

SOVA Center for Information and Analysis

Criminal Law on Hate Crime, Incitement to Hatred and Hate Speech

in OSCE Participating States

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This book offers a comparative analysis of the legal regulation of illegal activities commonly referred to as hate crimes, public incitement to hatred or hate speech, and of organizational activities pursuing the same goals.

The book covers the laws of all 57 OSCE participating States and includes an extensive annex with excerpts from their national legislation.

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Introduction

This book provides an overview of the legal regulation of illegal activities commonly referred to as hate crimes, public incitement to hatred and hate speech. It also examines the legal regulation of the activities of groups acting with these purposes. Further, it explores the differences between the concepts of hate crimes, public incitement to hatred and hate speech.

I should immediately clarify that the legal regulation of such crimes cannot be outlined simply and clearly, and that concepts like “hate speech” and “extremism” are highly controversial. This area has been and will remain the subject of powerful social and legal debate, as it involves such fundamental values as the freedom, equality and security of the general public. However, the purpose of this book is neither to summarize nor to analyze this controversy: I will confine myself to making references to relevant surveys and useful publications.¹ The purpose of this book is less ambitious: it is to summarize currently existing legal approaches as reflected in national legislation.

Each of the legal or quasi-legal concepts used herein, including the notions of “hatred” or “bias” regarding the groups in question, requires clarification for the purposes of subsequent analysis, in order not to create a false impression for the reader. Therefore, each chapter contains a detailed discussion of the relevant concepts.

In general, the subjects examined may be summarized as follows:

- Criminal acts committed on the grounds of hatred or bias (hate crimes), both violent and non-violent. In the latter case, I refer primarily to vandalism;
- Public statements in some way aimed at inciting hatred and hostility. Such statements include specific varieties of hate speech, such as, for example, Holocaust denial and/or the humiliation of people based on their group affiliation;

1 Worth mentioning is the generally obsolete but still useful collection of articles *Striking a Balance. Hate Speech, Freedom of Expression and Non-Discrimination* (London: Article 19, 1992). The dispute has continued ever since. See, for instance, Erik Bleich, *The Freedom to be Racist? How the United States and Europe Struggle to Preserve Freedom and Combat Racism* (NY: Oxford University Press, 2011). The following publication in defense of laws on hate speech merits mention as the most popular such work in recent years: Jeremy Waldron *The Harm in Hate Speech* (Cambridge, MA: Harvard University Press, 2012). This book elicited a number of critical responses from supporters of a restrictive interpretation of such legislation, as can be seen in the following collection of essays which will be further referenced herein: Michael Herz and Peter Molnar (eds.) *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (New York: Cambridge University Press, 2012).

- Organizational activity aimed at committing the above-mentioned criminal acts;
- Legal framework approaches in this area that have been established in some OSCE participating States, such as anti-extremism laws, anti-fascism laws, etc.

Historically, the relevant laws developed from rules meant to address attacks on state security, sedition, and blasphemy against the dominant Church. It was only later that these measures provided a basis for the formulation of laws on hate speech and on socially dangerous incitement against certain groups. Laws on hate crimes have evolved from a deeper understanding of the role of government in protecting equality, and as such they emerged subsequently. However, I limit myself to comparing existing legal norms in this book, rather than attempting to analyze the origin of such norms. Therefore, the review chapters of the book are presented without any specific order that would suggest a causal link between the norms in question.

After studying the country material, it seemed simpler to me to begin with an examination of hate crimes rather than with an examination of unlawful statements, as the legislation in this area revealed itself to be more uniform conceptually and thus more easily understood. Therefore, the chapters have been arranged in the following order:

Chapter One begins with a brief review of the international standards generated by various types of agreements and by the practice of international courts. However, in those cases in which pertinent international law as such has yet to be developed, this chapter also includes some conclusions which draw upon the efforts of the international expert community.

Chapter Two is devoted to all aspects of hate crime legislation, including legislation on vandalism. While this legislation is far from geographically homogeneous, it is less diverse conceptually than legislation on incitement to hatred and/or hate speech. **Chapter Three** contains an examination of legislation on incitement to hatred and/or hate speech, and applies some of the classifications described in Chapter Two.

Chapter Four is divided into several subsections and covers a variety of specific and unique relevant legal instruments. These include laws against “historical revisionism,” laws on the protection of “religious feelings” that go beyond the framework of generally-accepted legislation on the protection of freedom of conscience and on hate speech, and laws that criminalize participation in groups aiming to commit the above-mentioned crimes. This chapter also analyses anti-extremist legislation, which constitutes the only widespread attempt to create a uniform legal framework to address such crimes. This

legislation was formulated, as such, under the influence of Russian legislation. However, when examined on the scale of the entire OSCE, it more closely resembles an experiment undertaken by a number of countries. As a result, the structure of the relevant subsection is presented on a country-by-country basis, rather than through the classification of characteristics.

The conclusion includes an attempt at a consolidated comparative analysis. This attempt may appear to be statistical in nature, but I very much doubt that statistical methods are appropriate in this case, so I limit myself to a discussion of only the most noticeable patterns. Without prejudice to any of the hypotheses arising from this analysis, it is clear that the legislation of OSCE participating States is developing in two directions: it either places a greater emphasis on the protection of the state and/or public security or, rather, it aims first and foremost to protect minorities and/or to combat discrimination. Of course, this division is not a rigid one, and the actual enforcement of such legislation may be accompanied by substantial adjustments. Nevertheless, this conceptual distinction is clearly evident.

Each chapter contains many relevant details of national legislation. A more systematic examination of the legislation of each OSCE participating State can be made using the large table provided at the end of the book. The footnotes to this table include the legal provisions themselves, together with comments. A separate table is provided covering state laws in the United States of America. It was not possible to cite all of the legislation of all OSCE participating States in the core text: in fact, this was not judged to be necessary, given the repetitive or very similar wording found therein. Therefore, the text includes examples either of standard wording or of original wording.

Due to limited time and resources, a number of related topics were either omitted or only briefly mentioned. There is no doubt that, in the legal instruments of various countries, these topics overlap with those included herein. I refer specifically to such topics as terrorism, attempted coups, the organizing of riots, etc.

Moreover, I have limited my research almost exclusively to criminal law, although the state certainly has other means at its disposal, such as administrative actions, civil lawsuits, etc. This choice was due in part to the aforementioned resource constraints as well as to the fact that criminal law is the means most frequently discussed to address such crimes.

