



# STAND-UP

Standing up against hate in the EU

## D3.3 - Defining Hate Crime Report

### WHAT IS HATE CRIME?

#### Different Perspectives and Approaches towards the Definition of Hate Crime



## The Project

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## Deliverable

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## Summary

Hate crimes differ from ordinary crimes because of the motivation of the perpetrator and the impact they have not only on the victim but also on persons that share the same characteristics and society as a whole. In this sense, specific legal arrangements were established to handle hate crime and its consequences to people and society. Worldwide a long record pertaining to rules, guidelines as well as laws and jurisprudence, including special provisions for non-discrimination, as enshrined by the UN Human Rights Treaties, the European Convention on Human Rights and the EU Charter for Fundamental Rights, have influenced both the hate crime concept and its legal approaches.

Concerning especially EU, the Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law obliges member states to provide for criminal sanctions in relation to incitement to violence or hatred based on race, colour, descent, religion or belief, national or ethnic origin, as well as dissemination of racist or xenophobic material and condonation, denial or trivialisation of genocide, war crimes and crimes against humanity directed in such groups and consider racist or xenophobic motive as an aggravating circumstance. The Framework Decision is operated as a core pillar for a further understanding of the hate crime. However, member states differ significantly regarding their national hate crime provisions, mainly on two elements: a) the multiple introductions of the hate crime concept in the national laws (substantive crime, an aggravating circumstance, penalty enhancement), and b) different lists of protected characteristics.

Unified and coherent protection against hate crime within the framework of human rights, democracy and the rule of law is not possible unless a common socio-legal understanding of the concept is first established. In this regard, the present paper considers the issues raised by the different conceptualisations of hate crime, especially in the EU and addresses international, European and national legal frameworks in terms of non-discrimination and hate crime. The text by examining the existent legal order strives to provide common standards that could contribute to a hate crime definition on the EU level.



## 1. Introductory remarks

Hate crime is a phenomenon that gradually has received global recognition and has been defined as a social problem. Though, there is a multitude of international, European and national frameworks that are related and provide core approaches to what hate crime is, it appears to be a lack of common understanding of exactly what hate crime is, how the legislation should work and which groups should be protected. Moreover, even if the concept stands alone and has been discussed separately, in many cases, is conflated with racism<sup>1</sup>.

The term 'hate crime' is quite recent but actually the act is nothing new. This type of criminality is extremely old in human societies<sup>2</sup>, although its conceptualisation, its appearance in public discourse and the tightening up of official punitive responses have appeared lately<sup>3</sup>. Hate crime started to become a social issue mainly as a result of the civil rights movement in the USA along with the campaigns for the rights of gays, women and disabled people in the end of the 1970<sup>4</sup>. These social movements argued that hate crimes should be recognised in criminal law as substantive crimes because they cause lasting harm to both victims and society. Over the years, additionally with political pressure from representatives of other socially vulnerable groups, the concept was extended to other social categories of persons distinguished by certain common characteristics.

Hate crime is also recognised as a '*message crime*' but also as a '*symbolic crime*'<sup>5</sup>. In many cases, it does not matter who the victim is - it can be anyone - but what he or she represents (symbolic victim), since the intended goal is to send a '*message*' to the victim's community and to the wider community that those who share the same offending characteristic as the victim do not belong and cannot participate in that particular society. Victims are unwanted and unwelcome, they 'contaminate' the daily life of the perpetrator in the place he or she exclusively recognises as 'his or hers' and therefore do not even deserve protection of their lives and dignity. The perpetrator(s)

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<sup>1</sup> See, i.e., Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, Acts adopted under title VI of the EU Treaty Council

<sup>2</sup> Indicative examples are the witch-hunt in the Middle Ages, the attacks against Jews, gypsies, the lynching in the USA, the actions of Ku Klux Klan.

<sup>3</sup> The murders of the African-American James Byrd Jr. in Texas and the homosexual friend Matthew Shepard in Wyoming in 1998 were first recorded in the daily press as 'hate crimes' and strengthened the demands for their stricter treatment, see McLaughlin, E. (2006). Hate crime. In McLaughlin, E. & Muncie, J. (eds), The SAGE Dictionary of Criminology (pp. 194-197). London: Sage.

<sup>4</sup> Ibid.

<sup>5</sup> OSCE/ODIHR. (2022). Hate crime laws: A practical guide, 2<sup>nd</sup> edition, Warsaw: OSCE/ODIHR, available at: <https://www.osce.org/files/f/documents/1/4/523940.pdf>



of hate crimes address four audiences<sup>6</sup>: 1. their own group(s), i.e. those who self-identify as their peers, 2. the victim who is 'punished' for their social identity, 3. the victim's community with whom s/he shares the same (undesirable) characteristics, 4. the wider society to which s/he is reminded of the division into 'us and them'. Hate crimes impact the micro, medium and macro levels of society. As far as the *individual* (micro-level) is concerned, the effects are mainly to be found in the disruption of the person's identity and self-esteem, the inability to manage daily life, the broadening of fear and the feeling of being extremely powerless and weak towards hated manifestations. Regarding the *group/community* (meso-level) to which the survivor/victim belongs, the prevailing perception is that the 'others' victimized one of 'us'. Fear and hatred are therefore spread on both sides. In addition, the stigmatisation of the group/community is reinforced and perceptions and social relations based on 'identities' and 'differences' are consolidated. Also, the other members of the same group or with the same characteristics assume that they will be the next victims. In the *wider society* (macro-level), hate crimes affect all democratic institutions by disrupting the functioning of institutions such as education, work, and health as well as the values they stand for.

As hate crimes targeting persons, groups of people or property (mobile or not) that have specific (or perceived) characteristics, they assault the identity of the individual as such, which results in greater harm than other types of crime, since the victim is unable or unwilling to change the characteristics of the social identity that have victimised him/her. Therefore, hate crimes violate the dignity of the individual, and the idea of equality between members of society. Secondly, they generalise and escalate the fear of victimisation in the group/community that shares the same characteristic with the victim and is therefore likely to create serious public order problems, by escalating social exclusion and social unrest. Thirdly, through the '*normalisation*' of these crimes, due to the frequency of their commission along with their unnoticed distinctive character, tolerance and the pluralistic character of society are insulted.

Defining hate crime has been described as 'notoriously difficult'<sup>7</sup>. The term 'hate crime' describes mainly a type of crime rather than a specific offence in the criminal code and refers primarily to a conceptual category and secondarily to a legal definition<sup>8</sup>. The Office for Democratic Institutions and Human Rights (ODIHR) notes that the term 'hate crime' was first used officially by the Organization for Security and

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<sup>6</sup> Barbara, P., Shahid, A. (2012). "We are all vulnerable: The in terrorem effects of hate crimes", *International Review of Victimology*, 18:(1), pp.57-71.

<sup>7</sup> Hall, Nathan. 2013. *Hate Crime*, Oxford: Routledge.

<sup>8</sup> OSCE/ODIHR. (2012). Hate crimes in the OSCE region: incidents and responses, Annual Report for 2011, 1-179, available at: [http://tandis.odihr.pl/hcr2011/pdf/Hate\\_Crime\\_Report\\_full\\_version.pdf](http://tandis.odihr.pl/hcr2011/pdf/Hate_Crime_Report_full_version.pdf)



Co-operation in Europe (OSCE) only as recently as 2003, though some States were referring to the term 'hate crime' in their national legal framework<sup>9</sup>.

In the Deliverable D3.3 we are to further discuss international, regional and European understandings of hate crime, as reflected in organisations and relevant bodies along these legal frameworks. Moreover, a discussion on legal rationales is followed in order for a common approach towards a hate crime definition to be further elaborated.

