

Acronyms

CHAPTER ONE – INTRODUCTION

1.1 Why should prosecutors be concerned about hate crimes?

1.2 Criminal justice system response to hate crimes

1.3 Aims and goals of this guide

1.4 What is in this guide?

CHAPTER TWO – UNDERSTANDING HATE CRIMES

2.1 Defining hate crimes

2.1.1 Hate crimes start with a criminal act

2.1.2 Hate crimes require evidence of bias and prejudice, not necessarily hate

2.1.3 Types of characteristics commonly protected by hate crime laws

2.1.4 Hate crime offenders

2.2 Related issues

2.2.1 Hate speech

2.2.2 Discrimination

2.2.3 Genocide and war crimes

2.3 Hate crime laws

2.3.1 Types of laws that address hate crimes

2.3.2 Substantive hate crime laws

2.3.3 Penalty enhancements

2.3.4 General sentencing provisions

2.4 Characteristics

2.4.1 Race and racism

2.4.2 Ethnicity, national origin, nationality

2.4.3 Xenophobia

2.4.4 Religion or belief

2.4.5 Sexual orientation and gender identity

2.4.6 Other groups

2.5 Mistakes in perception

2.6 Victims by association

2.7 The international and regional framework

2.7.1 The United Nations

2.7.2 OSCE

2.7.3 Council of Europe

2.7.4 European Union

CHAPTER THREE- BUILDING A CASE

3.1 Opening the file

3.1.1 Using bias indicators to identify a potential hate crime case

3.1.2 Brutality of the attack

3.1.3 Signs and symbols

3.2 Types of evidence of bias motivation

3.3 Working with victims and witnesses

3.3.1 Addressing issues of reluctance to report

3.3.2 Assessing credibility without bias or prejudice

3.3.3 Addressing conflicts with victims

3.3.4 Co-operating with victim's counsel or victim advocates

3.4 Preparing the evidence

3.4.1 Admissibility

3.4.2 Common types and sources of direct evidence

3.4.3 Circumstantial evidence

3.4.4 More than one motivation: mixed motives

3.4.5 Presenting the impact on victims: physical and psychological

3.5 Charging a hate crime case

3.5.1 Alternative charges and initial legal qualification

3.5.2 Plea bargains or mediation

3.5.3 Countering defence arguments

3.5.3.1 "Just a fight"

3.5.3.2 "My words are not racist"

3.5.3.3 Defendant's relationships

3.5.3.4 Defendant is from the same background as the victim

3.6 Sentencing a hate crime case

3.6.1 Restitution and compensation

3.6.2 Other orders

3.6.3 Dealing with minors

CHAPTER FOUR- POLICIES AND PROCEDURES

4.1 Specialized guidance and training

4.2 Specialized units

4.3 Public awareness campaigns and outreach with community groups and civil society

4.4 Media strategies

4.5 Contributing to data collection and monitoring and public reports

4.6 Putting the pieces together: comprehensive approach to combating hate crimes

ANNEXES

Annex 1: ODIHR programmes and resources to combat hate crimes

Annex 2: OSCE commitments on hate crimes

Annex 3: List of key international instruments and jurisprudence

Annex 4: IAP standards

PREFACE

Hate crimes are criminal acts based on prejudice and intolerance. They occur in every country and can be particularly brutal and dangerous both to victims and to societies. This guide was developed to help prosecutors recognize and understand hate crimes and to prosecute them more effectively. The guide is a joint publication of the Organization for Security and Co-operation in Europe's (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) and the International Association of Prosecutors (IAP).

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

In response to the Ministerial Council's decisions, ODIHR has developed a range of programmes and publications to assist participating States to address hate crimes effectively and comprehensively. ODIHR's approach recognizes that isolated steps to combat hate crimes can have only a limited impact and that prosecuting hate crimes can be most successful when it is part of a broader approach. ODIHR's contribution to the development of this guide has therefore drawn on its wide experience in many aspects of addressing hate crimes, as well as on its broad geographical experience throughout the OSCE area.

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

Since the IAP's 8th European Regional Conference in The Hague in 2008, the IAP has seen addressing hate crimes as an essential area of professional development for prosecutors. At the 15th IAP Annual Conference in The Hague in September 2010, a workshop on Hate Crime entitled 'Hate Crime - towards universal recognition and action' provided an opportunity for prosecutors from all over the world to consider and comment upon an early concept paper for this guidance. For the present

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

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

³ OSCE Ministerial Council Decision No. 9/09, Athens, 1-2 December 2009 (emphasis added).

⁴ See at <http://www.iap-association.org/Resources-Documents/IAP-Standards/Professional-Responsibility/Standards_English>. Full text of the Standards is also included in Annex 4.

publication, the IAP provided access to its numerous experts and its experience-based insight into hate crime prosecutions.

This guide was produced as an additional tool to improve the investigation and prosecution of hate crimes. Developed by experts from various jurisdictions across the OSCE region, the guide is relevant to the diverse legal systems and legislative frameworks. ODIHR and IAP encourage its users to disseminate the guide widely, and to translate it into local languages.

Because the guide cannot address detailed issues of law and procedure that may arise in each jurisdiction, ODIHR offers its support to participating States that wish to use the guide as a basis to develop national or local policies and/or training for prosecutors.

Ambassador XY

ODIHR

Elizabeth Howe
General Counsel
International Association of Prosecutors

ACKNOWLEDGEMENTS

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

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

Based on this input, the guide was drafted by ODIHR, and edited and revised by Nasrin Khan and Peter Eicher. A training manual was prepared and a pilot training to test the Guide was held in July 2012. Until the publication of the guide in 2014, further training sessions were conducted by ODIHR's trainers in which the guide was adapted to the local legal situation and used as a foundation for training.

ODIHR and IAP express their gratitude to those involved in the drafting process and thank in particular the following members of the Expert Reference Panel:

- **Mr. Arben Smaçi**, Prosecutor in the Prosecution Office of Shkodra District, Albania
- **Mr. Artur Davtyan**, Deputy Head of the Department on Crimes against Individuals, General Prosecutor's Office of Armenia
- **Mr. Kamal Giliyov**, Head of Supervision over Law-Enforcement Agencies Department, Office of the Prosecutor General, Azerbaijan
- **Mr. Anar Taghiyev**, Prosecutor, International Relations Department, Office of the Prosecutor General of Azerbaijan
- **Mr. Goran Rubil**, Prosecutor, District Prosecutor's Office of Dobož, Bosnia and Herzegovina
- **Ms. Amina Ruždić**, Prosecutor, Cantonal Prosecutor's Office of Sarajevo, Bosnia and Herzegovina
- **Ms. Daniela Masheva**, Prosecutor's Office, Bulgaria
- **Ms. Birgitte Arent Eiriksson**, Rigsadvokatassessor, Director of Public Prosecutions, Denmark
- **Ms. Maia Kvirikashvili**, Head of the Human Rights Unit at Chief Prosecutor's office of Georgia
- **Mr. Dimitrios Gizis**, Public Prosecutor at the Athens Court of First Instance, Greece
- **Mr. János Homonnai**, Prosecutor at the Chief Prosecution Office of the Capital, Hungary
- **Ms. Elisabetta Ceniccola**, Prosecutor, Public Prosecutor Office, Italy

- **Mr. Kuandyk Rakhmetov**, Senior Prosecutor, Department for Supervision over Legality of Investigation and Interrogation, Prosecutor General's office of the Republic of Kazakhstan
- **Mr. Arstanaly Arakeev**, Prosecutor, the Prosecutor General's Office of the Kyrgyz Republic
- **Mr. Bodan Lazarevski**, State Prosecutor's Office, former Yugoslav Republic of Macedonia
- **Mr. Kole Sterjev**, State Prosecutor's Office, former Yugoslav Republic of Macedonia
- **Mr. Eduard Patić**, Prosecutor of the Human Rights Section, Prosecutor General's Office, Moldova
- **Mr. Eugen Rusu**, Deputy General Prosecutor, General Prosecutor's Office of Moldova
- **Mr. Miloš Šoškić**, Deputy Basic State Prosecutor in Podgorica, Montenegro
- **Mr. Nikola Samardžić**, Deputy Basic State Prosecutor in Herceg Novi, Montenegro
- **Ms. Barbara van Haren**, Prosecutor, Public Prosecution Office, National Expertise Centre on Discrimination, Zwolle, Netherlands
- **Ms. Maartje Vriens**, Senior Policy Advisor, Public Prosecution Service, National Expertise Centre on Discrimination, Netherlands
- **Ms. Saskia Wildemors**, Prosecutor, Public Prosecution Office, National Expertise Centre on Discrimination, Haarlem, Netherlands
- **Ms. Agnieszka Adamowicz**, Prosecutor of the District Prosecutor's Office in Lublin, Poland
- **Ms. Ewa Stasiak**, Public Prosecutor, Poland
- **Ms. Patrícia Naré Agostinho**, Prosecutor, Central Department of Investigation and Prosecution, Office of Prosecutor, Portugal
- **Ms. Oana Dragomir**, Prosecutor, International Judicial Co-operation, Prosecutor's Office attached to the Supreme Court of Cassation and Justice, Romania
- **Mr. Aleksey Zhafyarov**, Head of the Division on Supervision of Implementation of the Legislation on Interethnic Affairs, General Prosecutor's Office of the Russian Federation
- **Ms. Gordana Janicijević**, Deputy Republic Public Prosecutor of the Republic of Serbia
- **Mr. Bruno Vekarić**, Deputy War Crimes Prosecutor, The Office of the War Crimes Prosecutor of the Republic of Serbia
- **Mr. Miguel Angel Aguilar Garcia**, Prosecution Coordinator, Prosecutor's Office of Barcelona, Service of Hate Crimes and Discrimination, Spain
- **Mr. Jakob Holmberg**, District Attorney, Prosecutor's Office of Malmo, Sweden
- **Mr. Lars Morand**, Senior Public Prosecutor, Malmo, Sweden
- **Mr. Reshat Abdiev**, Deputy Prosecutor, Prosecutor's Office of the Autonomous Republic of Crimea, Ukraine
- **Ms. Nataliya Dryomina-Voloc**, Senior Researcher, National Academy of the Public Prosecutor's Office of Ukraine
- **Mr. Oleksii Lazarenko**, Senior Expert, Human Rights Monitoring Unit, Ministry of the Interior, Ukraine

BRILL

ACRONYMS

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

CHAPTER ONE INTRODUCTION

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

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

1.1 Why should prosecutors be concerned about hate crimes?

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

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

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

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

1.2 Criminal justice system response to hate crimes

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

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

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

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

1.3 Aims and goals of this guide

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

The beneficiaries of this guide include:

- Front-line prosecutors, but also investigators, police and judges, who may be required to collect evidence of bias motivation or to pass judgement on sufficiency of evidence;
- Policymakers, with the last chapter introducing policies and programmes that help prosecutors become more effective in their duties;
- Members of civil society who may wish to understand hate crime prosecutions better for advocacy or public information purposes;
- General public which will better understand hate crimes as well as the approach that the prosecutors should take.