Considering the fact that legal terminology in our area of interest is still in flux, and given the associated social rhetoric, I must begin with a few reservations.

First, I encountered the greatest difficulty in the differing classifications and terminology applied to prohibited statements. This issue will be discussed in detail in the

corresponding chapter; at the outset, let me say that I will be using the two terms “incitement to hatred” and “hate speech” as analytical terms. In this book, the term “incitement to hatred” denotes statements that are actually or potentially fraught with serious consequences and are aimed at inciting hatred, while the term “hate speech” refers to any statement indicating a negative attitude in one form or another which is not covered by the first term. It should be noted that the difference between the terms in practice is not a marked one.

Second, this book is not about political policies to maintain stability and security, nor does it attempt to address what is often called the “interethnic” or “interreligious” dimension. Rather, it deals exclusively with existing legal provisions, and therefore, examines individuals rather than any given community, unless explicitly stated otherwise in the law in question.

Of course, even before I began work on this book I had my own ideas about what I considered to be the best approach to formulating laws in the area of my interest. I formed these ideas based on my years of experience in researching various manifestations of radical Russian nationalism and the methods that the Russian state uses to counter them. As I studied the legislation of other OSCE participating States, new considerations arose. Therefore, I have allowed myself the indulgence of offering some conclusions and recommendations in Chapter Five.

Since one encounters certain continuity worldwide in the criminalization of the above types of activities and in the criminalization of activities threatening national security, material for this study would have been widely available in most countries. However, the various legal systems are simply too diverse to be effectively compared. Since my primary interest still lies with Russia, I thus chose to make comparisons only between those countries that lent themselves to such an exercise.

This means, first of all, of course, that I examined the situation in the post-Soviet countries, since their criminal law still features an obvious affinity to Russian criminal law. Secondly, I examined the experience of the European countries and of the United States, since it is the Western countries which have constituted and still constitute the main benchmark (the significant Other) in the discussion of any policies in Russia, including those considered here. In this fashion, the formal criterion for the selection of countries seemingly emerged by itself: the participating States of the OSCE.

I refer only in passing in this book to the practice of law enforcement, simply because the volume of material covered is already so large. Of course, in common law countries it is difficult to separate the norm itself from the practice of its enforcement, as the enforcement continually and substantially modifies the norm. This is not

the case for civil law countries, which represent the vast majority in the OSCE region. In these countries, we can confidently proceed with a comparison of legal norms. I therefore acknowledge that both US laws and to some extent British laws are given disproportionately little attention here.

In this context, three important reservations are necessary:

First, in different countries the prosecution and the court may have very different views on the range of penalties prescribed by law. It is frequently the case that the harshest penalties stipulated by law are never actually applied, so practice is limited to minimal degrees of penalties.

Second, the quality of the investigation and the trial play a particularly important role in cases involving statements, as these cases occur relatively rarely and are extremely difficult to investigate. This means that investigators, prosecutors and judges are often quite inexperienced and tend to make a number of mistakes.

Third, the cases of relevance to this study may be of significance in a political struggle that is underway in the country in question. Accordingly, it is of critical importance that both law enforcement agencies and the courts be free from interference by political actors in general, and that they be free from interference by the executive authorities in particular. The more fundamental and substantive are the violations of this requirement, the more clearly arbitrary political actions will tend to outweigh the value of legal wording. However, in this case, those regimes engaged in open interference of legal proceedings usually prefer to create laws that facilitate their repression.²

The design of this book was largely a reaction to the Russian analysis of issues of interest to me, and in particular, a reaction to the most frequent Russian reviews of the national legislation of different countries in the sphere in question. Such reviews as carried out in Russia may have different emphases, depending on the interests of their authors, which vary greatly depending on the public mood. So, the focus may be “anti-fascist”³ or “anti-extrem-

ist”⁴: the inverted commas are meant to highlight the ambiguity of these two terms. However, the selection of countries and laws by Russian analysts is both consistently unsystematic and highly fragmented.

My intention in creating an overview of the pertinent legislation of the 57 OSCE participating States was also largely motivated by my interest in improving the situation that has evolved in Russia today, a situation which can hardly be called satisfactory.⁵ However, I think that the constant comparison of international legal standards to Russian legal standards is counter-productive. After all, the disparate national standards follow their own logic, which cannot be captured through the prism of Russian legislation. At the same time, pertinent Russian legislation itself was, in fact, formulated largely with reference to corresponding Western models.

To avoid the temptation of taking a “Russia-centered” approach, I have chosen to use the collections of norms compiled by Western researchers.

Admittedly, these collections are what made this book possible in the first place: in different countries, relevant norms are “presented” in the body of legislation in completely different ways. The terminology used also differs from country to country and of course there is a large variety of languages involved. As a result, without these valuable reference works, it would have been impossible for me to do all of this on my own.

My main sources in writing this book were as follows:

1. The collection of norms on hate crimes in OSCE participating States compiled by the staff of the US human rights organization *Human Rights First*. These materials were kindly provided to me by Paul LeGendre and Innokenty Grekov.

These materials were originally collected and used in preparation for writing of *Hate Crime Law: A Practical*

2 This reflects the modern rhetorical obligation to stake a claim to “democracy” and “the rule of law,” and sometimes even to “human rights.” Even those regimes that are a far cry from these ideals seek to create some semblance of following them.

3 Probably the best example is *Foreign legislation against fascism* (Anti-Fascist Fund Bulletin: Moscow, 1997), No. 4, <http://www.aha.ru/~ofa/4.zip>

4 Nowadays Russia is dominated by the concept of “anti-extremism.” Alas, most of what’s written using this approach is of no value in understanding the legal realities of Russia or those of other countries, but there are notable exceptions. Worth mentioning here is Igor Bikeev and Andrey Nikitin, *Extremism: An Interdisciplinary Legal Study* (Kazan: Poznanie, 2011).

5 Both the development of rights in the area covered by the law *On Countering Extremist Activity* and the enforcement of the law itself are analyzed in the SOVA Center annual reports. See <http://www.sova-center.ru/en/xenophobia/reports-analyses/> and <http://www.sova-center.ru/en/misuse/reports-analyses/> Additional analysis can be found in the SOVA Center’s series of collections of reports. For the most recent information available at time of publication, see *Xenophobia, Freedom of Conscience and Anti-Extremism in Russia in 2015* (collection of reports) (Moscow: SOVA Center, 2016).