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<sup>9</sup> OSCE/ODIHR. (2014). Annual Report 2013, available at:  
<https://www.osce.org/files/f/documents/e/7/119809.pdf>





## 2. International, Regional and European Framework

### 2.1 The United Nations<sup>10</sup>

Contemporary International Human Rights Law is based on the principle of equality and non-discrimination. Moreover, according to article 1 par. 3 of the Charter of the United Nations, the purposes of the United Nations are: "*To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion*"<sup>11</sup>.

The United Nations has a long history of mobilizing the world against hatred of all kinds to defend human rights and advance the rule of law. The impact of hate speech as well as hate crime cuts across numerous existing United Nations areas of focus, from human rights protection and prevention of atrocity crimes to sustaining peace and achieving gender equality and supporting children and youth<sup>12</sup>. Fighting hate, discrimination, racism and inequality is at the core of United Nations principles and work. The Organization is working at this direction at every turn and participates dynamically in the global efforts to achieve the Sustainable Development Goals<sup>13</sup>. Indeed it has recently developed a Strategy on Hate Speech sets out strategic guidance for the United Nations system to address hate speech at the national and global level<sup>14</sup>.

According to the UN, hate crime is a prejudice-motivated crime which occurs when a perpetrator targets victims because of their membership (or perceived membership) in a certain social group or racial demographic<sup>15</sup>. The main focus is on hate speech, while recent UN Reports stress that online hate is increasing against minorities and

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<sup>10</sup> On the global level, International Labour Organisation has also participated in the discussion of discrimination as linked to broader approaches of hate crime with four conventions as follows: International Labour Organization Convention no. 29: "on forced or compulsory labour", (International Labour Organization Convention no. 105: "on the abolition of forced labour", International Labour Organization Convention no. 111: "on Discrimination in Employment and Occupation", International Labour Organization Convention no. 159: "on the vocational rehabilitation and employment of persons with disabilities", Recommendation 200: "on HIV / AIDS and the World of Work".

<sup>11</sup> Charter of the United Nations and Statute of the International Court of Justice, Charter of the United Nations, San Francisco, 1945, available at: [Charter of the United Nations.pdf](#) (undp.org)

<sup>12</sup> UN. hate speech, available at: <https://www.un.org/en/hate-speech>

<sup>13</sup> UN. Sustainable Development Goals, available at: <https://sdgs.un.org/goals>

<sup>14</sup> UN. (2019). Strategy and Plan of Action on Hate Speech, available at: [https://www.un.org/en/genocideprevention/documents/advising-and-mobilizing/Action\\_plan\\_on\\_hate\\_speech\\_EN.pdf](https://www.un.org/en/genocideprevention/documents/advising-and-mobilizing/Action_plan_on_hate_speech_EN.pdf)

<sup>15</sup> UN. Human Rights Office of the High Commissioner, available at: <https://www.ohchr.org/en/taxonomy/term/897>



that "*the tsunami of hate and xenophobia in social media*" appears to be largely failing, because hate is increasing, not diminishing<sup>16</sup>.

Important conventions and mandates of the UN that are associated with the concept of hate crime and its dimension which are related to the discrimination issue are mentioned analytically below:

- **United Nations Convention on the Elimination of All Forms of Racial Discrimination (CERD):** Article 1 of the Convention provides: "*the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on **race, colour, descent, or national or ethnic origin** which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life*". Inter alia, article 4 imposes on states the commitment to take immediate action so as to criminalize the "dissemination" of ideas based on racial superiority or hatred, the incitement to racial discrimination and all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.
- **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW):** Countries that have ratified the CEDAW are required take action to **end discrimination against women and girls in all forms**. This includes enacting laws and policies to protect women and girls from discrimination and repealing all existing discriminatory laws, policies, customs and practices.
- **International Covenant on Economic, Social and Cultural Rights (ICESCR):** Article 2 provides: "*The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to **race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.***"
- **Convention on the Rights of the Child (CRC):** inter alia, in Article 2 it is provided that States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's **race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status**.
- **International Covenant on Civil and Political Rights:** Article 2 states that "*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as **race, colour, sex,***

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<sup>16</sup> UN. Report: Online hate increasing against minorities, says expert, 23 March 2021, available at: <https://www.ohchr.org/en/stories/2021/03/report-online-hate-increasing-against-minorities-says-expert>



**language, religion, political or other opinion, national or social origin, property, birth or other status".** Article 20 states that "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". Article 26 provides that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as **race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"**.

- **United Nations Convention on the Rights of Persons with Disabilities:** According to Article 2, *Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;*<sup>17</sup>. In accordance with paragraph 1 of Article 4 "General Obligations" "*States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake: [...] (b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities; [...] (d) To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention; (e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise; "* and in accordance with Article 5 "Equality and Non-Discrimination" "*1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds. 3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided. 4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention"*<sup>17</sup>.

<sup>17</sup> Greek National Confederation of Persons with Disabilities, available at: <https://www.esamea.gr/about-us/welcome-note/86-legal-framework/symbasi/547-symbasi-oie-gia-ta-dikaiomata-ton-atomon-me-anapiria>



- **The mandate of Independent Expert on sexual orientation and gender identity (IE SOGI):** Clause 2 of the Human Rights Council Resolution 32/2 of June 2016 claims that the Human Rights Council: *“Strongly deplores acts of violence and discrimination, in all regions of the world, committed against individuals because of their **sexual orientation or gender identity**”*. The Mandate was renewed under Resolution 41/18 on June 2019. According to the new Clause 1, the Human Rights Council: *“Welcomes the work undertaken by the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity in the implementation of the mandate, the comprehensive, transparent and inclusive consultations conducted with relevant stakeholders, the thematic reports and the undertaking of country visits to different regions”*. Clause 2 now states that the Human Rights Council: *“Decides to extend the mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity for a period of three years to enable the mandate holder to continue to work in accordance with the mandate established by the Human Rights Council in its resolution 32/2”*<sup>18</sup>. The core characteristic in the UN human rights framework is the principle of equality and non-discrimination for all people which guarantees the equal enjoyment of human rights, protection of the law and dignity, without any discrimination based on **race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status**. Later conventions and mandates added to the list of protected features new grounds of discrimination such as **disability, sexual orientation and gender identity** as a more effective response to identified challenges.

## 2.2 The OSCE Office for Democratic Institutions and Human Rights (ODIHR)

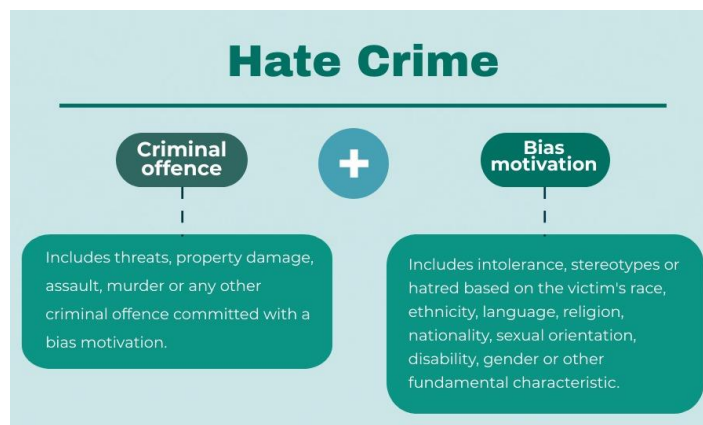
OSCE/ODHIR has developed a practical guide to provide States with benchmarks for drafting hate crime legislation within a simple, clear and accessible document. In this framework it has adopted its own definition for hate crime, according to which: *“Hate crimes are **criminal acts motivated by bias or prejudice** towards particular groups of people. Hate crimes comprise two elements: a criminal offence and a bias motivation. A hate crime has taken place when a perpetrator has intentionally targeted one or more people or property because of one or more identity traits or expressed hostility towards these identity traits during the crime. **People or property associated with – or even perceived to be a member of – a group that shares an identity trait can also be targets of hate crimes, such as human rights defenders,***

<sup>18</sup> UN. Human Rights Officer of High Commissioner, Independent Expert on sexual orientation and gender identity, available at: <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity>



*community centers, or places of worship*<sup>19</sup>. The above definition adopts the terms “bias or prejudice” rather than hate (more extreme emotion), when defining crime motivation<sup>20</sup>.