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

1.4 What is in this guide?

While prosecutors will always refer to national laws as their starting point, there may be ambiguities or gaps in legislation that fail to address many aspects of hate crimes. This guide therefore examines those aspects and highlights strategies for responding to them, whatever the national legal framework. **Chapter One** introduces the concept of hate crimes and

explains why these cases need to be taken seriously. **Chapter Two** provides a deeper understanding of hate crimes and the context for hate crime prosecutions. It discusses different types of legal frameworks and how they impact on prosecutions. It also describes the international legal framework surrounding hate crimes. **Chapter Three** discusses the elements of building a case, from the moment the prosecution file is opened, including recognizing indicators that a case might be a hate crime, proving motive, gathering key types of evidence and countering potential defences. **Chapter Four** explores the development of effective hate crime policies by governments and criminal justice actors that can contribute to improved responses, including successful prosecutions.

CHAPTER TWO

UNDERSTANDING HATE CRIMES

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

A hate crime is any act which is:

- Prohibited under criminal law (“the base offence”); and
- Motivated by prejudice because of a specific characteristic of the victim (“the bias motivation”).

The *base offence* can be directed towards one or more persons or property. The *bias motivation* is the offender’s prejudice towards the victim based on a characteristic which is a deep and fundamental part of a shared group identity, such as race, language, religion, ethnicity, nationality, gender or other characteristics.⁵

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

2.1 Defining hate crimes

Hate crimes are criminal acts committed with a bias motive.⁶ The term “hate crime” does not define a specific legal offence; rather it is a description of a concept.

2.1.1 Hate crimes start with a criminal act

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

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

2.1.2 Hate crimes require evidence of bias and prejudice, not necessarily hate

Once there is an identified criminal act, it becomes a hate crime if it was motivated by bias or prejudice. The use of the word “hate” can mislead people into thinking that the defendant must hate the victim or the victim’s group for a case to be considered a hate crime. This is not the case. The factor that turns an ordinary crime into a hate crime is the defendant’s selection

⁵ See also *Hate Crime Laws: A Practical Guide*, (Warsaw: ODIHR, 2009), p. 16, <<http://www.osce.org/odihr/36426>> and *Preventing and Responding to Hate Crimes: A Resource Guide for NGOs in the OSCE Region*, (Warsaw: ODIHR, 2009), p. 16, <<http://www.osce.org/odihr/39821>>.

⁶ This definition has been recognized by the OSCE participating States and is contained, *inter alia*, in the OSCE Ministerial Council Decision No. 9/09, adopted in Athens on 2 December 2009. <<http://www.osce.org/cio/40695>>.

of a victim based on the bias or prejudice about the group to which the victim belongs. Therefore, the term “bias-motivated crimes” is used in this guide interchangeably with “hate crimes”. The term “discriminatory crimes” can also be used, emphasizing that hate crimes are an extreme form of discrimination. Hate crime laws express the bias motive in different ways, not necessarily using the word “hate”. Some laws refer to “motives of hostility”⁷; others do not refer to any emotional state of the defendant, but simply penalize crimes where the victim is *selected* due to their group characteristic. The evidence required to prosecute will be determined by which type of law – the *hostility model* or the *discriminatory selection model* – has been adopted in national legislation. These models are discussed further in Chapter Three.

2.1.3 Types of characteristics commonly protected by hate crime laws

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

Protected characteristics must:

- Create a common group identity; and
- Reflect a deep and fundamental aspect of a person’s identity.

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

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

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

2.1.4 Hate crime offences and offenders

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

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

⁷ See *Hate Crime Laws: A Practical Guide*, (ODIHR: Warsaw, 2009) which discusses and gives examples of different types of hate crime laws and the implications of different word choices, <<http://www.osce.org/odihr/36426>>.

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

2.2 Related issues

2.2.1 Hate speech

Public expressions of hate, often referred to as hate speech or incitement to hatred, are regulated to a greater or lesser degree in many OSCE participating States. While hate speech is a serious concern, legal responses to it need to take fully into account the right to freedom of expression and opinion. This balance is determined differently in each OSCE participating State.⁸

All participating OSCE States have prohibitions on speech that amounts to an immediate threat or incitement to violence.⁹ Therefore, the wide range of laws and local circumstances make it impractical to give detailed guidance on the prosecution of hate speech that falls outside the framework of incitement to violence.¹⁰

The term “hate crimes” as used in this guide does not include acts that fall under the concepts of hate speech or incitement to hatred, without any immediate risks of violence.

2.2.2 Discrimination

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

Discrimination is most frequently regulated under civil law, but in some countries there are also provisions for criminal penalties. Such laws do not come within the definition of hate crimes because there is no base offence – there is no criminal act which exists independently from the bias element. Additionally, discrimination law is subject to different and very

⁸ Discussions on the issue are ongoing in international fora, with the prevailing opinion being that there is a high threshold for criminal prosecution of incitement to hatred. See the six-part test for prohibiting incitement to hatred in the “Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” from the four regional expert workshops organized by Office of the United Nations High Commissioner for Human Rights (OHCHR), in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012.

<http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf>.

⁹ The international community seems to be also increasingly inclined to prohibit only speech that incites violence. For example, in UN Human Rights Council Resolution 16/18, which was adopted by consensus by the UN General Assembly, the only mention of criminal penalties for inciting religious hatred was in relation to “incitement to imminent violence based on religion or belief.” UN General Assembly Resolution No. 66/167, “Combating intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons, based on religion or belief”, 19 Dec 2011, A/RES/66/167, <http://www.un.org/en/ga/search/view_doc.asp?symbol=%20A/RES/66/167>.

¹⁰ There are several recent resources which address the balance of freedom of expression and hate speech. For those from Member States of the Council of Europe, there is a useful reference guide on emerging principles on hate speech from the European Court of Human Rights: *Manual on Hate Speech* by Anne Weber (Council of Europe Publishing: Strasbourg, 2009), <<http://book.coe.int/ftp/3342.pdf>>. There is also a factsheet issued by the Council of Europe <http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf>.

detailed legal principles and jurisprudence. As a consequence, while discrimination is a serious issue and can set the context for the commission of hate crimes, this guide does not address discrimination law.

2.2.3 Genocide and other war crimes

International law, as well as many national laws, prohibits genocide and other war crimes, such as crimes against humanity. Some of these crimes include the targeting of individuals because of their affiliation with a particular group. For example, genocide requires an intention to destroy—in whole or in part—a national, ethnic, racial or religious group.¹¹ However, these types of crimes are qualitatively and quantitatively different from hate crimes because they require widespread, systematic acts of violence. While bias and prejudice may also underpin these serious and complex crimes, the legislative, investigative and prosecution issues arising from them are different. Therefore, such crimes are beyond the scope of hate crimes addressed in this guide.

2.3 Hate crime laws

While specific hate crime laws have the benefits of enshrining society's rejection of hate crimes and of facilitating effective data collection, hate crime prosecutions can still be pursued in the absence of specific provisions.

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

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

Case Example

Sentencing a hate crime case without a specific hate crime law

¹¹ See Article 2 of the Convention on the Prevention and Punishment of Genocide, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx>>.

Two men were sitting in the park in a city in the Netherlands. The offender approached them and asked if they were gay. When one of the men confirmed this, the offender made a derogatory statement about gays and said “I will show you what we do with gays.” The offender kicked one of the men in the head and started kicking and beating the other man. When the police arrived, the offender insulted the police and violently resisted arrest. He was convicted in first instance but lodged an appeal. On appeal he was sentenced to four months in prison, of which two months were suspended.

While there is no direct hate crime provision in the Netherlands Criminal Code, the judge considered the specific circumstances of the case for sentencing. Based on the statements made by the offender, the judge imposed an increased penalty based on the insults that demonstrated the bias motivation of the offender.

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

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

The following sections examine how laws can be used to prosecute hate crimes. It discusses the different types of laws, some of the commonly protected characteristics, the application of hate crime laws to victims who are targeted because of their association with protected groups or the mistaken belief that they belong to such groups, as well as the use of related anti-extremism laws.

2.3.1 Types of laws that address hate crimes

All OSCE participation States have some legislation which can be applied to hate crimes.¹² In general, there are two types of hate crime laws: substantive offences and penalty enhancements. However, general sentencing provisions can be applied to recognize bias motivation and seek an appropriate sentence where there is a complete lack of specific hate crime legislation or significant gaps.

2.3.2 Substantive hate crime laws

A substantive hate crime law is a separate provision within the law that includes the bias motive as an integral element of the legal definition of the offence. Usually, this separate offence will carry a higher penalty than the same act without the bias motive. A small number of countries have substantive hate crime laws. For example, in the United Kingdom racially or religiously aggravated assault is a specific offence that is distinct from an offence of assault without a bias motivation.¹³

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

2.3.3 Penalty enhancement laws

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

¹² For a comprehensive discussion and types of hate crime laws in the OSCE region and key points to consider when drafting legislation, please refer to *Hate Crime Laws: A Practical Guide* (Warsaw: ODIHR, 2009) <<http://www.osce.org/odihhr/36426>>. ODIHR also maintains a database of legislation, including a database on current hate crime laws across the OSCE region at <<http://legislationline.org>>.

¹³ Articles 28 – 32 of the Crime and Disorder Act 1998.