*Guide*⁶ published by the OSCE Office for Democratic Institutions and Human Rights (ODIHR). The preparation for this publication brought together representatives from a number of interested NGOs of various OSCE countries, including myself. This book largely provided the basis for the chapter on hate crimes in the present work.

Information on the legislation of the OSCE participating States is regularly updated on the Human Rights First website, where it is currently available.⁷

2. The collection of European norms, in the geographical sense of the word “Europe,” which was compiled in preparation for the United Nations expert seminar on legal countermeasures to incitement to hatred held in Vienna in February 2011.⁸ This collection is available on the UN website.⁹
3. Country addenda to a valuable study of legislation on blasphemy and religiously charged hate speech published by the Venice Commission (European Commission for Democracy through Law) of the Council of Europe.¹⁰
4. The database of the laws of OSCE participating States on the ODIHR website.
5. A collection of excerpts from legislation on combating racism and intolerance, available on the website of the European Commission against Racism and Intolerance (ECRI) of the Council of Europe.¹¹ This collection also contains valuable country-specific comments regarding both law enforcement and the understanding of the wording used in national legislation.

6 *Hate Crime Law: A Practical Guide* (Warsaw: ODIHR, 2009). This guide is available on the OSCE website in several languages, including in Russian. See <http://www.osce.org/odihr/36426>

7 *Hate Crime Report Card*, available on the Human Rights First website. See <http://www.humanrightsfirst.org/our-work/fighting-discrimination/hate-crime-report-card/>

8 This seminar was one of a series of regional seminars, resulting in the adoption of the Rabat Action Plan, referenced later in this book, which provides a summary of means for countering hate speech.

9 2011 Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred, Workshop for Europe (Vienna, 9–10 February 2011). For annexes with country-specific information see <http://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/AnnexesCountryVienna.aspx>

10 *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society* (Strasbourg: Council of Europe Publishing, 2010), pp. 151–310. This publication is available on the website of the Venice Commission of the Council of Europe <http://www.venice.coe.int/webforms/documents/?pdf=CDL-ST-D%282010%29047-e>

11 *Legal Measures to Combat Racism and Intolerance in Council of Europe Member States*. See the ECRI web-site http://www.coe.int/t/dghl/monitoring/ecri/legal_research/national_legal_measures/

I am extremely grateful to the authors of all the above-mentioned sources,¹² though I must note that these sources did contain a number of imprecisions. Of course, legislation changes rather frequently and not all authors manage to notice these changes, which means that some of these compilations cite laws that had changed by the time of their publication. Therefore, I was required to do a significant amount of updating and adjustment.

In general, the information in this book is up-to-date as of the end of 2012. In some cases subsequent changes to legislation were considered as well, in part during the preparation of the English translation in cooperation with ODIHR.

Unfortunately, I cannot guarantee that this work is free from errors and anachronisms. Therefore, I gratefully accept any comments or clarifications.

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The English edition was made possible through support from ODIHR. Some corrections and additions were introduced during preparation for the translation, including through consultation with ODIHR experts. Additionally, some sections of the book focusing specifically on Russia were abridged.

I am grateful to Dmitry Dubrovsky for his comments at the final stage of the work, to Jane Gorjevsky for helping with the translation of legal provisions and, of course, to all those who helped me in gathering information for this book: the legal staff of the US Library Congress, Michael Lieberman, Michael Whine, Ales Hanek, Klara Kalibova, Brigitte Dufour, and David Friggeri. I would like to thank both the translators of the book and Evelina Tishaeva who helped me review the translation. Apologies if I have missed anyone who provided me with assistance during my research.

12 I have listed only the main sources. I did use other sources, principally to verify the data. Worth mentioning from among them is: Dina Porat, Nina Osen and Talia Na'amat (eds.) *Legislating for Equality: A Multinational Collection of Non-Discrimination Norms: Europe* (Leiden-Boston: Martinus Nijhoff Publishers, 2012).

List of Acronyms

CIS	Commonwealth of Independent States
COE	Council of Europe
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
ECRI	European Commission against Racism and Intolerance
ICCPR	International Covenant on Civil and Political Rights
ODIHR	Office of Democratic Institutions and Human Rights
OSCE	Organization for Security and Cooperation in Europe
PACE	Parliamentary Assembly of the Council of Europe
UN HRC	United Nations Human Rights Council
UN OHCHR	United Nations Office of the High Commissioner on Human Rights

Chapter I. International Law

International law regarding hate crimes, incitement to hatred and hate speech has been described repeatedly, since it constitutes a relatively small number of normative texts as compared to the multitude of national laws. However, such international law is of interest to more people than is any specific national law.

International law can be divided into two categories. The first category comprises binding agreements to which states have acceded, with or without reservations. In such cases, the letter of these agreements is just as binding upon those states as is their national constitutional law or criminal code. Interestingly, the Russian constitution even asserts the primacy of international legal commitments over national law. The second category consists of a variety of non-binding recommendations, ranging from the UN Declaration on Human Rights to the resolutions of the Parliamentary Assembly of the Council of Europe (PACE) or of the Council of Ministers of Foreign Affairs of the OSCE. These recommendations do not provide a regulatory framework, but they do have significant influence over the understanding of both terminology and of the relevance and/or applicability of any earlier adopted norm. In between these two categories we find the case law of judicial and quasi-judicial bodies, such as the European Court of Human Rights (ECHR): the decisions of this court not only provide interpretations of norms in the first category, but also are able substantively to refine or improve them to such an extent that it would be more correct to say that case law in fact is spurring the development of these international legal norms.

In this chapter I will limit myself to introducing those specific norms relating to the first category described above which are in force in all or almost all OSCE participating States. I will then provide a brief summary of the main issues in the interpretation of these norms. Of course, no one interpretation is ever definitive, but it is possible to draw some currently valid conclusions from the broad ongoing discussion of these issues.

1. Basic norms and commitments

The United Nations Convention on the Elimination of All Forms of Racial Discrimination (CERD) contains the most detailed “thematic” provisions:

Art. 2(1)(b): “Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;”

Art. 4: “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, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, 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;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;”

The countries that have ratified the CERD in so doing committed themselves to prosecute the incitement of hatred, hate crimes and various forms of hate speech, as well as any organized activity directed at racial discrimination. Almost all of the OSCE participating States have ratified the CERD, though ten of them introduced various kinds of exclusionary clauses in the ratification of Article 4 of the Convention regarding the protection of freedom of speech, as was the case of the US, for example.