**Table 1:** The two elements of hate crime



**Source:** OSCE/ODIHR, <https://hatecrime.osce.org/>

The OSCE recognizes that hate crimes affect the security of individuals, their communities and societies, and can lead to serious security challenges and even conflict. ODIHR has been tasked by participating States to serve as a collection point for information, statistics and legislation on hate crime, and to help develop effective responses to the problem. Bias motivations can be defined as prejudice, intolerance or hatred directed at a particular group sharing a common identity trait, **such as race, ethnicity, language, religion, nationality, sexual orientation, disability, gender or any other identity traits.**

ODIHR reports on the following bias motivations in line with its mandate and official reporting by the OSCE’s 57 participating States:

- Racist and xenophobic hate crime
- Anti-Roma hate crime
- Anti-Semitic hate crime
- Anti-Muslim hate crime
- Anti-Christian hate crime
- Other hate crime based on religion or belief
- Gender-based hate crime
- Anti-LGBTI hate crime
- Disability hate crime

<sup>19</sup> OSCE/ODIHR. Hate crime reporting, what is hate crime, available at: <https://hatecrime.osce.org/>

<sup>20</sup> See also Garland, J., Funnell, C. “Defining hate crime internationally Issues and conundrums” in Schweppe, J., Walters, M.A. (eds) The globalization of hate. Internationalising hate crime?, pp.15-22, Oxford: Oxford University Press.



### 2.3 The Council of Europe

The Council of Europe has developed standards in order to combat hate crime. The Council of Europe considering that hate crime is one of the toughest challenges facing many societies today<sup>21</sup> and that effectively countering racism, xenophobia and intolerance requires a sustained and comprehensive approach, has set a broad range of common provisions up to date, encouraging Member States to address the causes and effects of hate crime<sup>22</sup>.

According to Council of Europe's work, hate crime<sup>23</sup> is related to the following:

- **European Convention on Human Rights (ECHR)**, article 14 provides that *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"*.
- **(Revised) European Social Charter** of 1961 (as revised in 1996). Article 15 of the Charter provides the right of persons with disabilities to independence, social inclusion and participation in social life. The Revised ESC contains Article E which provides, **on a non-exhaustive basis, reasons of prohibited discrimination as follows: race, colour, sex, language, religion, political or other opinion, ethnic origin or social origin, health, association with a national minority, birth or other status.** Prohibited grounds of discrimination are a combination of those contained in Article 14 of the ECHR and in the 1961 ESC Preamble.

**The European Committee of Social Rights (ECSR)** has already added, through its conclusions and its case law on collective complaints, an additional reason for prohibited discrimination which is disability. The ECSR, through its case law on collective complaints under the ESC Protocol on a system of collective complaints, has accepted and incorporated the concept of **systemic discrimination, the prohibition of which is also considered to fall under Article E of the Rev. ESC.** As *systemic discrimination* may be perceived the *legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups.* ECSR took a position on this concept, referring directly to and adopting literally the General Comment 20

<sup>21</sup> Council of Europe. ECRI Annual Report 2019, available at: <https://rm.coe.int/ecri-annual-report-2019/16809ca3e1>

<sup>22</sup> See: Council of Europe. Committee of Experts on Hate Crime PC/ADI-CH Council of Europe, Background document, 27 January 2022, available at: <https://rm.coe.int/pc-adi-ch-2022-4-en-background-document/1680a67ed3>

<sup>23</sup> Council of Europe. Committee of Experts on Hate Crime PC/ADI-CH, Council of Europe's work on hate crime, available at: <https://www.coe.int/en/web/committee-of-experts-on-hate-crime/coe-and-hate-crime>



of the Committee of United Nations Committee on Economic, Social and Cultural Rights.

The adoption of the concept of systemic discrimination by the ECSR, in the context of its case law on collective complaints, took place in the field of cases on the right to housing of the Roma. It is located in the field of administrative deportation (which targets only that specific group of the population, the Roma) and housing, where mass forced evictions and destruction of Roma settlements are carried out (see article 16 and 31 of the rev. ESC on the right to housing, article 19 par. 8 of the rev. ESC for the prohibition of expulsion under certain conditions in combination to art. E of the rev. ESC for non-discrimination). Moreover, the rev. ESC also includes more specialized provisions such as: article 19, which guarantees the right of migrant workers and their families to protection and assistance and article 20 guarantees the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex.

- **Convention on Cybercrime** and its Additional Protocol on the criminalization of acts of a **racist and xenophobic nature committed through computer systems**.
- **Recommendation CM/Rec (2010)5** of the Committee of Ministers to member states on measures to combat discrimination on grounds of **sexual orientation or gender identity** (adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies).
- The **European Court of Human Rights** (ECHR) has consistently held that the slip of the investigation or reporting of racist motive for the commitment of a crime consists of a violation of article 14 of the European Convention on Human Rights (ECHR)<sup>24</sup>. In particular, the ECHR, via its groundbreaking decision regarding the case of *Nachova and Others v Bulgaria* (ECHR 2005, *Nachova and Others v Bulgaria*, available at [www.echr.coe.int](http://www.echr.coe.int)) ruled that state organizations are obliged to investigate any possible racist motivation behind crimes or crimes committed because of bias against the religious belief of the victim. Furthermore, any criminal justice system that overlooks a bias motivation may be in violation of article 14 of the European Convention on Human Rights. In a series of judgments from within the past decade, the European Court of Human Rights has recognized specific occurrences of hate crime as human rights violations. For example, in *Stoica v. Romania* (ECHR 2008, *Stoica v. Romania*) the Court held that the racially motivated ill-treatment of a Roma minor by a police officer was a violation of the right not to be subjected to inhuman and degrading treatment (article 3) in conjunction with a violation of the prohibition against discrimination (article 14). The same pairs of articles were invoked in *Identoba and Others v. Georgia* (ECHR 2015, *Identoba and Others v. Georgia*) in which case the Court held that a hateful mob attack on individuals assembled to demonstrate against

<sup>24</sup> See: European Court for Human Rights. Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, Prohibition of discrimination Updated on 30 April 2022, [https://www.echr.coe.int/Documents/Guide\\_Art\\_14\\_Art\\_1\\_Protocol\\_12\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf).



homophobia amounted to a violation of the victims' human rights.

- **Declaration of the Committee of Ministers on the Rise of Anti-Gypsyism and Racist Violence against Roma in Europe**<sup>25</sup>.

Furthermore, several non-binding Council of Europe standards in this area set out the requirement that criminal offences should be subject to special treatment when committed with prejudice or bias, including the 2002 General Policy Recommendation No. 7 (revised 2017) of the European Commission against Racism and Intolerance (ECRI), which calls for legislation to combat crimes motivated by hostility towards a person or a group's perceived **race, colour, language, religion, nationality, or national or ethnic origin**. Worth mentioning is also the adoption of the Resolution 2417 (2022), *Combating rising hate against LGBTI people in Europe* in line with the Recommendation 2220 (2022) *Combating rising hate against LGBTI people in Europe*, which calls on all Member States to tackle hatred and discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) people in order to achieve genuine equality for LGBTI people.