A general penalty enhancement applies to all crimes in the penal code. For example, in Finland, the grounds for increasing punishment includes when “the crime has been motivated by race, colour, national or ethnic origin, religion or belief, sexual orientation or disability or by other comparable ground.”¹⁴ Provisions on general enhancement of penalties are usually found in the general part of the code, common to all crimes.

A specific penalty enhancement may apply only to designated crimes. For example, in Ukraine, the sentencing range for intentional serious bodily injury is increased from five to eight years to seven to ten years when it is “motivated by racial, ethnic or religious intolerance.”¹⁵ Often, the specific penalty enhancement is contained in a section immediately following the provision defining the related base offence.

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

2.3.4 General sentencing provisions

States without express provisions to address bias motivation can use general sentencing principles to impose a proportionate sentence for hate crimes. There are several ways that hate crimes can be prosecuted in jurisdictions without specific hate crime legislation:

- Motives of the perpetrator. Some sentencing provisions, such as those of the German Criminal Code, specifically allow the “motives of the perpetrator” to be taken into account when imposing a sentence.¹⁶
- Prosecution policies. In some States, prosecution services have policies which seek a specific sentence increase for hate crimes. For example, in the Netherlands, the Guidelines of Criminal Procedure require prosecutors to seek a 50 per cent increase in the sentence for crimes such as physical assault, threats, vandalism and damage to property when such crimes are motivated by bias against the protected grounds listed in its anti-discrimination provision.¹⁷
- Other sentencing factors. Some States allow the court to take into account other factors when sentencing hate crimes, such as the grave consequences, the particular cruelty of the crime or the particular vulnerability of the victim. This can be a way of ensuring that the increased harm caused by bias crimes is recognized within the criminal sanction.

In order to sentence accordingly, the court must have been presented evidence of the bias motivation during the fact-finding phase of the case.

2.4 Characteristics

¹⁴ Criminal Code of Finland, Section 5.

¹⁵ Article 121 of the Criminal Code of Ukraine of 5 April 2001, No. 2341-III with amendments and supplements and as amended by the Law N 5284-VI (5284-17) of 18 September 2012.

¹⁶ Criminal Code of the Federal Republic of Germany, Article 46(2), available at <<http://legislationline.org/documents/section/criminal-codes/>>.

¹⁷ *Guidelines for Sentencing Demands in Discrimination Case [Richtlijn voor Strafvordering Discriminatie]* (1999R007) (amended 1 September 2009); See also the discrimination provisions of Sections 137c to 137g of the Criminal Code [*Wetboek van Strafrecht (WvSr)*].

Most hate crime laws list a limited set of protected characteristics. The protected characteristics differ, but most laws penalize, at a minimum, crimes based on racial, national or religious bias. Other characteristics such as gender, disability, sexual orientation and gender identity are also frequently included.

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

A hate crime can target the victim because of several protected characteristics. Not all biases may, however, be equally evident. It is important for the prosecutors to be aware of this and strive to identify all the biases underlying a hate crime. Gender bias is one cross-cutting example which is easy to overlook in a hate crime prosecution involving other protected characteristics (see section 2.4.5 below).

2.4.1 Race and racism

The word “race” refers to groups of people who are considered distinct due to physical characteristics, such as skin colour. However, it is important to understand that race is a social construct and the international community has rejected any doctrine of racial superiority or theories that attempt to determine the existence of distinct human races.¹⁸ Nevertheless, although the term “race” is not precise, it remains prevalent in international and national texts as an umbrella term that captures concepts such as ethnicity, skin colour or national origin.

If the word “race” appears in national legislation, but is not defined or not well understood in national justice systems, it may be useful for prosecutors to refer to international instruments, such as Article 1 of United Nations (UN) Convention on the Elimination of All Forms of Racial Discrimination¹⁹ (CERD), which defines the related term, “racial discrimination” as “any distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

2.4.2 Ethnicity, national origin, nationality

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

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

¹⁸ The Durban Declaration and programme of action, World Conference against Racism, preamble, 2001, <<http://www.un.org/WCAR/durban.pdf>>.

¹⁹ All participating States of the OSCE are signatories to the CERD, but many have entered reservations in respect of, *inter alia*, the right to freedom of expression. The full text of the CERD is available at <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>>.

2.4.3 Xenophobia

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

In addition to having a bias motive, xenophobic crimes may also include a political element. When committed as part of a broader pattern of terror or on a large scale, they are more likely to be prosecuted under anti-terrorism laws than as hate crimes.²⁰ Although hate crimes and terrorism overlap, most terrorist crimes are aimed at exerting pressure on governments and political goals, whilst most hate crimes lack such objectives.

2.4.4 Religion and belief

Freedom of religion or belief is enshrined in a number of international and regional instruments.²¹ It is one of three core protected characteristics, along with race and nationality, which are included in nearly every hate crime provision in the OSCE region. In 2011, the UN General Assembly adopted resolution 66/167, which condemns acts of violence targeting persons or property based on their religious association and calls on States to protect religious sites subject to destruction and vandalism.²²

If there is no specific definition of religion or belief in national legislation, it may be helpful for prosecutors to examine General Comment 22 of the UN Human Rights Committee, which provides the authoritative interpretation of the provisions of the International Covenant on Civil and Political Rights (ICCPR).²³ The Committee stated that the concept of freedom of thought, conscience or religion encompasses “theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief” and that the terms “religion” or “belief” should be construed in the broadest terms, to include both institutional and lesser known belief systems.²⁴

2.4.5 Sex and gender

²⁰ For example, on 22 July 2011, Anders Breivik bombed government buildings in Oslo Norway, leaving eight dead, before heading to a Labour Party youth camp where he opened fire on the participating youths, killing 69 people. He declared that his motive was to save Norway and Western Europe from being taken over by Muslims. His victims included Muslims and non-Muslims, immigrants and ethnic Norwegians. Breivik viewed anyone who supported liberal politics as a legitimate target. He was charged with terrorism-related crimes and convicted of these charges in August 2012.

²¹ Freedom of religion or belief was a founding principle of the OSCE, contained as Principle VII in the Helsinki Declaration of 1975 and reaffirmed repeatedly in subsequent OSCE commitments. These freedoms are also enshrined in the Universal Declaration of Human Rights, Article 18; International Convention on Civil and Political Rights, Article 18; European Convention on Human Rights, Article 8; American Convention of Human Rights, Article 12 and other documents.

²² “Resolution 66/167 adopted by the UN General Assembly: Combating negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons based on religion or belief” A/RES/66/167, 19 December 2011,

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

²³ The full text of the ICCPR is available at <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>>.

²⁴ General Comment No. 22. (Article 18 freedom of conscience, thought or religion), para. 2. For further information on international standards with respect to freedom of religion or belief, see the ODIHR-drafted *Guidelines for Legislation on Freedom of Religion or Belief*, (adopted by the European Commission for Democracy through Law (Venice Commission)), 18-19 June 2004). <<http://www.osce.org/odihr/13993>>.

OSCE participating States have committed themselves to making equality between men and women an integral part of their policies.²⁵ Specifically, OSCE participating States have committed to “prevent and combat all forms of gender-based violence against women and girls”.²⁶ A number of OSCE participating States have included gender and/or sex as a protected characteristic in their hate crime laws or hate crime recording policies.²⁷

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

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

2.4.6 Other groups

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

Statistics and other materials published in ODIHR’s annual report *Hate Crimes in the OSCE Region: Incidents and Responses*, show that hate crimes against lesbian, gay, bisexual and transgender (LGBT) persons are a serious issue throughout the OSCE area. Twenty participating States collect data on crimes motivated by bias against these protected characteristics and ten also included transgender identity as a separate category.²⁸

The UN Convention on Rights of Persons with Disabilities²⁹, which has been ratified by 46 OSCE participating States, recognizes State obligations to protect people with disabilities from violence. ODIHR’s annual report *Hate Crimes in the OSCE Region: Incidents and Responses* indicates that 16 OSCE participating States report collecting data on hate crimes on the grounds of disability.³⁰

2.4 Mistaken perception

²⁵ OSCE Ministerial Council, Decision No. 14/04, “2004 OSCE Action Plan for the Promotion of Gender Equality”, <<http://www.osce.org/mc/23295>>.

²⁶ OSCE Ministerial Council, Decision No. 15/05, “Preventing and Combating Violence Against Women” Ljubljana, 6 December 2005, <<http://www.osce.org/mc/17451>>.

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

²⁸ *Hate Crimes in the OSCE Region: Incidents and Responses– Annual Report for 2012* (Warsaw: ODIHR, 2013), p. 79 <<http://tandis.odihhr.pl/hcr2012>>. Within the UN community, there is also an emerging recognition that individuals should not be subjected to violence based on their sexual orientation or gender identity. See Statement on behalf of 62 United Nations members, including 41 OSCE participating States (UN General Assembly, *Statement on Human Rights, Sexual Orientation and Gender Identity*, 18 December 2008, available at: <<http://www.unhcr.org/refworld/docid/49997ae312.html>>.)

²⁹ <http://www.un.org/disabilities/convention/conventionfull.shtml>.

³⁰ *Hate Crimes in the OSCE Region: Incidents and Responses – Annual Report for 2012* (Warsaw: ODIHR, 2013), p. 87 <<http://tandis.odihhr.pl/hcr2012>>.

Another question to be addressed by prosecutors is how national law applies to situations in which the defendant is mistaken about the victim's identity. For example, if a man wearing a turban is attacked under the mistaken belief that he is a Muslim, can the offender be prosecuted for an anti-religious hate crime? The majority of hate crime laws in the OSCE region would allow this act to be prosecuted as a hate crime based on the offender's perception.

Most hate crime laws are qualified by the defendant's motive for choosing the victim. Under these laws, the prosecution must establish that the defendant believed the victim belonged to a certain group and that the defendant committed the crime because of bias against that group. For example, Hungary's Criminal Code³¹ describes an offender as "any person who assaults another person for being a member or a *presumed* member" (emphasis added) of a protected group. The inclusion of the word "presumed" means that mistakes of perception are covered by the law. Likewise, in Greece, the Criminal Code³² states that commission of a crime "on the basis of national, racial or religious hatred or hatred on the grounds of a different sexual orientation" constitutes an aggravating circumstance. This wording means that if the offender assaults a person under a mistaken belief that he or she is a "foreigner", the victim's actual nationality is irrelevant.