The widely-ratified wording of the *International Covenant on Civil and Political Rights* (ICCPR) is no less significant. Having proclaimed the principle of freedom of expression in Article 19, it introduces limitations as follows in Article 20:

Art. 20(2): “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

This standard is much more specific than the broader limitation contained in Article 19 itself, though the latter must be borne in mind as well. In conformity with Art. 19(3)(b), the right to freedom of expression of one’s opinion “may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary... for the protection of national security or of public order (*ordre public*), or of public health or morals.”

This limitation is repeated in similar language in the *European Convention on Human Rights* (ECHR) (also known as the *Convention on the Protection of Human Rights and Fundamental Freedoms*) which is binding upon the Member States of the Council of Europe. Forty-seven of the 57 OSCE participating States are also Council of Europe Member States.

Article 10(2) of the Convention on freedom of expression reads as follows:

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

It is interesting that the restrictions on freedom of assembly found in Article 11 of the Convention are rather similar to those on freedom of expression contained in Article 10(2), while there are fewer restrictions on religious freedom (freedom of conscience) in Article 9(2), which reads as follows:

“Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

Let us recall that the ECHR was adopted in 1950 at a time when religious and political radicalism were not topical in Europe. However, the limitations in Article 10 are applicable to freedom of religious expression as well.

Finally, Article 17 of the ECHR is worth noting. It reads:

“Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

This provision can be applied to many radical groups and to their propaganda.

As is clear from a consideration of the above-mentioned standards alone, here we are dealing with discrimination as a broad topic, the initial formulation of which was based precisely upon racial, ethnic and religious discrimination. However, anti-discriminatory standards are a separate and very broad topic of their own. Because international conventions and other agreements regarding terrorism are only indirectly related to the topic of this book, such agreements will not be examined herein.

2. The absence of norms related to hate crimes

And so we find that there are no conventions on a topic of great importance for our review, that of violent hate crimes. The likely reason for this is that the concept itself of violent hate crimes was developed only after the period during which most of the major conventions were

adopted. The only standard that existed was that cited above: states, in signing the CERD, committed themselves to criminalizing “all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.” However, strictly speaking, even without considering the Convention, acts of violence constitute criminal acts in any country, and the Convention itself did not give rise to the understanding of the concept of hate crime. Slightly later this concept spread throughout the OSCE region, and today a significant majority of participating States have corresponding legislation.

Theoretically, another international legal source stipulating special punishments for hate crimes could be the prohibition against discrimination. In fact, in 2005, in “Nachova and Others vs. Bulgaria,” the ECHR ruled¹³ that the authorities must investigate the racist motive of an attack if the suspicion of such a motive exists. In another decision, the ECHR emphasized that hate crimes cannot be examined on a par with conventional crimes.¹⁴ However, it must be recognized that the proliferation of hate crime laws began long before these decisions, and that the ECHR rulings had little influence on this process or, unfortunately, on the process of the creation of national norms regulating the need to investigate the motive of hatred.

In parallel with the spread of legislation on hate crimes, the OSCE issued a variety of relevant recommendations.¹⁵ In particular, it approved a common understanding of hate crimes as “criminal acts committed on the basis of prejudice.”¹⁶

Since these recommendations are adopted by the OSCE on a basis of consensus, it is fair to assume that the need for such legislation is not disputed by anyone in particular in the OSCE region. Moreover, the decisions of the OSCE Ministerial Council generate political commitments for participating States. Despite this fact, anti-hate crime

13 *Nachova and Others v. Bulgaria*, Judgment of the European Court of Human Rights (Grand Chamber), 6 July 2005, paras 160–168: <http://hudoc.echr.coe.int/eng?i=001-69630>

14 *Secic v. Croatia*, Judgment of the European Court of Human Rights, (Chamber Judgment), 31 May 2007, para. 66: <http://hudoc.echr.coe.int/eng?i=001-80711>

15 One of the first and most frequently-cited recommendations is the reference to the importance of anti-hate crime legislation contained in OSCE Ministerial Council Decision No. 4/03, “Tolerance and Non-Discrimination,” Maastricht, 2 December 2003, p. 2, para. 6, <http://www.osce.org/mc/19382?download=true>

16 OSCE Ministerial Council, Decision No. 9/09, “Combating hate crimes,” Athens, 2 December 2009, <http://www.osce.org/cio/40695?download=true> This is the most meaningful OSCE decision on this issue.

legislation is not yet found in all OSCE countries. The diversity of norms and approaches to their formulation will be discussed below in the corresponding chapter. It should be noted that it was in order to assist participating States in this process that the OSCE published "Hate Crime Laws: A Practical Guide" in 2009.

3. Difficulties in understanding norms on public statements

§ 1. What the experts agree upon

There is a considerable body of literature which provides analysis of the international legal regulation of incitement to hatred and of hate speech, and which includes consideration of the case-law established by United Nations and Council of Europe courts. The problem, however, lies not so much in the differences in academic approaches, as it does in the differences to be found in the political practices and intentions of governments.

Although the idea that incitement to hatred should be restricted, including by criminal law, is a universal one among OSCE participating States, with the exception of the United States, there is still no consensus on the approach to its limitation. The discussion at the international level revolves around the interpretation of the articles of the covenants and conventions mentioned above.