In 2022, the members of **the Committee of Experts on Hate Crime**<sup>26</sup> (PC/ADI-CH), an intergovernmental Committee composed of national and independent experts have discussed the preamble and main operative elements of a **draft Recommendation on combating Hate Crime** in Europe by the end of 2023 under a comprehensive approach and in light of a victim-centred approach. More particularly, taken into consideration that there is a range of definitions of hate crime in Council of Europe member states, the Recommendation aims to ensure that criminal justice procedures and other services dealing with the aftermath of hate crime do not cause further unnecessary distress, yet it encourages positive protective action against repeat victimisation. More analytically, the Committee of Experts has set a goal to prepare and draft a Committee of Ministers Recommendation on combating hate crime in Europe by the end of 2023. This Recommendation will complement and advance existing Council of Europe standards in the area of hate crime, as well as findings and recommendations by monitoring bodies and the relevant case law of the European Court of Human Rights. The Committee will attempt to define key terms related to hate crime and contextual factors that lead to bias motivated violence.

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<sup>25</sup> See: Strategic documents and texts adopted by the Committee of Ministers, available at: <https://www.coe.int/en/web/roma-and-travellers/adopted-texts>

<sup>26</sup> See: Committee of Experts on Hate Crime PC/ADI-CH, Preliminary outline of the draft Recommendation on combating Hate Crime, 21 February 2022, available at: <https://rm.coe.int/item-06-pc-adi-ch-2022-3rev-preliminary-outline-of-the-draft-recommend/1680a686bb>, Council of Europe. Committee of Experts on Hate Crime PC/ADI-CH Council of Europe, Background document, *ibid*.





The Recommendation will be based on the human rights standards as presented in article 14 of the ECHR, article 4 of the Additional Protocol to the Cybercrime Convention, the 2002 ECRI GPR No. 7, other procedural safeguards, Resolutions and Guides of the Council of Europe as well as on the ECHR case law. The Committee will take into consideration the various definitions of hate crime of the Council of Europe member states. These definitions are usually comprised of two main legal elements: conduct which amounts to a criminal offence and a biased or prejudiced motivation. The targets of the hate crimes can be either persons or property, associated with specific characteristics protected by the national legal systems.

The member states have also adopted different legislative approaches to hate crime and penalty application. The three main models are the “*sentence enhancement model*”, where there is an additional penalty beyond the ordinary offence, the “*sentence aggravation model*”, which is adopted by the EU and whereby the bias is considered an aggravating factor in the limits of the ordinary penalty, and the “ ”, whereby hate crime constitutes a stand-alone offence.

The Recommendation will take a **victim-centred approach**. It will encourage positive protective action against re-victimization by ensuring through policies and trainings that victims of hate crime have access to justice as well as by non-judicial redress mechanisms. The Committee of Experts will also build on Recommendation (2006)8 on Victim Support Services, which outlines a set of minimum standards for the treatment of victims as well as for the establishment of specialised centres, national help lines and co-ordination of services for victims.

In the area of law enforcement and criminal justice, in line with Recommendation (2018)8 on restorative justice, the Committee of Experts will examine alternative mechanisms to complement the process. This may include action that will enable victims, perpetrators and other stakeholders to actively participate in the resolution and reparation of the crime. The Recommendation will consider police training and sensitization and will focus on procedural and processing matters of hate crime. It will explore areas of victim identification, victim testimony and sanctions. In order to prevent repeat offences and help the perpetrators to desist from hateful behaviour, the Committee will process matters of rehabilitation, social reintegration and “*exit*” work, as they have been also significantly developed in member states. The Committee of Experts will be looking at the important role played by State authorities, independent agencies, and civil society organisations in addressing hate crime. Meanwhile, the Recommendation will promote both national and international cooperation and coordination.



## 2.4 The European Union

According to EU legislation, all forms and manifestations of hatred and intolerance, including hate speech and hate crime, **are incompatible** with the values of human dignity, freedom, democracy, equality, rule of law and respect for human rights, including the rights of persons belonging to minorities, upon which the EU is founded. The special need to address these phenomena on a common basis stems from the serious impacts of hate speech and hate crime on the core EU values enshrined in Article 2 of the TEU. Safeguarding common values requires common action<sup>27</sup>. Combating hate speech and hate crime is part of the Commission's action to promote the EU's core values and to ensure that the EU Charter of Fundamental Rights is upheld<sup>28</sup>.

European Union has produced a variety of legal instruments guaranteeing those values.

In more details:

- **Article 21 of the Charter of Fundamental Rights of the European Union:** provides that *"Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited"*.
- **Article 2 of the Treaty on European Union (TEU),** which states that *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."*
- **Article 10 of the Treaty on the Functioning of the European Union (TFEU)** which states that *"In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation"*.
- **Article 19 TFEU** which gives to the EU a political mandate to *"... take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or*

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<sup>27</sup> European Commission. Communication from the Commission to the European Parliament and the Council: A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime, COM(2021)777 final, Brussels, 09.12.2021, available at:

[https://commission.europa.eu/system/files/2021-12/1\\_1\\_178542\\_comm\\_eu\\_crimes\\_en.pdf](https://commission.europa.eu/system/files/2021-12/1_1_178542_comm_eu_crimes_en.pdf)

<sup>28</sup> European Commission. Combating hate crime and hate speech, Measures to prevent and combat different form of hatred and to protect victims, available at: [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/combating-hate-speech-and-hate-crime\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/combating-hate-speech-and-hate-crime_en)



- belief, disability, age or sexual orientation".*
- **Article 67 TFEU** which provides that the EU "*shall endeavour to ensure a high level of security through measures to prevent and combat [...] racism and xenophobia*".
  - **Council Directive 2000/43/EC** of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Article 1 of the Directive states that the purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.
  - **Directive 2010/13/EU of the European Parliament and of the Council** of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services (Audio-visual Media Services Directive) - Member States (a) shall ensure by appropriate means that audio-visual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality (article 6); and (b) shall encourage media service providers under their jurisdiction to ensure that their services are gradually made accessible to people with a visual or hearing disability (article 7).
  - **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.
  - **Directive 2014/54/EU of the European Parliament and of the Council** of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.
  - **European Parliament resolution** of 25 October 2017 on fundamental rights aspects in Roma integration in the EU: fighting anti-Gypsyism (2017/2038 (INI)), *EU C 346, 27.9.2018, pp. 171-183.*
  - **Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions** - EU Strategy on Victims' Rights (2020-2025), COM (2020) 258 final.
  - **Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions** – A Union of Equality: EU anti-racism Action Plan 2020-2025, COM (2020) 565 final.
  - **Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions** - Union of Equality: Lesbian, Gay, Bisexual, Transgender, Intersex, Queer (LGBTIQ) Equality Strategy 2020-2025, COM (2020) 698 final.