Where the law is focused on the victim's membership in a protected group, some jurisdictions have drafted their laws specifically to cover instances of mistaken perception. For example, the French Penal Code³³ imposes increased penalties 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."

Even if national hate crime legislation focuses on victim membership rather than offender motivation, it may still be prosecuted as a hate crime; most legal systems do not allow mistake of fact of this sort to negate criminal liability. In any event, bias motivation can be taken into account under general sentencing principles as discussed in Chapter 2.3.4.

2.5 Victims by association

Some hate crimes involve the victim being targeted not because of some personal characteristic, but because of their association with a person or people against whom the perpetrator has a bias. For example, targets by association can include interracial couples, people who support minorities or human rights causes, or members of civil society groups and organizations (CSOs) working on human rights' issues on behalf of groups such as migrants or gays and lesbians. In such cases, the victim may even belong to the same group as the defendant. However, the perpetrator is motivated by the same bias as if the victim had been a member of a different group than the perpetrator.

If hate crime provisions are written so that the prosecution needs to prove only the defendant's subjective motivation, then victim by association cases can be prosecuted using hate crime provisions. For example, under the Ukrainian Criminal Code³⁴, the prosecution has

³¹ Article 216(2). See the provision of the 2013 Hungarian Criminal Code at <<http://www.legislationline.org>>.

³² Article 79. See the provision of the Greek Criminal Code at <<http://www.legislationline.org/documents/section/criminal-codes>>.

³³ Article 132-76. See the provision in the French Penal Code at <<http://www.legislationline.org/documents/section/criminal-codes>>.

³⁴ Article 67(3). See the provision of in the Ukrainian Criminal Code at <<http://www.legislationline.org/documents/section/criminal-codes>>.

simply to prove that the defendant “committed the crime because of hostility on racial, national or religious grounds.” Under these circumstances, the victim’s membership in a particular racial, religious or national group is not the key issue.

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

2.7 The international and regional framework

The hate crime concept is grounded in the universal principles of equal rights, tolerance and democratic values that are reflected in a number of international treaties and instruments and regional standards. Many domestic laws on this issue are rooted in international standards and obligations.

2.7.1 The United Nations

The UN human rights framework requires States to guarantee equal rights, equal protection of laws and to prevent discrimination. The Universal Declaration of Human Rights lays the framework for the principles of equal rights and non-discrimination, as the first international instrument to affirm that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”³⁵

The ICCPR expands on these principles with specific treaty provisions. Articles 6 and 7 guarantee an individual’s rights to life and freedom from inhumane and degrading treatment, respectively, while Article 2 requires to States to have sufficient legislative, judicial and other measures to ensure a remedy is available in the event of treaty violations. The Human Rights Committee, which oversees implementation of the treaty, has observed that States have an obligation to investigate violations committed by State actors and by private actors against other individuals.³⁶

Article 2 contain provisions on the non-discrimination principle similar to that in the Universal Declaration, while Article 26 more specifically requires equality before the law, equal protection of the law and protection from discrimination. Thus, the ICCPR obligates states to investigate violence committed against individuals and to discharge these duties without discrimination.

The CERD is even more specific about the duties to investigate racist violence, requiring States to implement legislation to prohibit acts of violence and incitement to violence based on racism, in addition to some forms of racist speech.³⁷ The CERD Committee, which

³⁵ Universal declaration of Human Rights available at: <http://www.un.org/en/documents/udhr/>.

³⁶ UNHRC General Comment 31: The Nature of the General Legal Obligations imposed by the Covenant, adopted on 29 March 2004, UN Doc CCPR/C/21/Rev.1/Add.13, paragraphs 6-8.

³⁷ Article 4(a) states: “States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and... inter alia: (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof...”.

oversees the treaty's implementation, has emphasized the "importance of prosecuting racist acts, including minor offences committed with racist motives, since any racially motivated offence undermines social cohesion and society as a whole."³⁸ The Committee has also recommended that, in order for victims of racism to bring cases to court, States should ensure victims are allowed to participate in criminal proceedings in accordance with jurisdictional rules, kept informed about the progress of proceedings, protected against reprisals or intimidation and have access to compensation and assistance, where available.³⁹

As described in the box below, the Committee has underscored the duty of the prosecution to ensure that racist motivation is fully investigated. Failure to do so when there is *prima facie* evidence of bias motivation in connection with a serious crime is considered a violation of Article 6 (effective remedies) and Article 2, paragraph 1(d) (bringing an end to racial discrimination by all appropriate means).⁴⁰

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

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

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

Although the UN framework does not require States to adopt specific hate crime laws, there is an emerging recognition of the duty to investigate, prosecute and punish hate crimes. As States report to the UN regularly on progress in implementing the rights enshrined in the

As there is no consensus as to when speech can be restricted without infringing the right to freedom of expression, many States have entered reservations to this provision.

³⁸ Committee on the Elimination of Racial Discrimination General Comment 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, Sixtieth Session, Supplement No. 18 (2005) UN Doc A/60/18, pg. 103, para. 15.

³⁹ *Ibid.*, pages 104-05, para. 17.

⁴⁰ Committee on the Elimination of Racial Discrimination, Communication No. 46/2009, Opinion adopted by the Committee at its eightieth session, 13 February to 9 March 2012, CERD /C/80/D/46/2009, in the case of *Mahali Dawas and Yousef Shava v. Denmark*.

treaties to which they are States parties, their records on hate crimes will come under scrutiny.⁴¹

2.7.2 OSCE

Since 2003, when the term “hate crimes” was first officially used by the OSCE, the Ministerial Council has repeatedly asserted that hate crimes affect not only the individual, but also have the potential to lead to conflict and violence on a wider scale.⁴² As the OSCE requires consensus for any decisions or commitments, every participating State has actively agreed to abide by these commitments. OSCE commitments form a set of principles which are politically binding on States.

The Ministerial Council Decision in 2009 on Combating Hate Crimes⁴³ remains one of the most comprehensive commitments by the international community concerning State obligations to address hate crimes. Participating States, inter alia, committed themselves to:

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

2.7.3 Council of Europe

Forty-seven of the 57 OSCE participating States are signatories of the Council of Europe’s European Convention on Human Rights⁴⁴ (ECHR). As such, the judgments of the European Court of Human Rights (“the Court”), which is the ECHR enforcement mechanism, are highly influential within the OSCE region. The Court has considered States’ obligations under the ECHR in relation to crimes based on bias motives on a number of occasions. These all involve Article 14 of the Convention, which contains the principle of non-discrimination and can be invoked only if another, substantive right under the Convention is in issue.

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

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

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

⁴¹ racial discrimination, article 4, 25 August 1985. Also General Recommendation 07 (General Comments), which requests states to submit information on legislation and its application in their periodic reports.

⁴² See, OSCE Ministerial Council Decision No. 4/03, “Tolerance and Non-discrimination”, Maastricht, 2 December 2003, <<http://www.osce.org/mc/19382>>. A full list of relevant OSCE commitments can be found in Annex 2.

⁴³ OSCE Ministerial Council Decision No. 9/09, “Combating Hate Crimes”, Athens, 1-2 December 2009 <<http://www.osce.org/cio/40695>>.

⁴⁴ Full text of ECHR is available here: http://www.echr.coe.int/Documents/Convention_ENG.pdf.

To give meaning to the right to life (Article 2) and the right to be free from ill-treatment (Article 3) under the ECHR, States have a “positive obligation” to undertake effective investigations into crimes which interfere with those rights.⁴⁵ This has two aspects: the first is that States are required to take measures to ensure that individuals within their jurisdictions are not subjected to ill-treatment, whether by State actors or by private individuals. The second aspect is that States are required to conduct an official investigation that is reasonably expeditious.

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

In the case of *Stoica v. Romania*, where the alleged ill-treatment by police of a 14 year old Roma boy left him with permanent disabilities, the Court found that the military prosecutors had premised their findings on the statements of the police officials who clearly had every reason to wish to exonerate themselves and their colleagues from any liability. At the same time, the prosecutors had dismissed all statements by villagers, all of whom were of Romani ethnicity, on the grounds of an alleged bias in favour of the applicant. Additionally, the prosecutors had ignored statements by police officials that the villagers’ behaviour was “purely Gypsy”, a statement that in the eyes of the Court demonstrated the stereotypical views of the police.⁴⁶

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

In the case of *Angelova and Iliev v. Bulgaria*,⁴⁷ the applicants alleged that the State had failed in its obligation to conduct an effective and prompt investigation into the death of a Roma man, and that the lack of legislation for racially motivated murder failed to provide adequate legal protection against such crimes. The Court held that a lack of direct hate crime laws did not hinder their ability to pursue the racist motivation during the criminal process and that the general legal framework could allow for appropriate and enhanced punishment for these types of crimes. This underscores that although States are not required to have specific hate crime laws, crimes that are particularly egregious, such as the increased harm to individuals and society that are caused by hate crimes, require proportionate punishment under the law.

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

⁴⁵ *Nac*
2005.

⁴⁶ *Stoica v. Romania*, Judgment of the European Court of Human Rights, 4 March 2008.

⁴⁷ *Angelova and Iliev v Bulgaria*, Judgment of the European Court of Human Rights, 26 July 2007.