It is important to bear in mind that the core concept in this case is not hate speech, but incitement to hatred, and specifically – public incitement. This terminology is based on that used in international law and expresses the way the state and most analysts understand the primary hazard – not as a manifestation of intolerance or propaganda, but as statements in the broadest sense of the word which induce listeners to dangerous actions or create the danger of such actions. "Hate speech" is perceived by many experts, especially in the US, as a concept that is too easily abused to the detriment of freedom of expression. However, the term "hate speech" describes a much broader range of statements that do not necessarily instigate anything, but which in some way create a negative attitude in society or in one part of society against another.¹⁷ Since some form of contempt towards large and small social groups is inevitable, as are public displays of such attitudes, regulation in this area is considered by many to be a more delicate matter. As a result, it is fair to say – as opposed to the clearer issue of "incitement to hatred" – that the level

17 On this distinction, see the careful analysis from leading experts on hate speech contained in Susan Benesch, "Contribution to OHCHR Initiative on Incitement to National, Racial, or Religious Hatred," United Nations Office of the High Commissioner on Human Rights, 2011, http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/ContributionsOthers/S.Benesch.doc

of international consensus here is much lower.¹⁸

However, agreement on terminology is only the beginning of achieving a common perception of what and how incitement to hatred and hate speech should be restricted and punishable by law, assuming that such an idea is feasible and desirable in the first place. At the UN conference in Geneva that was convened on the tenth anniversary of the UN Conference Against Racism in Durban, a decision was taken to organize a series of expert seminars "to attain a better understanding of the legislative patterns, judicial practices and national policies in the different regions of the world with regard to the concept of incitement to hatred."¹⁹ As a result of those seminars, a key advisory document was adopted in October 2012 – the Rabat Plan of Action,²⁰ to which I will refer later. Furthermore, many academic and semi-academic reports have been published that provide an indication of current trends in the expert community on countering "incitement to hatred." Since our focus is not theoretical ideological debate, but rather the interpretation of international law, certain "extremes" may be discarded at the outset. Of course, the concept of what is extreme is a subjective one. On the one hand, there is broad agreement that societies should be democratic and should respect freedom of expression in its various forms: therefore, restrictions on hate speech should not be used as an instrument of political pressure by the authorities, and in general, in accordance with the European Convention, restrictions on freedom of expression must be "prescribed by law and are necessary in a democratic society." This understanding is contrary to the legislative and enforcement practice of many countries, but very few such countries are willing to argue in favor of their "right" to persecute peaceful dissidents under the guise of the ban on hate speech. On the other hand, the position of the United States, where there is no criminalization of public incitement as such, regardless of the consequences, is also regarded as extreme. The actual situation in the US is more nuanced, as will be discussed in the relevant

18 One of the most interesting attempts to draw the conceptual line between a criminal statement and a simply objectionable one was made in an article to be found in the highly relevant compilation "Extreme Speech and Democracy". See Robert Post "Hate Speech" in Ivan Hare and James Weinstein (eds.) *Extreme Speech and Democracy*, (NY: Oxford University Press, 2009), pp. 123-138.

19 *Durban Review Conference: Outcome Document*, (New York and Geneva: United Nations, 2010), p. 20.

20 "Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence," Office of the United Nations High Commissioner for Human Rights (OHCHR), 2012, http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf

chapter. Thus, the problem boils down to how to formulate the concept and wording of the corresponding laws in order to strike the best possible balance between freedom of expression and hate speech restrictions.

Of course, the experts at the OHCHR workshop for Europe held in Vienna in 2011 were not fully in agreement, but in general, this group's analysis of the sources of law²¹ produced fairly similar results.

Louis-Léon Christians, author of the introductory overview of the seminar in Vienna,²² noted the absence of any conceptual agreement among European countries on the issue of criminalization of incitement to hatred and hate speech. First, European legislation does not provide clarity on those issues which were left unresolved in the conventions and covenants: questions remain as to how to find what is criminal in this area and what is not. However, it is clear that, unlike in the United States, this boundary is not determined based on whether these statements pose "a direct and immediate threat" in the form of certain criminal acts. Second, provisions on "incitement to hatred" coexist and are combined in different ways with rules on hate crimes, blasphemy, offence to ethnic dignity, separatism, denial of historical genocide, etc., which precludes a clear understanding of the proper norm on incitement to hatred.

§ 2. The Council of Europe

Not even the guidance documents of the Council of Europe reflect the achievement of any common understanding among its member states. Louis-Léon Christians himself wrongly interprets these recommendations as providing an understanding of hate speech specifically or primarily as incitement. The fact of the matter is that the recommendations lack a clear or even implicit call for some action as a unifying feature. What is more, there is no attempt to narrow the concept of such a unifying feature down to calls for a specified list of actions, such as to acts of violence.

In fact, some of the recommendations actually politicize the issue. Further, they do nothing to render the boundaries of what is permitted any clearer. The following is the definition contained in the 1997 Recommendation of the Committee of Ministers of the Council of Europe:

"...the term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote

*or justify racial hatred, xenophobia, anti-semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."*²³

Nor was a narrower definition provided by the carefully prepared 2002 recommendation of the Council of Europe's Commission against Racism and Intolerance (ECRI), which was issued as Recommendation No. 7:

"18. The law should penalise the following acts when committed intentionally:

- a) public incitement to violence, hatred or discrimination,*
- b) public insults and defamation or*
- c) threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;*
- d) the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;*
- e) the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes;*
- f) the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material containing manifestations covered by paragraphs 18 a), b), c), d) and e);*
- g) the creation or the leadership of a group which promotes racism ; support for such a group ; and participation in its activities with the intention of contributing to the offences covered by paragraph 18 a), b), c), d), e) and f);*
- h) racial discrimination in the exercise of one's public office or occupation."*²⁴

In addition, paragraph 20 of the same document stipulates that any form of complicity in the acts listed in paragraph 18 should be punished. On the other hand, the Recommendation states that not only criminal, but also administrative and civil law can be used, meaning that the acts listed should not necessarily be considered to be criminal offences.

Further, para. 21 states that the presence of a racist motivation for these acts constitutes an aggravating

21 2011 Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred, Workshop for Europe (Vienna, 9-10 February 2011).

For experts' papers see <http://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/ExpertsPapers.aspx>.

22 Louis-Léon Christians, *Ibid.*, http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/ViennaWorkshop_BackgroundStudy_en.pdf

23 Appendix to Recommendation No. R (97) 20 of the Council of Europe Committee of Ministers to Member States on "Hate Speech," http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec%2897%2920_en.pdf

24 ECRI General Policy Recommendation N°7 on National Legislation to Combat Racism and Racial Discrimination, Council of Europe https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N7/Recommendation_7_en.asp

circumstance. This can be understood to mean that the wording of paragraph 18 does not necessarily imply a racist motive, with the exception of sub-paragraph “d.” So, according to this recommendation, the public denial of genocide, ethnic threats, etc. must be punished, regardless of the motivation.