The most relevant legislative instruments are the following:

- **The 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**, which calls on EU Member States to ensure that racist and xenophobic motivations **are considered as aggravating circumstances when determining criminal penalties**. While EU law does not provide for a legal definition of hate speech and hate crime as such, hate crime within the meaning of the Framework Decision is referred to as any criminal offence (base offence), other than hate speech, committed with a racist or xenophobic motivation (bias motivation), defined by reference to **race, colour, religion, descent or national or ethnic origin**. More specifically, the Framework Decision sets out criminal law definitions of the most severe forms of racism and xenophobia, referring to public incitement to violence or hatred directed against a group or a member of such a group sharing a protected characteristics. Framework decision refers both to hate speech and hate crime.
- The next common response to strengthen the legal framework on tackling hate speech and hate crime across the EU is the **Communication (2021) 777 final** titled *“A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime”* which was adopted by the European Commission on 9 December 2021 with the **aim to trigger a Council Decision extending the current list of so-called ‘EU crimes’** as laid down in Art 83 on the *Treaty on the Functioning of the European Union* to hate crime and hate speech<sup>29</sup>. If this Council decision is adopted, the European Commission would be able, in a second step, to propose secondary legislation allowing the EU **to criminalise other forms of hate speech and hate crime, in addition to racist or xenophobic motives**.

Moreover, **the extension of the list of ‘EU crimes’ to hate speech and hate crime**, as also announced by President von der Leyen in her 2020 State of the Union Speech<sup>30</sup> in the light of the criteria laid down in Article 83(1) TFEU<sup>31</sup> focuses on:

- **The cross-border dimension of hate speech and hate crime:** Online hate speech spreads fast and is accessible to everybody anywhere. The ideologies behind hate

<sup>29</sup> European Commission. A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime, COM(2021)777, *ibid*.

<sup>30</sup> European Commission. State of the Union 2020, State of the Union Address, available at: [https://ec.europa.eu/info/sites/default/files/soteu\\_2020\\_en.pdf](https://ec.europa.eu/info/sites/default/files/soteu_2020_en.pdf)

<sup>31</sup> See European Commission, Press Release, December 2021, available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_6561](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6561), European Parliament, Combating hate speech and hate crime in the EU, At a glance, available at: [https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/733520/EPRS\\_ATA\(2022\)733520\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/733520/EPRS_ATA(2022)733520_EN.pdf), Peršak, N. (2022). Criminalising Hate Crime and Hate Speech at EU Level: Extending the List of Eurocrimes Under Article 83(1) TFEU. *Crim Law Forum* **33**, 85–119, <https://doi.org/10.1007/s10609-022-09440-w>, European Commission. Combating hate crime and hate speech, Measures to prevent and combat different form of hatred and to protect victims, *ibid*.



speech and hate crime can be developed internationally and can be rapidly shared online. Hate crimes can be committed by networks with members from several countries.

- **Hate speech and hate crime as an area of crime:** The Commission considers that hate speech and hate crime are an area of crime as they share an intrinsic special feature, i.e. 'hatred' targeting persons or groups of persons sharing (or perceived as sharing) the same protected characteristics.
- **Hate speech and hate crime as an area of particularly serious crime:** Hate speech and hate crime are particularly serious crimes as they undermine the EU common values and fundamental rights, as enshrined in Articles 2 and 6 Treaty on European Union, as well as in the Charter. They have harmful impacts on the individuals, their communities and on society at large.
- **Developments in crime:** There has been a steady increase in the two phenomena due to various economic, social and technological changes and developments. The COVID-19 pandemic has been one of the factors contributing to this increase.
- **No alternatives to extending the list of EU crimes:** Hate speech and hate crime are criminalised to a varying degree in the EU Member States. Only the extension of the list of EU crimes to hate speech and hate crime can enable an effective and comprehensive criminal law approach to these phenomena at EU level, along with a consistent protection of the victims of such acts.

In this sense, the Commission considers these offences as 'particularly serious' because of the harm they cause to individual victims, wider communities, and society as a whole. In light of the above mentioned and **while divergent national approaches across the EU weaken efforts in this regard, it has been clearly identified the need for a common approached to combating these phenomena.**



### 3. Discussion on hate crime rationales

Hate crime as research and academic discussion have revealed needs to be seen in the context of a dynamic social process that involves communities, perpetrators, victims and the broad society<sup>32</sup>. On the other hand, legal and policy responses to combating hate crime differ across Member States, as the Framework Decision 2008/913/JHA, leave options open for how lawmakers tackle hate crime in their criminal codes.

#### 3.1. Divergences and convergences – comparative analysis among the member states

##### 3.1.1 Legislating against hate crimes – substantive crime or penalty enhancement?

Member States, in accordance with the Framework Decision, brought into force laws, regulations and administrative provisions necessary to comply with it. Each Member State has transposed this provision in different ways (Table 1). According to Article 4 of Framework Decision, Member States “*shall 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 penalties*”. In this context, national legislators have three options on how to transpose the provision into national law. First, they can choose to include bias motivation as an **aggravating circumstance** which is applied by the court when deciding on the precise extension of the penalty to be imposed. A second legislative option for the Member States is to apply **penalty enhancements to specific offences** if they are motivated by bias and a third one is to combine both methods, i.e. “a specific aggravating circumstance or enhancement of penalty for certain offences and a **general** aggravating circumstance for any other offence”<sup>33</sup>. In simple terms, according to Viktor Kundrák, OSCE/ODIHR Hate Crime Officer (STAND-UP Seminar at the European Parliament<sup>34</sup>), there are three ways of legislating against hate crime: 1.

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<sup>32</sup> Perry, J. (2015). “Evidencing the case for ‘hate crime’ “. In Chakraborti, N., Garland, J. (eds), *Responding to hate crime: The case for connecting policy and research*, Bristol: The Policy Press.

<sup>33</sup> FRA (2018). *Hate crime recording and data collection practice across the EU*, available at: <https://fra.europa.eu/en/publication/2018/hate-crime-recording-and-data-collection-practice-across-eu>

<sup>34</sup> A seminar was organized at the European Parliament in Brussels on 28-29.9.2022 on *Defining Hate Crime* with the participation of European experts from the legal and police fields, CSOs, NGOs, policy makers and academia. The meeting aimed to find a common definition of “hate crime” in order to support the RIPP-cycle and ensure the highest level of victim assistance within the framework of multi-agency cooperation. See the relevant news release: <https://stand-up-project.eu/2022/09/30/defining-hate-crime-stand-up-seminar-at-european-parliament/>



Substantive offence and 2. Penalty enhancement (general or specific). In particular, the substantive offence as a way of legislating against hate crime includes bias motivation which is the constitutive element of an offence. The key question here has to do with which offences are to be listed. Though there is not an extensive list, crimes of high penal value, like homicide, assaults, and threats should be included. As for general penalty enhancements, it can be stressed that aggravating circumstances apply to all crimes, though specific penalty enhancements are attached to some offences, usually to their qualified forms. Viktor Kunderák urged that a combination of the above approaches is necessary for an effective legal protection against hate crime.

**Table 1: Comparative analysis of the legal framework pertaining to hate crime in the EU-27**

<b>Transposition of the Framework Decision into national law of the member states</b>	<b>Member states</b>
Aggravating circumstance	Austria, Cyprus, Denmark, Finland, France, Germany, Italy, Lithuania, Malta, Romania, Spain, Sweden
Aggravating circumstances regarding certain substantive offences	Belgium, Bulgaria, Greece, Luxembourg, Portugal, Slovakia, Slovenia
Combination	Croatia, Czech Republic
No provision	Estonia, Hungary, Ireland, the Netherlands, Poland

Source: FRA (2018). Hate crime recording and data collection practice across the EU

As discussed above, the legal frameworks in the EU-27 pertaining to hate crime include also a number of **substantive hate crime offences whose definition includes a bias element**<sup>35</sup>. Hate speech is a typical offence of this kind which -with the exception of Sweden- is included to all Member States legislation. Moreover, the criminalization of incitement to discrimination is included in the legal framework of Bulgaria, Estonia, France, Germany, Italy, Luxembourg, the Netherlands, Portugal, Romania, Slovenia and Spain. Also, Finland, France, Latvia, Luxemburg, Slovenia, Spain and Sweden have provisions to distinguish a substantive hate crime when they occur in areas such as access to goods and services, economic activity or employment, or when particular aggravating circumstances apply (Table 2).