In *Angelova and Iliev v. Bulgaria*, the Court also examined the role of authorities in specifically uncovering racist motivation. The police had identified the alleged assailants in the death of Roma man, one of whom directly admitted the racial motivation for the crime. However, the police failed to conduct the necessary investigative proceedings within the statute of limitations for prosecutions against most of the suspects. The Court held that the domestic authorities had failed to conduct a prompt and effective investigation into the incident, especially “considering the racial motives of the attack and the need to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racial violence.”⁴⁸ Consequently, the Court found Bulgaria to be in breach of the procedural aspect of the right to life (Article 2) in connection with the principle of non-discrimination (Article 14) because the authorities failed to make the “required distinction from other, non-racially motivated offences, which constitutes unjustified treatment irreconcilable with Article 14.”⁴⁹

In *Sesic v. Croatia*, the Court extended that same reasoning to violations of the investigative procedural aspect of the right to be free from ill-treatment (Article 3) in connection with Article 14. The applicant was a Roma man who was severely beaten by two individuals with wooden bats while they shouted racial abuse. Despite several leads, police failed to take reasonable investigative measures to find the perpetrators and bring them to justice. The Court held that State authorities have the duty, when investigating violent incidents, “to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have non-racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.”⁵⁰

In *Milanovic v. Serbia*, the Court extended the same principles concerning crimes motivated by racism to crimes motivated by an anti-religious bias.⁵¹ The applicant, a member of the Vaishnava Hindu, or Hare Krishna, religious community was subjected to numerous physical attacks around the time of major Serbian Orthodox religious holidays. The State was held in breach of the procedural aspect of Article 3 (prevention of ill-treatment) in conjunction with Article 14 (non-discrimination principle) for failing to investigate effectively and promptly the religious bias motivation of the crimes. The Court especially took note that the police failed to take the victim’s case seriously, even though there was a pattern of targeting around religious holidays. Instead, the police referred to the victim’s religion and “strange appearance”, which suggested that any investigative steps were *pro forma* and inadequately addressed the seriousness of the anti-religious bias motivation presented in the case.

⁴⁸ Ibid., para. 105.

⁴⁹ Ibid., para. 117.

⁵⁰ *Sesic v. Croatia*, Judgment of the European Court of Human Rights, 31 May 2007.

⁵¹ *Milanovic v. Serbia*, Judgment of the European Court of Human Rights, 14 December 2010.

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

2.7.4 European Union

The European Union (EU) Framework Decision on Combating Racism and Xenophobia⁵² is one of the EU's responses to hate crimes. This decision binds all EU member States to review their legislation and ensure compliance with the decision. It is intended to harmonize criminal law across the EU and to ensure that States respond with effective, proportionate and dissuasive penalties for racist and xenophobic crimes.

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

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

⁵² Council Framework Decision of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, 2008/913/JHA.

CHAPTER THREE

BUILDING A CASE

3.1 Opening the file

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

Necessary co-operation between the police and prosecution in hate crime cases requires shared understanding of the hate crime concept and of the protected characteristics, and good inter-agency communication. While separate training programmes for law enforcement agencies and for prosecutors on hate crimes are beneficial, joint training should also be considered to foster co-operation.⁵³

Whether a full file of evidence has been provided or little more than an outline of facts and some key data, in the end it is for the prosecutor to determine if the case should be prosecuted as a hate crime and if any additional evidence is needed to prove the elements of the crime and the bias motivation.⁵⁴ The following sections explain how to use available information to build a hate crime case.

3.1.1 Using bias indicators to identify a potential hate crime case

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

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

A decision to flag a case as a hate crime may be taken at different stages by either the police or the prosecution, based on similar analysis. Bias indicators are thus relevant both at the crime scene and when reviewing evidence of a crime.⁵⁵ Some countries have developed their own list of bias indicators, which police and prosecutors apply to all cases to help determine

⁵³ For more details on ODIHR's Training against Hate Crimes for Law Enforcement (TAHCLE) and Prosecutors and Hate Crimes Training (PAHCT), see Annex 1.

⁵⁴ In case of penalty enhancement offences (in legal systems where finding on guilt and sentencing happen at separate stages) additional penalties might be handed out by the sentencing court and not charged by the prosecutor, and therefore the case needs to be marked as a hate crime and the evidence had ready for presentation at court.

⁵⁵ See also *Preventing and Responding to Hate Crimes: A Resource Guide for NGOs in the OSCE Region*, (Warsaw: ODIHR, 2009) <<http://www.osce.org/odihr/39821>>.

motive. The excerpt in the box below, from a leaflet on hate crimes for police officers provided by the Polish Ministry of Interior, lists the most important bias indicators.

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

Example of bias indicators for first responders

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

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

Signs indicating hate crimes

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

Such indicators may include:

- Circumstances connected with the victim: a person belonging to a minority group (e.g., national, ethnic, religious, sexual), or by his or her relationship with a person belonging to a minority or the promotion of a minority group;
- Circumstances connected with the target of the crime when it involves property, including its function (e.g., place of worship, cemetery, place of assembly of persons of a particular racial group, nationality, religion, etc.);
- Circumstances connected with the offender: conduct that is known to law enforcement authorities that is consistent with organized hate groups; or the offender has previously been involved in incidents of this kind or is a member of an organized hate group;
- The conduct of the offender: comments, gestures, written statements (occurring both in the course of committing a crime as well as preceding it), signs, symbols, graffiti and crime scene drawings (including the content of racial, ethnic, religious or related to gender);
- Circumstances of time and place of the crime: the incident coincided with a holiday or date relevant to the victim group; the area already had a number of crimes or incidents of hate take place; or the place is generally known or perceived as an area associated with a particular minority group;
- Victim or witness to an event perceived it as motivated by bias;
- No other motives.

Commentary:

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

3.1.2 Brutality of the attack

Violent attacks with no obvious motive where there is a racial or other group difference between the victim and the perpetrator is a strong indicator that the crime may have been motivated by bias. Anyone can be a victim of a hate crime, regardless of whether they are from a minority group. However, religious, racial, ethnic and sexual minorities and people with disabilities suffer disproportionately from hate crimes. In some, albeit rare, cases, bias crimes demonstrate extreme, brutal violence which stems from the way in which perpetrators seek to dehumanize victims against whom they hold biased and intolerant views. Hence, if the victim belongs or appears to belong to such a minority, and there is no other obvious motive (e.g., economic), further investigation of motive is warranted.

Case Example Brutality of the attack

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

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

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

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

3.1.3 Signs and Symbols

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

If it appears that there are symbols that indicate bias motive, expert evidence of the meaning of such symbols will be required. Testifying experts can usually be found in, or recommended by, the Ministry of Interior or other relevant authorities⁵⁶ and also some CSOs. Some CSOs also maintain online databases with signs and symbols, such as the Polish *Nigdy Wiecej* (“Never Again”) or the US-based *Anti-Defamation League*⁵⁷, that have sections on their websites where neo-Nazi symbols have been collected.

3.2 Types of evidence of bias motivation

Before gathering additional evidence, the prosecutor determines whether the relevant provisions or law require proof of “hate” or hostility by the offender, or whether the law

⁵⁶ For example, the German Ministry of Interior and the French Gendarmerie have databases and experts in extremist symbology.

⁵⁷ <www.nigdywiecej.org, http://archive.adl.org/hate_symbols/default_graphics.html>.

requires only that the offender target an individual because of his or her actual or presumed connection with a particular group. These two different approaches are known as the *hostility model* and the *discriminatory selection model* of legislation, respectively. The discriminatory selection model is objective, as the prosecution need prove only that the perpetrator selected the victim due to his or her membership in a particular group. It is not necessary that the selection of the victim involve negative emotions. In other words, the question to be asked is “was this victim selected because of their group identity (race/ethnicity/religion/sexual orientation, etc.)” and not whether the perpetrator “hated” the targeted group. The discriminatory selection model would apply, for example, if a perpetrator admitted to targeting a gay man for robbery on the basis of a belief that gay men do not fight back, or targeting a migrant on the basis of a belief that the migrant would not report the crime to the police because of his or her immigration status.

The hostility model takes a more subjective approach that might require additional evidence of animosity towards the victim group. This could comprise the offender’s admission that “gay people deserve to get robbed” or the use of homophobic slurs directed at the victim, or that the defendant wants all migrants out of his country because they take away jobs from citizens.

In practice, these legislative approaches will mostly require similar evidence, because bias and prejudice are the drivers for hate crimes, whichever model of legislation is used. When building a hate crime case, the prosecutor has to ask the same key questions, although the approach to the question of sufficiency of evidence may be different.

3.3 Working with hate crime victims and witnesses

Hate crimes have some special features which prosecutors and investigators need to keep in mind when assessing evidence from victims and witnesses. Many victims of hate crimes are reluctant to come forward and tell the full story of their victimization for a variety of reasons. They are often members of marginalized communities who experience discrimination as a regular part of their daily lives. Authorities need to be aware that for some victims, approaching law enforcement is a big step in itself.

Gender also plays an important role. Gender bias may be a motive of the hate crime, or one of the motives, in which case it needs to be identified and the case prosecuted accordingly. In their work with both victims and witnesses, prosecutors should at all times consider gender aspects of the case. Where possible, policies for addressing gender when prosecuting hate crime cases should be devised. These may need to address some procedural issues, e.g., reconciling the victims’ needs with the rules governing appearances of the victim or witness in court. Hate crimes victims generally, and victims of sexual violence or gender-based crime in particular, often find it hard to face the perpetrators in the courtroom.

3.3.1 Addressing issues of reluctance to report

Under-reporting is common in hate crime cases.⁵⁸ There are some common factors which may explain a victim’s reluctance to report the crime to authorities, as set out below.

⁵⁸ “European Union Minorities and Discrimination Survey, Main Results Report” European Union Fundamental Rights Agency, (Vienna: 2009). This is also commonly reported to ODIHR during focus groups with civil society in preparation for the delivery of in-country training on hate crimes for law enforcement officials. While no international survey has measured the level of under-reporting specifically in gender-based hate crime, the violence against women cases are among the most under-reported.

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

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

Secondary victimization: Members of a community may have routinely experienced discrimination and even hostile treatment by their neighbours and even by the authorities. They may feel that they will experience similar mistreatment again if they ask authorities for assistance. The first response of the authorities to the victim's report may not have been sensitive to the victim's physical and psychological state, discouraging his/her further involvement with the authorities. These fears can perpetuate the lack of trust between community groups and authorities.

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

Since the victim is the most important witness in most cases, being aware of these issues and taking steps to reassure victims (to the extent possible) is an important part of helping build a case. Prosecutors should ensure that victims' concerns are addressed at the earliest opportunity, either directly or through the police or other agencies, and apply for the appropriate protection measures in their jurisdiction, using both criminal and civil means as applicable. Attention should be paid to the particular position of women as victims and witnesses in this regard. Being aware of cultural differences and building trust with local communities can be a time consuming process, but for prosecutors and other law enforcement officials it can pay off through much improved witness and victim co-operation⁵⁹; this point is discussed in more detail in Chapter 4.3.