The recommendations issued by the Parliamentary Assembly of the Council of Europe (PACE), based on the practice of the ECHR, also fail to provide a narrower legal framework. There is no specific PACE recommendation on hate speech per se, but there are two major related texts – the Draft Resolution entitled “*Threat posed to democracy by extremist parties and movements in Europe*” of 2003²⁵ and Recommendation 1805 “*Blasphemy, religious insults and hate speech against persons on grounds of their religion*” of 2007.²⁶

The Draft Resolution advises member states, in its paragraph 13 (a),

“to provide in their legislation that the exercise of freedom of expression, assembly and association can be limited for the purpose of fighting extremism. However, any such measures must comply with the requirements of the European Convention on Human Rights.”

The description of “extremism” as provided in the document is rather complicated, but it is clear that the paragraph above primarily refers to inciting hatred. I will enter into greater detail on the definition of extremism in the subsection of Chapter IV on anti-extremist legislation.

Recommendation 1805 calls for restricting the criminalization of statements associated with religion in the same way as those associated with ethnicity, which would eliminate the criminalization of “insulting a specific religion.” This topic will also be discussed in a separate chapter. Suffice it to say that these recommendations consider only some of the issues involved and generally do not provide any more narrow or specific concept of “incitement to hatred” and related notions.²⁷

However, clearly discriminatory or inflammatory statements can sound completely different if they are directed at a religion. Of course, statements related to religion are all subject to the same restrictions as any other statements, since international law does not specify otherwise. But it is also true that the Conventions skirt the question of how to understand certain statements of

inequality that arise from religious doctrines. I believe they are right to avoid this issue. After all, almost all of these doctrines were formed long before the era of the proclamation of equality. Since then, they have been subject to a number of transformations, and even today remain subject to varying interpretations. In any case, neither international nor national law has enough authority to effect the transformation of religious doctrines, although both can certainly limit certain public statements on the basis of such doctrines.²⁸

§ 3. The United Nations

The experts chosen for the abovementioned UN seminars, who in a sense are thus endorsed at the highest international level, have tried to introduce more clarity, but being bona fide lawyers they could not invent refinements that are simply not found in international legal norms. All of the experts stressed the principle of restrictions themselves being restricted, the principle of the proportionality of sanctions for violations, and the principle of the need for restrictions “in a democratic society” which itself suggests a specific set of values. In general, these experts echo the comments made by the UN Human Rights Committee, the expert body of the United Nations that serves as the court for the observance of the International Covenant on Civil and Political Rights (ICCPR).

Therefore, it is noteworthy that the UN Human Rights Committee has considered it necessary to include provisions that directly concern hate speech in its recommendations on the application of Articles 19 and 20 of the Covenant. These provisions are in addition to the general principles mentioned in the preceding paragraph:

“46. States parties should ensure that counter-terrorism measures are compatible with paragraph 3. Such offences as “encouragement of terrorism”²⁹ and “extremist activity,”³⁰ as well as offences of “praising,” “glorifying,” or “justifying” terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression...”

48. Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific

25 See <http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?fileID=10247&lang=EN>

26 See <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17569&lang=en>

27 PACE has adopted resolutions on related topics, but they do not contain anything more specific. See, for instance, Resolution 1495 of 2006 : Combating the Resurrection of Nazi Ideology, PACE, <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17427>

28 For example, PACE’s attempt to speak on the topic of the content of religious doctrines is hard to view as successful: see paras. 16 and 17 of Recommendation 1804 of 2007: State, Religion, Secularity and Human Rights, PACE, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17568&lang=en>

29 Concluding observations on the United Kingdom of Great Britain and Northern Ireland (CCPR/C/GBR/CO/6).

30 Concluding observations on the Russian Federation (CCPR/CO/79/RUS).

circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.³¹

49. Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression³². The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events. Restrictions on the right of freedom of opinion should never be imposed and, with regard to freedom of expression, they should not go beyond what is permitted in paragraph 3 or required under article 20.³³

Worth noting is the para. 43 on regulation over the Internet: “Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3 (of Article 19 of the Covenant)”.

When one examines the full text of the “general comments,” one understands the circle of concepts that are linked to the regulation of restrictions on freedom of expression and the related collisions. With regard to the actual incitement to hatred and hate speech, only one fundamental wish is formulated: that special laws against extremism, terrorism, blasphemy, “historical revisionism” and so on should not generate any restrictions on rights and freedoms that would be more stringent than those already provided for in Articles 19 and 20 of the Covenant.

Neither these nor other official recommendations contain any attempt to clarify the restrictions and prohibitions set forth in the Covenant and the other major conventions mentioned above. In many expert reviews,

articles and recommendations on the subject of incitement to hatred and hate speech, national legislators are called upon to more clearly and thus more narrowly formulate the restrictions, but there does not seem to be any agreement on how this clarity should be achieved. Reviews of the relevant literature have been attempted many times and I will not repeat them here; rather, I will provide the recommendation of a reputed organization, ARTICLE 19, as just one example to prove that we still have a long way to go before we reach such clarity. In fact, ARTICLE 19 calls for narrower legal definitions as well as an open list of prohibited grounds of public incitement to hatred.³⁴

I think the reason is that there is no clarity in the interpretation of key concepts of “hatred/hostility” in the phrase “incitement to hatred/hostility”: this is noted, for example, by Toby Mendel, the author of one of the most interesting articles on this topic.³⁵ It is worth pointing out that the words “hatred” and “hostility” are almost always used interchangeably, and there is no common understanding of how they might be distinguished in legal terms. And one often finds these concepts defined with reference to one another, which does not add clarity. For example, the “Athens Declaration on Legislation concerning Defamation of Religion, Anti-Terrorism and Anti-Extremism,” issued in December 2008 by several key figures from international organizations, indicated that:

“Restrictions on freedom of expression to prevent intolerance should be limited in scope to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”³⁶

Mendel cites the attempts of the Supreme Court of Canada to provide the following definition as a positive example:

“Hatred is predicated on destruction, and hatred against identifiable groups therefore thrives on insensitivity, bigotry and destruction of both the target group and of the values of

31 Concluding observations on the United Kingdom of Great Britain and Northern Ireland-the Crown Dependencies of Jersey, Guernsey and the Isle of Man (CCPR/C/79/Add.119). See also concluding observations on Kuwait (CCPR/CO/69/KWT).

32 So called “memory-laws,” see communication No. 550/93, Faurisson v. France. See also concluding observations on Hungary (CCPR/C/HUN/CO/5), paragraph 19.