**Table 2: Examples of substantive hate crime offences whose definition includes a bias element**

<b>Substantive hate crime offences</b>	<b>Member states</b>
Hate speech	All members states except Sweden

<sup>35</sup> FRA. (2018). Hate crime recording and data collection practice across the EU, *ibid.*



Incitement to discrimination	Bulgaria, Estonia, France, Germany, Italy, Luxembourg, the Netherlands, Portugal, Romania, Slovenia, Spain
Discrimination which occurs in areas such as access to goods and services, economic activity or employment, or when particular aggravating circumstances apply	Finland, France, Latvia, Luxembourg, Slovenia, Spain, Sweden
Use of violence against people or property on grounds of race, ethnicity, nationality, religion or political convictions	Bulgaria
Violence towards the member of a community	Hungary
Violence or unlawful threats against a person or group of persons	Poland
Setting up, financing or supporting organisations with the aim of discriminating or instigating hatred	Finland, Italy, Portugal, Romania, Spain
Torture for reasons based on discrimination	Romania, Spain
Desecration of or damage to places of worship or crimes against religious sentiments	Bulgaria, Portugal, Romania, Spain

Source: FRA (2018). Hate crime recording and data collection practice across the EU

### 3.1.2 Hostility vs discrimination

Regarding hate crime legislation there are two key models<sup>36</sup> of hate crime laws, the *'hostility model'* and the *'discriminatory selection'* which define the motive of the perpetrator. The deliberate choice of one of the above models in the legislation of a member state can impact investigatory and prosecutorial approaches.

Analytically, ODIHR makes use of the term *'bias'* when defining the hate crime motivation instead of the term *'hate'* which presupposes an extreme emotion<sup>37</sup>. According to Viktor Kunderák, hatred is not required, the underlying bias/prejudice is a sufficient factor for committing a hate crime. Bias/prejudice can be manifested through **a)** target selected because of a protected characteristic or **b) hostility** towards group demonstrated during the attack.

<sup>36</sup> OSCE/ODIHR. (2022). Hate crime laws: A practical guide, *ibid*.

<sup>37</sup> According to OSCE / ODIHR. (2022). Hate crime laws: *"Bias has a broader meaning than hate, and a bias motive only requires some form of prejudice on account of a personal characteristic. Bias can be felt in respect of a person, or a characteristic or an idea (where the victim symbolizes that characteristic or idea)"*, (p.18).





Tina Stavriniaki<sup>38</sup>, Vice-Chair of the UN Committee on the Elimination of Racial Discrimination (STAND-UP Seminar at the European Parliament) elaborated the two main models that have been developed on defining motives. The hostility model prioritizes hate-related terminology and arises from the understanding that perpetrators act out of hatred or hostility towards a person or a group of protected characteristics. The term hate compared to other more specialized terms such as racial violence, has the advantage of inclusiveness, encompassing crimes targeting all kinds of protected characteristics. But, the feeling of hate is quite hard to prove it in a court and is related to very subjective elements. In most cases, legislation following this model stresses the importance of how hostility is expressed (i.e. symbols). In this sense, the risk of leaving aside crime where such hostility was not expressed so explicitly in terms to satisfy the required high threshold is present. On the other hand, as Tina Stavriniaki urged, the discriminatory selection introduces a causal link between the protected characteristic and the perpetrator's behavior without imposing any requirement on emotions towards the victim. The perpetrator targets the victim because of a specific characteristic derived from stereotypes and bias. The external expression of hostility is not necessary in order for the offence (hate crime) to be proved as what important is, is that the perpetrator independently of expression of hostility, chooses the victim or the group because of a fundamental and unchanging characteristic of the personality/group. This model is far more inclusive and comprehensive and allows punishing crimes that they may be mixed or reflect the victimization and vulnerability of the groups due to structural discrimination. Examples of 'hostility model' statutes are found in Belgium, Canada, Serbia and Ukraine, while examples of statutes that fall under the discriminatory selection model are provided in Bulgaria, Denmark, France and North Macedonia<sup>39</sup>.

### 3.1.2.a The doctrine of multiple/mixed motives

Bias motivation does not necessarily have to be the sole ground for committing a hate crime. An act could be motivated in whole or partly by bias as the perpetrator might have more than one motive for acting. Regarding the latter, mixed motives can be combined in one case, i.e. opportunistic along with bias motives (race, sex etc.). In this aspect, the question raised here is if the bias motivations will be the only factor that leads to the committing of a hate crime or if it could be concurrent with other motivations (money or possessions stolen). In this respect, some legislations require the bias motive for only or for the most basic, while others could recognize an act as a hate crime if a bias motivation –among others- is included in a penal act<sup>40</sup>. Despite

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<sup>38</sup> See footnote 34.

<sup>39</sup> OSCE/ODIR (2022) Hate crime laws: A practical guide, *ibid*.

<sup>40</sup> Example of mixed motive hate crime laws in Belgium, Malta, The United Kingdom and the United States, OSCE/ODIHR. (2022). Hate crime laws: A practical guide, *ibid*.



the differentiations regarding the concept of “mixed motives”, the European Court of Human Rights in the case *Balazs v. Hungary* 2015 (no 15529/1241) pronounced that:

*“In investigating hate-motivated incidents and crimes, it is important to take into account all possible motives. For example, an incident in which a person is singled out for attack because of his or her identity may still be a hate crime even if the person is also robbed in the course of the incident. A question will arise as to whether the crime was motivated in whole or in part by prejudice and hatred; in some countries, if there is any mixed motive it will not be treated as a hate crime.*

*In many reported cases, individuals who have been targeted for attacks because of prejudice and hatred have also been victimized in other ways. The fact that they also had items of value stolen in the course of these attacks – a cell phone or money – is sometimes used to argue that the incident was not a hate crime. An important consideration is whether the particular individual was selected as a target because he or she was identified as a member of a particular ethnic, religious or other group.”*

By taking into account the wide approach of the ECHR to the concept of mixed motives, it is assumed that the category of hate crimes includes crimes that are not based solely on a bias motivation.

### 3.1.3 Protected characteristics

According to the interpretation developed by the OSCE, hate crime has two core elements<sup>42</sup>. The first element of hate crimes is that they are offences under criminal law (assault, destruction of property, murder, etc.). Therefore, without the commission of a criminal offence, a hate crime cannot be established, that is *“if there is no base offence, there is no hate crime*. The second element is that the offence committed must have a particular motive, a *bias* motive. According to OSCE/ODIHR, *“it is this element of bias motive that differentiates hate crimes from ordinary crimes. This means that the perpetrator intentionally chose the target of the crime because of some protected characteristic: The target may be one or more people, or it may be property associated with a group that shares a particular characteristic. A protected characteristic is a characteristic shared by a group, such as “race”, language, religion, ethnicity, nationality, or any other common factor”*.

To assess whether a criminal act was motivated by bias, OSCE uses several *“bias indicators”* that provide criteria for assessing the possible motive, although they do not necessarily prove that bias was the motive for the act. These indicators relate to the victim's perception of whether or not the act was motivated by bias, the perpetrator's verbal or written reference to the characteristics of the victim's identity, the differentiation between the perpetrator and the victim in terms of race, language,

<sup>41</sup> ECtHR. *Balazs v. Hungary*, 15529/12, available at:

<https://hudoc.echr.coe.int/fre/#%22itemid%22:%22001-158033%22>

<sup>42</sup> OSCE/ODIHR. (2022). *Hate crime laws. A practical guide*, (p.16), *ibid*.



etc., the perpetrator's membership of organised groups (e.g. paramilitary or nationalist organisations), the importance for the group, in the case of attacks against property (movable or immovable), the particular structure of a union character or a location, for example, because of its religious or other symbolic dimensions<sup>43</sup>. A hate crime may also involve multiple prejudices (e.g. religious and ethnic) and the act itself may be related to the material gain that may result from the theft of money, mobile phones, etc.<sup>44</sup> Therefore, the motives are in many cases mixed.