3.3.2 Assessing credibility without bias or prejudice

Another aspect of working with victims is being aware of stereotyping when assessing a witness's credibility. Some witnesses and victims may appear uncooperative for reasons that have already been described. Others, in the opinion of law enforcement personnel, may not be credible. These opinions must not be based on stereotypes or bias. In *Stoica v. Romania* and in *Milanovic v. Serbia*, for example, the European Court of Human Rights found the States in breach of their obligation to investigate cases involving bias motivation effectively. In those

⁵⁹ See, for example, *Preventing and Responding to Hate Crimes, a Resource Guide for NGOs in the OSCE Region*, (Warsaw: ODIHR, 2009), page 29.

cases, the Court emphasized that the stereotyped views of the investigators and prosecutors towards the victims contributed to the Court's decision that failure to investigate was partly due to racial discrimination in breach of Article 14 of the ECHR.

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

3.3.3 Addressing conflicts with victims

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

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

3.3.4 Co-operating with victim counsel or victim advocates

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

Case Example

Working with victims who have special needs

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

Commentary: In the U.K., sentencing disability hate crimes requires proof that the offender “demonstrated hostility” towards a person’s disability before, during or immediately after the incident or was otherwise motivated by hostility towards a person’s disability. In this case, the prosecutor was able to prove the demonstrated hostility by evidencing the perpetrator’s intent to take advantage of the victim’s learning disability, based on a prejudice that his learning disability would prevent him from successfully testifying against the offender. The prosecutor’s application for special measures – the use of an intermediary – was a key part of the successful case outcome.

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

3.4 Preparing the evidence

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

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

3.4.1 Admissibility

In adversarial proceedings, the types of evidence that can be admitted will depend on national criminal procedures. While evidence of previous bias-motivated acts or prejudiced beliefs about a specific group may be used to prove a bias tendency, such evidence is often inadmissible. The closer in time and relevance to the offence itself, the more likely it is that the evidence will be admitted.

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

3.4.2 Common types and sources of direct evidence

Because hate crimes are message crimes, offenders often want others to know their motives.

They may make offensive statements to the victim or leave hateful words and symbols as graffiti on property. The offender may also boast about the crime to friends, family or in public settings. They often make admissions to police and investigators about their bias.

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

Case Example **Statements of defendants before the crime**

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

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

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

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

Commentary:

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

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

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

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

Some hate crime offenders make a recording of the incident to post on the Internet or show to friends. Websites hosting Internet forums are used to organize, or boast about, bias crimes.

There are examples of cases in which such recordings have proved important in establishing the motive and provided essential intelligence enabling investigators to gather evidence which led to a conviction. Such extensive investigative steps may not be appropriate in all cases, as the amount of resources dedicated to the investigation will likely depend on the seriousness of the crime at issue. In serious cases, however, it is likely that the crime was not the suspect's first hate crime and investigation into the offender's background may reveal evidence of other incidents.

Type of evidence	Sources
Statements made before the event that indicate planning	Victim, co-perpetrators, witnesses to the incident
Offensive statements towards the victim during the incident	Victim, suspect's associates/co-perpetrators, friends, family, other witnesses. Search of suspect's cell phone, (including photographic images/video), computer and Internet usage
Statements of admission after the event	Suspect's associates/co-perpetrators, friends, family or other witnesses. Search of suspect's cell phone, (including photographic images/video), computer and Internet usage
Statements of direct admission	First responders to the crime scene, witnesses, police/prosecution investigators; co-perpetrators
Connections to an organized hate group	Search of suspect's house for magazines, posters, books, leaflets, etc. Search of suspect's cell phone, (including photographic images/video), computer and Internet usage

3.4.3 Circumstantial evidence

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

- The suspect's association with organized hate groups;
- The incident occurring on a day, time or place significant for the target community;
- The incident occurring on a day, time or place that commemorates an event or is symbolic for the offender, such as Hitler's birthday;
- The brutality of the attack with lack of other motives;
- A pattern of similar incidents using a method sufficiently similar that there is a strong likelihood of a link.

Case Example:
Using circumstantial evidence to prove bias motivation

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

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

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

Commentary

There were key steps to successfully prosecuting this case:

- The Internal Security Agency provided police investigators with relevant information very quickly after the attack. As the investigation continued this level of co-operation was maintained.
- While witness evidence may not have been sufficient on its own, it was used as intelligence to establish grounds for seeking judicial authorization for a wiretap.
- Searching the suspects’ homes elicited publications and past associations of the defendants with far-right groups, which enabled the prosecutor to draw the inference that this was a racist attack.
- The totality of the inferential evidence, including the unprovoked, brutal nature of the attack, showed the defendants’ racist views.

Sources:

<http://romove.radio.cz/en/article/23320/limit#kw> and

<http://www.cnn.com/video/#/video/international/2010/06/28/wus.scars.of.racism.hatred.bk.a.cnn?iref=allsearch>

3.4.4 More than one motivation: mixed motives

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

3.4.5 Presenting the impact on victims: physical and psychological

In many jurisdictions, medical documentation outlining the nature, seriousness and impact of a victim’s injuries is necessary for the legal qualification of physical injury charges. If medical documentation is part of the evidence, prosecutors should also ensure that the medical records match the severity of the injuries suffered by the victim and make necessary follow-up inquiries if they do not. Because hate crimes can reflect patterns of discrimination

often experienced by marginalized groups, the victim may have been unable to access proper treatment or may have experienced further discrimination when seeking assistance.

Specialized victim support services are a useful partner to the prosecution at this stage – firstly because the victim may have shared the extent of his or her injuries with them more willingly than with the authorities, and secondly due to their knowledge of the common patterns of victimization. For example a female victim may be more willing to trust a women’s support CSO than the police.

Evidence of psychological impact may not be necessary to prove the case if, for example, the charge relates to light bodily injury or property damage. But there is evidence that psychological impact of even relatively minor bias crimes on their victims can be greater than that of more serious non-bias motivated crimes on their victims.⁶⁰ While there may not be psychological evidence available, a simple way to reflect the many negative impacts of a bias crime is to provide the victim an opportunity to present the full impact of the experience in the manner most appropriate in the local jurisdiction.

3.5 Charging a hate crime case

3.5.1 Alternative charges and initial legal qualification

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

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

Case Example

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

⁶⁰ Paul Iganski and Sporidoula Lagou, “How Hate Crimes Hurt More: Evidence from the British Crime Survey” in *Hate Crimes: The Consequences of Hate Crime, Vol 2*, (Ed. Barbara Perry and Paul Iganski), Praeger, Westport (2009), pp. 1-13.

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

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

Commentary: A common theme in hate crime cases is the escalation of events. What may start out as minor, but offensive, non-criminal incidents, can escalate into more serious violence. The CERD Committee has noted in its General Recommendation 31 the importance of prosecuting even low-level offences. The offender in this case had a history of harassing the Jewish prayer house and when he was confronted, he responded with violence. There was also an emerging pattern of public displays of anti-Semitism against individuals in the community. This particular incident could be viewed as an attempt at targeting the entire community, as the remarks were shouted at a community building, towards anyone and everyone inside. Prosecutors took this case as a serious matter in part because of its potential for escalation and responded swiftly and with serious charges to send a message to the community and wider society.

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

3.5.2 Plea bargains or mediation

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

Case Example

Efficiently using guilty pleas to recognize bias motivation

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

Commentary: This incident reveals that bias and prejudice can be more complex than a single bias. The incident began with racist insults. During the physical assault, the women's hijab was pulled off, suggesting that the offenders were also targeting the women's expression of being a Muslim. Under U.K. legislation, the crime of racially or religiously aggravated assault can be prosecuted if "during, before and immediately after the incident" the offender demonstrated hostility towards the person based on race or religion. As this case was processed as a guilty plea, the prosecutors chose to base the charge and conviction on the most clearly evidenced hostility – the racist statements that immediately preceded the assault.

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

3.5.3 Countering defence arguments

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

3.5.3.1 "Just a fight"

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

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

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

Case Example A hate crime murder – not just a fight

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

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

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

Under the principle of dual sovereignty, the federal prosecutors were able to charge the two lead students with murder-related hate crime charges in federal court based on evidence that was not available during the state trial. The jury rejected the "just a fight" defence and convicted both of murder as a hate crime. They were sentenced to nine-year prison terms. The verdicts and sentences were upheld on appeal.

Commentary: The case highlights a common theme in hate crime cases – that the victim comes from a marginalized community. It is important to recognize the role that independent government institutions can provide in giving some oversight to controversial cases. It also highlights common defence strategies that cite alcohol or the "just a fight" argument to minimize behaviour that has devastating impact.

Sources:

http://www.nytimes.com/2010/10/15/us/15scranton.html?_r=2&

http://www.pennlive.com/midstate/index.ssf/2012/06/hate-crime_verdicts_upheld_in.html

3.5.3.2 "My words are not racist"

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

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

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

3.5.3.3 Defendant's relationships

The fact that a defendant has relationships with people from a similar background as the victim does not automatically exclude that bias and prejudice motivated his or her criminal conduct in the case at issue. Bias and prejudice are complex. Many times prejudiced people know and like individuals from groups they don't normally trust, but view that person as an exception rather than negation of their stereotypes. It is important to assess the defendant's behaviour within the incident with which he is charged to reveal the bias and prejudice in a particular action.

Case Example

Looking at the defendant's conduct, not excuses

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

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

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

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

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

3.5.3.4 Defendant is from the same background as the victim

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

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

3.6 Sentencing a hate crime case

In jurisdictions where the hate crime law is a penalty enhancement provision and sentencing and finding of guilt are separate stages of the proceedings, a judge may refuse to sentence on the basis of a bias motive if the bias element has not been included in evidence during the trial phase. Similarly, in the case of a guilty plea, the motivation must be included within the accepted facts in order for the penalty enhancement to be applied. In jurisdictions where hate crime laws are rarely used, it can be helpful for prosecutors to ensure that the case file includes a clear analysis of why sentencing should take into account the bias motive, including referring to international standards outlined in Chapter 2.7, The international and regional framework.