33 General comment No. 34. Article 19: Freedoms of opinion and expression, UN HRC, 12 September 2011, <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> Notes inside the quote refer to decisions and resolutions of the Committee.

34 See key recommendations in *Prohibiting Incitement to Discrimination, Hostility or Violence*. (London: Article 19, 2012), p. 2, <https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf>

35 Toby Mendel, “Does International Law Provide for Consistent Rules on Hate Speech?” in Michael Herz and Peter Molnar (eds.) *The Content and Context of Hate Speech*, op. cit., pp. 417-429.

36 Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights), Special Rapporteur on Freedom of Expression and Access to Information, OSCE, 15 December 2008, <http://www.osce.org/fom/35639?download=true>

our society. Hatred in this sense is a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.”³⁷

But no matter how one regards this definition, one thing is clear: it is only valid in Canada and does not have the status of a law. The same applies to any other attempts to define the key concepts.

There is also no universally-accepted interpretation of a set of activities that might be covered by the notion of “incitement.” There is a general perception that we are referring to a call for concrete action, especially to a limited type of action, such as violence, for example. But there is no assumption that the statement should be grammatically constructed as a call to act.

§ 4. An attempt to rank public statements based on degree of danger

Worth noting is the attempt to classify the different types of incitement to hatred and hate speech through international law: this is an attempt to rank the measures taken by the State according to the danger of the statements. I refer to the Council of Europe’s Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems.³⁸ The Protocol has not yet been ratified by even half the members of the Council of Europe: as a result, although it has come into force, it still cannot be considered a source of international law. However, the approach that it suggests might offer a way forward: in many cases, the Protocol leaves to the discretion of states how broadly or narrowly to interpret the boundaries used to determine the criminalization of statements.

The Protocol provides that states may criminalize the spread – in this case through a computer system – of any “racist and xenophobic material” that in one form or another incites violence, discrimination or hatred based on race and other characteristics. It also indicates that states may not criminalize any public incitement to discrimination which does not involve incitement to violence or hate speech. Signatory states commit to criminalize racist threats involving the threat of a serious crime, but they may choose whether or not to criminalize racist

insults. Denial of genocide and of crimes against humanity recognized by international courts may be criminalized in general, or only criminalized if they are connected to hate speech, or may not be criminalized at all.³⁹

4. The Contribution of the European Court of Human Rights

Some uniformity could be introduced by enforcement at the level of international courts, and this is partly the case. But we should not exaggerate the successes of international law enforcement in clarifying the regulation of prosecution of incitement to hatred and hate speech. As we have seen above, the UN Committee on Human Rights in its review of cases was unable to offer more clarity beyond what was quoted. As for the OSCE, it does not have its own quasi-judicial authority.

In most cases, it is the practice of the European Court of Human Rights (ECtHR) that is analyzed for its relevance. I have already mentioned one decision of the ECtHR above. One might even say that for the OSCE region, with the exception of the United States, ECtHR decisions form a sort of reference point, even if they are binding only upon the member states of the Council of Europe (de facto, rather arbitrarily). In its ruling on the case *Handyside vs. UK* (1976), the ECtHR declared a formula which has since been repeated several times, including in PACE recommendations. This formula states that freedom of expression “applies not only to the transfer of such “information” or “ideas” that are favorably received or regarded as friendly or neutral, but also those that offend, shock or disturb the State or any part of the population.”⁴⁰ However, this declaration does not dismiss the restrictions on freedom of expression laid down in the Convention.

The ECtHR bases itself not only on the restrictions applied by various articles of the Convention, but also on Art.17 (see above). This does not mean that such actions, including statements against the values of the Convention, certainly constitute a crime, but it does mean that they are excluded from protection by the Convention. Thus, the state is entitled to impose restrictions – including in the form of criminal sanctions – for activities aimed “at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in

37 *R. v. Keegstra*, [1990] 3 SCR 697, Supreme Court of Canada <http://www.canlii.org/en/ca/scc/doc/1990/1990canlii24/1990canlii24.html>

38 Treaty No. 189, “Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems,” Council of Europe, <http://conventions.coe.int/Treaty/EN/Treaties/Html/189.htm>

39 It should be noted that the Protocol is the first international legal instrument in which the issue of “historical revisionism” is interpreted more broadly than simply “Holocaust denial.” The dynamics of criminalization of “historical revisionism” will be discussed in greater detail in the corresponding chapter.

40 *Handyside v. United Kingdom*, 1976, ECHR, <http://hudoc.echr.coe.int/eng?i=001-57499>

the Convention.”⁴¹ From the standpoint of the Convention and the ECHR, it provides grounds for banning neo-Nazi parties, as well as communist parties, radical Islamic parties and others, although each case should be considered individually. And of course, this restriction is directly related to incitement to hatred.

In the ECtHR practice there has never been a case regarding incitement of hatred or hostility on ethnic or religious grounds in which it disagreed with the national court. (I do not refer here to cases regarding anti-government and related incitement.) And this does not necessarily refer to direct public incitement. For example, in 2004 the Court found it legitimate to prosecute a British far right party for its public indiscriminate linking of Islam with terrorism.⁴² The various “Holocaust deniers” have never won a case at the ECtHR either.⁴³ Thus, in these cases the ECtHR has actually so far confirmed that national legislation and law enforcement are complying with the Convention. Although there are some cases from Russia in the ECtHR pipeline that may have a different outcome, it is impossible at this juncture, before the decisions are taken, to refer to any increasing complexity in the Court’s position. The ECtHR has thus not noticeably affected the understanding of restriction of hate speech in international law, although the Court’s confirmation of the important general principle of proportionality of sanctions to prevent abuse of restrictions on freedom of expression and on other freedoms has certain merit.

In addition, the ECtHR has issued decisions on matters which, while not crucial for the regulation of hate speech, are nevertheless important. For instance, in its 1994 ruling on the case “Jersild v. Denmark,” the ECtHR found that the citation of hate speech in the media in the broadest sense, including, for example, interviews, may not itself be prosecuted.⁴⁴

41 “Convention for the Protection of Human Rights and Fundamental Freedoms,” Council of Europe, 1950.