The discussion concerning motive is not a simple one. The term '*hate crime*' has been widely criticized as a specific criminal offence<sup>45</sup>. Some legal circles are openly in favour of the complete abolition of the relevant legislation because it criminalises the morale or motives of human behaviour, which in practice are very difficult to detect in a court of law<sup>46</sup>. On the other hand, advocates of hate crime support the motive to be extended to other categories of vulnerable cases in need of protection (age, political beliefs)<sup>47</sup>. Moreover, according to significant ECHR's judgments it is ruled that the authorities should take all the reasonable steps to investigate and unmask not only racist motives but also other motives beyond racism, namely religious hatred, disability, political opinions, sexual orientation or gender-based discrimination<sup>48</sup>.

Other objections focus on the victim and the implicit **hierarchy between victims**<sup>49</sup> as if some victims are considered '*more victimised*' than others, or if victimisation in the same criminal offense is more significant than another (e.g. street assault against a migrant and street assault against a native). Actually, in Europe and outside of the continent as well, there is a lack of consensus regarding particular dimensions of hate crime concept as well as which crime victim groups. Of the fifty-seven Member States of OSCE fifty-one collate hate crime data under a number of different bias

<sup>43</sup> OSCE-ODIHR. Annual Report for 2011, *ibid*, p. 149.

<sup>44</sup> OSCE-ODIHR. Annual Report for 2011, *ibid*, p. 150

<sup>45</sup> Jacobs, J., Potter, K. (2001). *Hate crimes: Criminal law & identity politics*, Oxford: Oxford University Press.

<sup>46</sup> White, R. (2002). "Hate crime politics", *Theoretical Criminology*, 6(4), pp.499-502.

<sup>47</sup> HEUNI. European Institute for Crime Prevention and Control affiliated with the United Nations (2008), *Hate crime - Papers from the 2006 and 2007 Stockholm Criminology Symposiums*, Publication Series, No.57, Helsinki.

<sup>48</sup> See: indicatively, Religious hatred (ECtHR, *Milanović v. Serbia*, No. 44614/07, 14 December 2010), Harassment related to disability (ECtHR, *Dordevic v. Croatia*, No. 41526/10, 24 July 2012), homophobic violence (ECtHR, *Identoba and Others v. Georgia*, No. 73235/12, 12 May 2015), Gender-based discrimination (ECtHR, *B.S. v. Spain*, No. 47159/08, 24 July 2012), bias motives by association (ECtHR, *Škorjanec v. Croatia*, No. 25536/14, 28 March 2017), FRA, *Unmasking bias motives in crimes: selected cases of the European Court of Human Rights*, 27 November 2018, available at: [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2018-unmasking-bias-motives-paper\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-unmasking-bias-motives-paper_en.pdf)

<sup>49</sup> Boeckmann, R. J., Turpin-Petrosino, C. (2002). "Understanding the harm of hate crime", *Journal of Social Issues*, 58(2), pp. 207-225.



categories<sup>50</sup>. The most widely used categories are those based on **race, ethnicity, and religion**, which are utilized by two-thirds of OSCE states for data collection. Differentiations of this kind unveil the broad understanding of hate crime victimization especially when other categories are compiled from statistical data in various countries such as **gender, language, right-wing extremism, wealth, health, and political beliefs**<sup>51</sup>. These cross-national differences regarding the protected characteristics are often affected by outlaw criteria i.e., history and context, the State will to combat hate crime as well as the pressure groups' (in) achievements in each society.

In the EU, Framework Decision refers to protected characteristics namely race, colour, religion, descent or national or ethnic origin in the context of bias motivation. Though member states, in the light of Article 21<sup>52</sup> of the EU Charter of Fundamental Rights and Article 14<sup>53</sup> of the European Convention of Human Rights, often include other protected grounds in their hate crime provisions in their national legislation. For example, protected grounds of “*sexual orientation*”, “*disability*”, and “*gender identity*” have been included by many member states. Moreover, the concept of an “*open-ended*” clause has been introduced by a few Member States (Table 3).

OSCE/ODIHR's annual reports on hate crime routinely are addressing the following bias motives: *racist and xenophobic, anti-Roma, anti-Semitic, anti-Muslim, anti-Christian, other hate crime based on religion or belief, disability, gender-based, anti-LGBTI*<sup>54</sup>. **Protected characteristics do not only concern motive but the who is - or potentially be - victim of hate crime and accordingly the rights of this person. The lack of a consensus on the victim status equals to a protection gap for the victims.**

Member States' hate crime laws differ significantly in terms of the characteristics of the groups affected<sup>55</sup>. In OSCE, hate crime legislation most commonly refers to crimes motivated by prejudice towards individuals who are targeted because of their membership in a group that is defined by *race, religion, nationality or national origin*. Further, the hate crime laws of the participating states are listed also on *sexual*

<sup>50</sup> Garland, J., Funnell, C. (2016). “Defining hate crime internationally Issues and conundrums”, *ibid*.

<sup>51</sup> Chakraborti, N., Garland, J. 2012. ‘Reconceptualising Hate Crime Victimisation through the Lens of Vulnerability and “Difference”’, *Theoretical Criminology*, 16(4): 499– 514.

<sup>52</sup> Race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

<sup>53</sup> Sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

<sup>54</sup> OSCE/ODIHR. Hate crime reporting, Hate Crime Data, *ibid*.

<sup>55</sup> Protected characteristics are not strictly defined so that the national courts and the European Court for Human Rights retains the flexibility to interpret them in the light of changing context. See also: Bond, M. (2018). *An introduction to the European Convention on Human Rights*, Strasbourg: Council of Europe.



*orientation, disability and gender identity*. Fewer member states, Czech Republic, Finland, Slovenia and Sweden have included an open-ended clause, leaving space for a wide understanding of the protected grounds. **Which characteristics to include in hate crime is not a simple issue and the socio-politico-cultural context of each member state dictates a specific conceptualization of hate crime**, i.e. Nazism, colonialism, slavery, and communism<sup>56</sup>.

**Table 3: Comparative analysis by protected characteristics on hate crime in the EU-27**

Protected characteristics	Member states
Sexual orientation	Austria, Belgium, Croatia, Cyprus, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden
Disability	Austria, Belgium, Croatia, Finland, France, Greece, Hungary, Lithuania, Luxembourg, Latvia, the Netherlands, Portugal, Romania, Slovenia, Spain
Gender identity	Austria, Croatia, Cyprus, France, Greece, Hungary, Malta, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden -Greece includes "gender characteristics"-
Open-ended clause	Czech Republic ("or other similar hatred"); Denmark ("or the like"); Finland ("or by similar grounds"); Slovenia ("or any other circumstances"); and Sweden ("or other similar circumstances")

Source: FRA. (2018). Hate crime recording and data collection practice across the EU

<sup>56</sup> Perry, J. (2015). "Evidencing the case for 'hate crime' ", *ibid.*



## 4. A harmonization approach: towards a ‘common’ definition of hate crime?

Hate crime, though broadly recognized as a distinct category of crime, has not reached a common approach in terms of a legal definition and an effective implementation throughout the EU. Especially, the Framework Decision has set a common ground of legal rationale for hate crime, however Member States make use of the discretion provided and proceed to different legal approaches. On the other hand, the existing normative framework enshrined in the UN Human Rights Treaties, the European Convention on Human Rights, the EU Charter for Fundamental Rights, in provisions in the legal national orders as well as in case law from European Courts, leave room for a common understanding of hate crime and further on, the establishment of a sustainable hate crime definition. A common approach to hate crime on the EU level is of great importance to safeguarding the rule of law and the pluralistic parts of democracy. Moreover, by having different approaches to hate crime legislation, the EU creates different groups of victims of hate crime in almost every Member State, while victims need to be recognised independently of their country of residence. In addition, common approaches to hate crime will streamline data collection systems and harmonise national case law through EU-levelled specialised training to judges, prosecutors, lawyers as well as, law enforcement officers.