3.6.1 Restitution and compensation

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

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

3.6.2 Other orders

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

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

3.6.3 Dealing with minors

Dealing with hate crimes committed by minors can be more difficult than those committed by adults. While the approach to minors in the justice system varies widely among jurisdictions, it is always different from that of adults. The increased penalties associated with hate crimes, if available, may not be appropriate in these cases. Instead, working with young offenders can provide an opportunity to address their biases. However, bearing in mind the escalating nature of hate crimes, a prosecutor has a very important decision to make in regard to how to deal with minors who commit these offences. Rather than dismiss such cases as “just” childhood bullying, it is important to make certain that steps are taken to ensure appropriate rehabilitation and some element of recognition that the crime and the bias motive are unacceptable.

CHAPTER FOUR

POLICIES AND PROCEDURES

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

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

4.1 Specialized guidance and training

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

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

Written prosecution guidance

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

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

Strengthening prosecution skills and knowledge of hate crimes through training: Community Relations Service in the U.S. Department of Justice

In 2009, new US federal hate crime legislation was passed increasing penalties for violent hate crimes, broadening and simplifying federal jurisdiction, and for the first time recognizing certain violent acts directed at individuals because of their actual or perceived sexual orientation or gender identity as federal hate crimes. As part of this legislation, Congress authorized an agency within the Department of Justice (the Department responsible for federal prosecutions) to develop the capacity for better responses and prevention of hate crimes.

The Community Relations Services (CRS) is a non-enforcement and non-prosecutorial component of the U.S. Department of Justice, originally formed as part of the 1964 Civil Rights Act to help mediate issues in communities involving racial discrimination. Between 2010 and 2012, it focused much of its work on hate crime training and conferences, working with U.S. Attorneys in multiple districts to hold hate crime summits and conferences to share information and best practices, to discuss victims' rights, and to provide training for local law enforcement agents and prosecutors. It conducts two-day training programmes that provide state and local law enforcement officers with skills and knowledge critical when addressing hate crimes. The programme was designed to familiarize participants with best practices for identifying, reporting, investigating, and prosecuting hate crimes. The programme also covers effective strategies to educate the public about hate crimes and their significance.

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

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

4.2 Specialized units

Some prosecution agencies develop a cadre of specialists as a means to respond to crimes which are particularly challenging to detect and prosecute, and which have seriously harmful effects. For example, many jurisdictions have specialized units for domestic violence, child abuse or human trafficking. This concentration of expertise allows authorities to maximize their resources and knowledge. Prosecution agencies have deployed specialist hate crime prosecutors either as part of a separate hate crimes unit or as focal points within their area. For example, the Dutch Prosecution Service on Discrimination and the Hate Crime and Discrimination Service of the Barcelona Public Prosecution have specialized offices that can either prosecute hate crime cases directly or provide support to prosecutors. These units also co-operate closely with police.

Hate Crimes and Discrimination Service in the Office of Prosecutor of Barcelona

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

In 2010, the Office was assigned a full-time co-ordinator and initiated the issuance of a Protocol on “procedure in criminal acts motivated by hatred or discrimination” which instructs police officers on how to identify and record hate crimes, recommends contacting the Service to inform them of the hate crime case, and ensures victims receive proper referrals to services, if needed. The Service’s report on its activities for 2010 stated that it had been involved with 69 cases, while acknowledging that these were reported cases and recognizing that actual number of hate crimes was much higher.

In 2011, following this successful model, similar services began in the prosecutors’ offices in Madrid and Malaga.

Source: Submissions of Spain’s National Point of Contact on Combating Hate Crimes for ODIHR’s Hate Crimes in the OSCE Region: Incidents and Responses annual report for years 2009-2011

4.3 Public awareness campaigns and outreach with community groups and civil society

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

Possible outreach activities that could include prosecutors include:

- Organizing meetings with various groups and criminal justice officials to discuss current issues with the community and provide updates within appropriate legal procedure rules;
- Acting as public ambassadors by speaking about hate crimes to public groups, including schools, churches or community centres;
- Developing awareness-raising materials about hate crime.

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

Beginning in 2010, ODIHR has worked with OSCE Field Operations in South Eastern Europe to develop hate crime awareness booklets for distribution in their local areas. The publications aim to help police, prosecutors, judges, legislators, local authorities and CSOs better understand the problem of hate crimes. While each booklet has general information on the concept of hate crimes, it can also contain local case examples and local legislation. Each publication is produced in local languages. To date, publications have been produced in co-operation with the OSCE Mission to Bosnia and Herzegovina, OSCE Mission in Kosovo, OSCE Mission in Skopje and the OSCE Presence in Albania.

OSCE Mission to Bosnia and Herzegovina: <http://www.osce.org/odihhr/104165>

OSCE Presence in Albania: <http://www.osce.org/odihhr/104164>

OSCE Mission in Kosovo: <http://www.osce.org/odihhr/104166>

OSCE Mission in Skopje: <http://www.osce.org/odihhr/104168>

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

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

Working with communities: CRS in the U.S. Department of Justice

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

More specifically:

- CRS assists willing parties and explores opportunities to develop and implement local strategies that can help law enforcement, local officials, civil rights organizations, and interested community groups respond to alleged hate crimes and find ways to prevent future incidents.
- State and local law enforcement officials and community leaders may contact CRS to request assistance in improving communication between law enforcement and community members in the aftermath of a hate crime.
- CRS may help facilitate dialogues between law enforcement and community members to increase mutual understanding about the investigative and prosecutorial process as well as the concerns of people in the community.
- CRS improves community response mechanisms, by facilitating the development of community capacity to help prevent hate crimes with services and programmes that include: conciliation, mediation, training, technical assistance, and other tension reduction techniques.
- CRS may introduce the community to representatives of agencies that respond to hate crimes, including federal, state, and local law enforcement officials, and local government resources.

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

4.4 Media strategies

The media can have a positive or negative impact on the public's perception of how hate crime cases are addressed. Prosecutor's offices may have established protocols for dealing with the media in relation to ongoing cases. While the foremost concern should be with maintaining the integrity of the investigation and respecting a defendant's right to a fair trial (including the presumption of innocence), a co-ordinated effort with the media can help disseminate appropriate information to the community.

One widespread practice which prosecutor's offices should avoid when informing the public on the status of a case is excluding the possibility of bias motivation from the beginning. Sometimes, authorities deny the existence of bias motivation even before the evidence has been gathered, based on the belief that this will calm potential community tensions. The problem with this approach is that it rarely succeeds; instead, it leaves victims and their communities with the impression that the investigation will not look into motive in a thorough and effective way. By the same token, it may be dangerous to publicize a bias motivation

solely based on a victim's or another's perception before the evidence to substantiate the bias element is established. To do so may unrealistically heighten expectations.

In countries where victim reporting of hate crimes is low, leading to low numbers of hate crime prosecutions, authorities may want to emphasize to the media that they consider an increase in hate crime prosecutions as a positive indication that more members of affected communities trust authorities to handle their cases seriously.

Highlighting notable hate crime prosecutions and convictions on public websites

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

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

4.5 Contributing to data collection and monitoring and public reports

Collecting data on hate crime prosecutions is an important way to track effective prosecutions and to monitor why some prosecutions were unsuccessful. OSCE participating States have made commitments to collect data on hate crimes and to make that information publicly available – including through ODIHR's annual report *Hate Crimes in the OSCE Region - Incidents and Responses*.⁶¹ Comprehensive data can increase the ability of authorities to understand better the problem of hate crimes and monitor the effectiveness of programmes designed to address them. A comprehensive approach includes data and statistics on the number of cases reported to law enforcement, the number of cases prosecuted and the number of cases sentenced. Disaggregation of that data by types of crimes and bias motivation can also prove useful in analysing patterns of hate crimes.

Annual report on prosecution of hate crime cases from CPS in the U.K. and press releases

In October 2012, the CPS released its fifth annual "Hate crimes and crimes against older people report" covering prosecutions between 2011 and 2012. The report looks at statistics of successfully prosecuted hate crimes, including in the areas of racially and religiously aggravated hate crimes, homophobic and transphobic hate crimes and disability hate crimes. In addition to statistics, the report highlights positive case studies, lessons learned and programmes implemented to improve prosecution responses to hate crimes. http://www.report-it.org.uk/files/cps_hate_crime_report_2012.pdf

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

Source: <http://www.independent.co.uk/news/uk/crime/hatecrime-cases-failing-in-court-says-cps-8215804.html>

Prosecution offices can work towards developing a data collection policy for recording hate crimes, as well as collaborating with other government agencies to develop a cohesive and consistent approach to data collection by all relevant agencies. As many States already

⁶¹ See, e.g. *Hate Crimes in the OSCE Region - Incidents and Responses: Annual Report for 2012*, (Warsaw, 2013) available at <http://tandis.odihhr.pl/hcr2012/>. As of 2014, ODIHR reports on hate crimes online, at <http://hatecrime.osce.org/>.

compile some form of hate crime statistics, many of these procedures could be adapted and tailored to the specifics of hate crime prosecutions.⁶²

Croatia Hate Crime Protocol

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

Article 8.

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

Article 9.

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

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

Article 10.

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

Article 11.

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

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

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

Article 12.

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

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

4.6. Putting the pieces together: a comprehensive approach to combating hate crimes

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

⁶² ODIHR publication, *Hate Crime Data Collection and Monitoring Mechanisms: a Practical Guide*, outlines a detailed approach to establishing an effective national system to collect data on hate crimes.

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

The Stockholm Police Department has taken a number of initiatives since 2007 to develop the full spectrum of law enforcement capacity to respond to hate crimes, including co-operative efforts with prosecutors:

- **Training:** all front-line officers and others who come into contact with hate crimes, including dispatch and front desk intake officers, have been trained.
- **Action card:** a Standard Operating Procedure card has been issued, listing bias indicators for all officers and steps to identify and respond to hate crimes.
- **Specialized police hate crime units:** contact points have been appointed in all policing areas with the responsibility to develop working methods and co-ordinate hate crime investigations and training in the department.
- **Community policing:** in each of four policing areas, an officer is designated as the “hate crime cop”, with the duty to actively seek out and work with community associations to encourage reporting of hate crimes, and also to work with schools.
- **Assigned prosecutor to hate crime unit:** a specially assigned prosecutor works closely with investigating police to develop methods on how to assess and investigate hate crimes for successful prosecution.
- **Police website with information on hate crimes:** the website provides public information and contacts, with the aim to increase reporting of hate crimes.