FRA has urged that the obligation of each Member State to unmask bias motivation, under Article 14 of the ECHR and the corresponding concept of human dignity should not be part of a judge’s discretion to decide, not even to the discretion of the States<sup>57</sup>. This is the point by which all efforts to protect individuals and groups with particular characteristics start. From this point of view, a common legal definition is necessary for the fundamental understanding of hate crime and the protection of victims. Also, according to FRA, it is certainly preferable to widen criminal law provisions in order to include equally all grounds of discrimination covered by Article 14 of the ECHR or Article 21 of the Charter of Fundamental Rights of the European Union<sup>58</sup>. A common understanding of hate crime laws should further include, as many Member States have already provided in their national legal context, characteristics that are fundamental to the person’s identity, including *gender, sex and sexual orientation, religion* or cannot be changed as *disability*. Hate crime laws should also apply to cases where perpetrators acted with multiple or mixed motives. The aforementioned, could

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<sup>57</sup> FRA. (2012). Making hate crime visible in the European Union: acknowledging victims’ rights, Luxembourg: Publications Office of the European Union, available at:

[https://fra.europa.eu/sites/default/files/fra-2012\\_hate-crime.pdf](https://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf)

<sup>58</sup>ibid.



formulate common criteria and help to surpass definitional boundaries.

There are, also, other instruments that could further enshrine a common understanding of hate crime and constitute the basis of common criteria for a hate crime definition widely accepted by the Member States.

- Article 19 of the Treaty on the Functioning of the European Union enshrines a list of protected grounds limited **to sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation** and it serves as the basis for the adoption of EU Directives in the field of equal treatment.

- Article 13 of the Treaty of Amsterdam aims to prevent discrimination on the grounds of characteristics such as **race, ethnic origin, religion and belief, gender, sexual orientation, age, and disability**.

-**The Framework Decision (2008/913/JHA)** on combating racism and xenophobia. The Framework Decision is the only existing EU criminal law instrument that harmonises the definition of and criminal penalties for some specific forms both for hate crime and hate speech, namely **race, colour, religion, descent or national or ethnic origin**.

- Article 14 of the ECHR /Prohibition of discrimination: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as **sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status**.

-Article 21 of the Charter of Fundamental Rights of the EU /non-discrimination: 1. Any discrimination based on any ground such as **sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation** shall be prohibited.2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

-**OSCE /ODIHR's non-legally binding definition of hate crime**: "criminal acts motivated by bias or prejudice towards particular groups of people", the key recommendations for legislators of OSCE/ODHIR<sup>59</sup>, along with **the bias motivations mentioned in the hate crime data** of OSCE<sup>60</sup> and by taking into consideration **the bias motivation/discrimination model** that seems to be adopted by the majority of national legal systems.

The above could successively contribute to a **consensus regarding two key concepts of hate law, namely the motive and the protected characteristics**. The OSCE/ODHIR non-legally binding definition accepts that the hostility model is not necessary to

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<sup>59</sup> OSCE/ODHIR. (2022). Hate crime laws: A practical guide, *ibid*.

<sup>60</sup> OSCE/ODIHR. Hate crime Reporting, Hate Crime Data, *ibid*.



define an offence as hate crime as bias or prejudice are sufficient for a concrete common definition. Protected characteristics in the context of the Framework Decision became *de facto* insufficient (see Table 3 and what protected characteristics members stated have incorporated in their national legal frameworks ) to cover alone the wide range of hate crime incidences that target new identities in the changing circumstances of our time.

A common understanding of hate crime should take into account the following aspects as they have been provided by the comparative analysis among the national legal systems and the human rights acquis:

1. Both substantive offence and aggravating circumstance can operate in each member state efficiently. In addition, the combination of protection that derives from these approaches is not only possible but also desirable.
2. The discrimination model is being accepted as a minimum prerequisite regarding hate crime. Though the hostility model is also acceptable, it requires the expression of hate which is difficult to prove at the court because of its subjective character.
3. In hate crime coexist multiple/mixed motives. In particular, motives can correlate with protected characteristics and at the same time, a profit or gain may derive in cases of i.e. attacks against property. Recognize that the victim must be chosen by multiple motives / (presumed) characteristics.
4. Gender, sex, sexual identity and disability should be added as protected characteristics in the context of an updated approach of hate crime followed by the legal experience of the almost 25-year Framework Decision. Enriching the list of the protected characteristics already included in the Framework Decision is necessary for the holistic protection of victims that are targeted because of their belonging to a group with specific characteristics.

The knowledge deriving from the legal approaches to hate crime in the EU may lead to the adoption of an updated understanding of it, either as a substantive offence, an aggravating circumstance or both, the definition of which will include the concept of discriminatory selection, the doctrine of multiple/mixed motives and the widening of the list of protected characteristics. Concerning the latter, **gender-based, LGBTIQ+ and disability** characteristics should at least add to the ones of **race, colour, religion, descent or national or ethnic origin** included as protected in the Framework Decision.

In principle, a shared understanding facilitates the dialogue for a common definition of hate crime. Moreover, a common definition provides **legal certainty for the victims** of hate crime independently of where a person belongs to a group with particular characteristics lives, travel, study, etc. The common European hate crime definition is the next step of a unified and coherent protection for hate crimes across European Union.





## 5. Conclusions

Despite the multitude and variety of international, European and national frameworks, there is neither a core definition of hate crime nor a collective approach to the issue, the relevant legislation, and the way it should be prosecuted and punished. However, it is common place that a hate crime is consisted of a criminal offence, whereas according to each national legislation the acts considered as offences can differentiate, and of a bias motive. As aforementioned, the bias is targeted against a protected characteristic, such as *sex, race, religion, ethnicity* or *any other common factor* that is shared by a social group. These characteristics, though, are not collectively protected by all European states, as the spectrum of the protection can be broadened or shortened according to each national law.

At national level, some European states have adopted lists of protected grounds that go (far) beyond this list. However, many people discriminated against are still left out of the protection of anti-discrimination laws in Europe.

For this reason, a common approach by all states is important. **The STAND-UP project proposes to include an expansion of the list of vulnerable social groups, since any form of hatred is incompatible with human rights law and the prospect of modern societies.** The expansion will allow to name social groups in need for protection, sending a symbolic message. Furthermore, if some characteristics of social groups are not included, there is a risk that they will not be covered by judicial interpretation and by policy and decision-making. Finally, some equality bodies have a mandate only for grounds that are explicitly covered, which means that recognising new protected characteristics would enhance their ability to take action.

A possible expansion could be at least based on **gender identity, gender expression, sex characteristics and disability**. Beyond these categories, there should also be considered **the grounds provided by the human rights instruments and especially the Charter**. These grounds should be further explored and developed to ensure a more encompassing and coherent protection under European law.



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