Source: Submissions of Sweden's National Point of Contact on Combating Hate Crimes for ODIHR's Hate Crimes in the OSCE Region: Incidents and Responses annual reports 2009-2012

Annex 1: ODIHR programmes and resources to combat hate crimes

Training on hate crimes:

- PAHCT (Prosecutors and Hate Crimes Training): ODIHR's training programme for prosecutors is designed to improve the skills of prosecutors in understanding, investigating and prosecuting hate crimes. With each training session tailored to the specific needs and concerns of legal professionals in a particular participating State, it is a flexible training based on case studies and hate crime legislation of the target participating State's jurisdiction, and delivered in the local language. The programme can be integrated into the broader curriculum of a prosecutorial or judicial training academy.
- TAHCLE (Training against Hate Crimes for Law Enforcement): ODIHR's training programme for law enforcement is designed to improve police skills in recognizing, understanding and investigating hate crimes, interacting effectively with victim communities, and building public confidence and co-operation with other law-enforcement agencies. <http://www.osce.org/odihr/94898>
- Training on Hate Crimes for CSO: ODIHR helps raise awareness of hate crimes among civil society and international organizations by providing information about hate crime characteristics and the impact of hate crimes on the stability and security of the community, and by supporting the efforts of civil society to monitor and report hate crimes. ODIHR also supports efforts by CSOs to reach out to communities and foster relationships between community groups and law enforcement so that victims will feel confident to report crimes. ODIHR also supports the efforts of civil society to advocate for better hate crime laws.

Hate Crime reporting:

- Hate Crimes in the OSCE Region: Incidents and Responses: Annual Reports for
 - year 2012: <http://tandis.odihr.pl/hcr2012/>
 - year 2011: <http://tandis.odihr.pl/hcr2011/>
 - year 2010: <http://tandis.odihr.pl/hcr2010/>
- Hate crime reporting website: <http://hatecrime.osce.org/>

Hate Crime Laws: A Practical Guide <http://www.osce.org/odihr/36426>

Hate Crime Data-Collection and Monitoring Mechanisms: A Practical Guide

Preventing and responding to hate crimes: A resource guide for NGOs in the OSCE region <http://www.osce.org/odihr/39821>

Regional Handbooks:

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

Educational and prevention efforts:

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

Annex 2: OSCE Ministerial Council Decisions on hate crimes

- **participating States' commitments to:**

- “collect, maintain and make public, reliable data and statistics in sufficient detail on hate crimes and violent manifestations of intolerance, including the numbers of cases reported to law enforcement, the numbers prosecuted and the sentences imposed. Where data-protection laws restrict collection of data on victims, States should consider methods for collecting data in compliance with such laws” (MC Decision No. 9/09);
- “enact, where appropriate, specific, tailored legislation to combat hate crimes, providing for effective penalties that take into account the gravity of such crimes” (MC Decision No. 9/09);
- “take appropriate measures to encourage victims to report hate crimes, recognizing that under-reporting of hate crimes prevents States from devising efficient policies. In this regard, explore, as complementary measures, methods for facilitating the contribution of civil society to combat hate crimes” (MC Decision No. 9/09);
- “introduce or further develop professional training and capacity-building activities for law-enforcement, prosecution and judicial officials dealing with hate crimes” (MC Decision No. 9/09);
- “in co-operation with relevant actors, explore ways to provide victims of hate crimes with access to counselling, legal and consular assistance as well as effective access to justice” (MC Decision No. 9/09);
- “promptly investigate hate crimes and ensure that the motives of those convicted of hate crimes are acknowledged and publicly condemned by the relevant authorities and by the political leadership” (MC Decision No. 9/09);
- “ensure co-operation, where appropriate, at the national and international levels, including with relevant international bodies and between police forces, to combat violent organized hate crime” (MC Decision No. 9/09);
- “conduct awareness raising and education efforts, particularly with law enforcement authorities, directed towards communities and civil society groups that assist victims of hate crimes” (MC Decision No. 9/09);
- “nominate, if they have not yet done so, a national point of contact on hate crimes to periodically report to the ODIHR reliable information and statistics on hate crimes” (MC Decision No. 9/09);
- “consider drawing on resources developed by the ODIHR in the area of education, training and awareness raising to ensure a comprehensive approach to the tackling of hate crimes” (MC Decision No. 9/09);
- “calls on participating States to increase their efforts, in co-operation with civil society to counter the incitement to imminent violence and hate crimes, including through the Internet, within the framework of their national legislation, while respecting freedom of expression, and underlines at the same time that the opportunities offered by the Internet for the promotion of democracy, human rights and tolerance education should be fully exploited” (MC Decision No. 10/07);

- “collect and maintain reliable data and statistics on hate crimes and incidents, to train relevant law enforcement officers and to strengthen co-operation with civil society” (MC Decision No. 10/07);
- “collect and maintain reliable data and statistics on hate crimes which are essential for effective policy formulation and appropriate resource allocation in countering hate motivated incidents” (MC Decision No. 13/06);
- “facilitate the capacity development of civil society to contribute in monitoring and reporting hate-motivated incidents and to assist victims of hate crime” (MC Decision No. 13/06);
- “promote capacity-building of law enforcement authorities through training and the development of guidelines on the most effective and appropriate way to respond to bias-motivated crime, to increase a positive interaction between police and victims and to encourage reporting by victims of hate crime, i.e., training for front-line officers, implementation of outreach programmes to improve relations between police and the public and training in providing referrals for victim assistance and protection” (MC Decision No. 13/06);
- “[s]trengthen efforts to collect and maintain reliable information and statistics on hate crimes and legislation, to report such information periodically to the ODIHR, and to make this information available to the public and to consider drawing on ODIHR assistance in this field, and in this regard, to consider nominating national points of contact on hate crimes to the ODIHR” (MC Decision No. 10/05);
- “[s]trengthen efforts to provide public officials, and in particular law enforcement officers, with appropriate training on responding to and preventing hate crimes, and in this regard, to consider setting up programmes that provide such training, and to consider drawing on ODIHR expertise in this field and to share best practices” (MC Decision No. 10/05);
- “consistently and unequivocally [speak] out against acts and manifestations of hate, particularly in political discourse” (MC Decision No. 10/05);
- “[c]ombat hate crimes which can be fuelled by racist, xenophobic and anti-Semitic propaganda in the media and on the Internet, and appropriately denounce such crimes publicly when they occur” (MC Decision No. 12/04);
- “condemn publicly, at the appropriate level and in the appropriate manner, violent acts motivated by discrimination and intolerance” (MC Decision No. 4/03);
- “Enact[ing] or strengthen[ing], where necessary, legislation and policy measures to address discrimination and bias-motivated crime against Roma and Sinti” (MC Decision No. 4/13);
- “Build[ing] the capacity of law enforcement agencies and personnel to identify, collect data, investigate and prosecute hate crimes against Roma and Sinti” (MC Decision No. 4/13).

- **tasking ODIHR to:**

- “explore, in consultations with the participating States and in co-operation with relevant international organizations and civil society partners, the potential link between the use of the Internet and bias-motivated violence and the harm it causes as well as eventual practical steps to be taken” (MC Decision No. 9/09);

- “follow closely anti-Semitic incidents” and “incidents motivated by racism, xenophobia, or related intolerance, including against Muslims”, and “report its findings to the Permanent Council and the Human Dimension Implementation Meeting and make these findings public” (MC Decision No. 12/04);

- “continue its close co-operation with other relevant inter-governmental agencies and civil society working in the field of promoting mutual respect and understanding and combating intolerance and discrimination, including through hate crime data collection” (MC Decision No. 13/06);

- “continue to serve as a collection point for information and statistics on hate crimes and relevant legislation provided by participating States and to make this information publicly available through its Tolerance and Non-Discrimination Information System and its report on Challenges and Responses to Hate-Motivated Incidents in the OSCE Region” (MC Decision No. 13/06);

- “strengthen, within existing resources, its early warning function to identify, report and raise awareness on hate-motivated incidents and trends and to provide recommendations and assistance to participating States, upon their request, in areas where more adequate responses are needed” (MC Decision No. 13/06).

Annex 3: List of key international instruments and jurisprudence

International and regional human rights treaties

Universal Declaration of Human Rights:

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

International Covenant on Civil and Political Rights:

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

Convention on the Elimination of all Forms of Racial Discrimination:

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

Convention on the Rights of Persons with Disabilities:

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

European Convention on Human Rights:

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

International documents

United Nations, Human Rights Committee, General Comment 22:

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

United Nations, Human Rights Committee, General Comment 31:

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

United Nations, CERD Committee, General Recommendation 31:

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

United Nations, CERD Committee, General Recommendation 34:

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

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

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

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

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

Regional documents

EU Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0055:0058:en:PDF>

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA; <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0029&from=en>

ECRI general policy recommendation N°1: Combating racism, xenophobia, antisemitism and intolerance (1996)
http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N1/Rec01en.pdf

ECRI general policy recommendation N°2: Specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level (1997)
http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N2/Rec02en.pdf

ECRI general policy recommendation N°3: Combating racism and intolerance against Roma/Gypsies (1998)
http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N3/Rec03en.pdf

ECRI general policy recommendation N°7 on national legislation to combat racism and racial discrimination (2002)
http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N7/ecri03-8%20recommendation%20nr%207.pdf

ECRI General Policy Recommendation N°8 on combating racism while fighting terrorism (2004)
http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N8/recommendation_N°_8_eng.pdf

ECRI general policy recommendation N°9 on the fight against anti-Semitism (2004)
http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N9/Rec.09%20en.pdf

ECRI General Policy Recommendation N°11: Combating racism and racial discrimination in policing (2007)
http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N11/e-RPG%2011%20-%20A4.pdf

European Court of Human Rights Cases

Nachova and Others v. Bulgaria (2004)
<http://echr.ketse.com/doc/43577.98-43579.98-en-20040226/view/>

Angelova and Illiev v. Bulgaria (2007)
<http://echr.ketse.com/doc/55523.00-en-20070726/view/>

Šečić v. Croatia (2007)

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

Milanović v. Serbia (2010)

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

Stoica v. Romania (2008)

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

Annex 4: IAP Standards of Professional Responsibility and Statement of the essential duties and rights of prosecutors

To be inserted