42 *Norwood vs. the United Kingdom*, ECtHR, 2004, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67632>

43 The ECtHR practice with regard to hate speech is rather briefly summarized in by Tarlach McGonagle, *A Survey and Critical Analysis of Council of Europe Strategies for Countering “Hate Speech,” The Content and Context of Hate Speech: Rethinking Regulation and Responses* M. Herz & P. Molnar ed., Cambridge University Press 2012, p. 456-498. See also the review prepared for the seminar held by ECRI in November 2006: Anne Weber, “The Case-law of the European Court of Human Rights on Article 10 ECHR Relevant for Combating Racism and Intolerance,” Expert seminar: Combating Racism While Respecting Freedom of Expression (Strasbourg: ECRI, 2007), pp. 97-113.

44 *Jersild v. Denmark*, ECtHR, 1994, [http://hudoc.echr.coe.int/eng?i=001-5789#{"itemid":\["001-5789"\]}](http://hudoc.echr.coe.int/eng?i=001-5789#{)

5. Decisions of the Council of the European Union

A large part of the OSCE participating States are now also members of the European Union, which is able, unlike the OSCE and the Council of Europe, to establish unified legislative approaches. This is done through the decisions of the EU Council, which are then necessarily implemented in the national law of EU member states, albeit with considerable delay. The legislative practice of the EU countries in the field of our interest is unlikely to have a significant effect on lawmaking in the US and Canada, but it certainly does have an effect on the countries to the east of the EU. Its effect is greater, of course, on those countries wishing to get closer to the EU, but it also has a certain effect on those countries whose policies are formed on the basis of political opposition to official Brussels.

The key EU decision as of 2014 was the “EU Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law.”⁴⁵ The Framework Decision pursues the ambitious goal of ensuring that within the EU all actions motivated by racism and xenophobia are treated equally, whether they are considered to be a crime or not, while recognizing that the full harmonization of legislation is impossible (see paras. 5 and 6 of the Preamble).

The Framework Decision contributes to legislative practice simply by clarifying certain important concepts, especially by determining the targets of hatred, i.e. the population groups concerned. First, “religion” is understood as any form of attitude towards religion. Second, with reference to the conventional nature of the categories of “race,” “ethnicity,” and so on, the Framework Decision states that what is most important is how hatred is directed against individuals based on their direct national or ethnic origin or on their alleged descent from a different race or color. The Framework Decision is thus limited to this list of possible targets of hatred, which are treated as mandatory for legislation. However, countries are of course free to include other prejudices in their laws as well, such as gender, sexual orientation or others.

Article 1 of the Framework Decision requires the criminalization of both incitement to hatred and of “historical revisionism” associated with incitement to hatred. It refers specifically to

public incitement to violence and/or hatred against a group or people of a group, as defined by the characteristics listed above. A further reference is made to such

45 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, Official Journal of the European Union, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008F0913&from=EN>

incitement through the public distribution of various materials. What is important here is that the Framework Decision insists on using strong words like “violence” and “hatred” rather than terms such as “enmity,” for example.

Article 1 also makes reference to public approval, denial or gross trivialization of crimes of genocide, crimes against humanity and war crimes as defined by Articles 6-8 of the Statute of the International Criminal Court or by Article 6 of the Nuremberg Charter, if such a statement is made to incite violence or hatred, as stated above.

Member states are free to limit the criminalization of the above statements only to those cases in which such statements may disturb public order or are threatening or offensive. As for “historical revisionism,” member states may consider only those facts that have been established by a final decision of international and/or national courts. And of course, member states cannot violate their existing obligations regarding the respect of fundamental rights and freedoms, including freedom of expression, freedom of assembly, and so on.

The Framework Decision also contains a rather unusual restriction: countries may criminalize the above statements related to religion only if they can be used as a pretext to act against groups defined by reference to other elements of the list related to race, ethnicity and nationality.

While the wording used in Article 1 of the Framework Decision is very similar to the terminology used in national criminal codes, the subsequent articles make further refinements, including some of a procedural nature. Inter alia, the Framework Decision stipulates maximum penalties varying from one to three years’ imprisonment.

Article 4 stipulates the need for legislation specifically to treat racist and xenophobic motivation as an aggravating circumstance.

Article 5 requires establishing the liability of organizations for the above crimes if such crimes were committed in the organization’s name or in the name of a person occupying a position of authority within the organization. Article 6 even lists options for penalties, including for organizations, which range from withholding public financing to liquidation.

The Framework Decision gave member states a two-year grace period to comply with its provisions and an additional three years to produce a report. The 2014 report⁴⁶ showed no uniformity of legal norms in EU leg-

islation (not only the generally much more diverse range of state-members of the Council of Europe, as mentioned above). And while norms on incitement to hatred are present in one or another form in all EU countries, and would have existed even without the Framework Decision, this is not the case for the norms on “historical revisionism.”

6. The Rabat Plan of Action

Finally, it should be noted that ECtHR decisions and international legal norms themselves only indirectly affect lawmakers and, in most cases, those enforcing the law, through well-known experts who interpret these norms and decisions. Therefore, the abovementioned attempts by the United Nations to systematize rules relating to hate speech and incitement to hatred and at least to issue recommendations are important steps. It should be noted that the OSCE, guided as it is by the principle of consensus, has not dared to do so, although it did prepare the aforementioned guide on hate crime legislation.

The Rabat Action Plan, approved by the UN Human Rights Council in April 2013,⁴⁷ provides the following essential recommendations for lawmakers:

- There should be legislation prohibiting incitement to hatred, since it is directly stipulated by international law;
- The wording of this legislation should not deviate from the language of international law, including Article 20 of the ICCPR. In particular, this means that states should not change the “hard” terms like “hatred” to softer synonyms;
- Restrictions on freedom of expression should not be excessive so as not to upset the balance established, in particular, by Articles 19 and 20 of the ICCPR, which state that such restrictions must be only those necessary in a democratic society and that they should respond to a real social need;
- The restrictions must be clearly stated in the law, as opposed to being stated too broadly or in a vague manner;
- Penalties and restrictions must be proportionate, so that the damage from the restrictions to freedom of

46 Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, European Commission, 2014, http://ec.europa.eu/justice/fundamental-rights/files/com_2014_27_en.pdf

47 UN Human Rights Council Resolution 22/31, Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief, United Nations, 20XX, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/130/20/PDF/G1313020.pdf?OpenElement>

It should be noted that in the same resolution, the Human Rights Council made an implicit distinction between public incitement to violence, which the Council would criminalize, and other forms of hate speech not subject to such specific treatment.

expression would not exceed the damage from the statement;

- Laws on blasphemy and criticism of religion are unacceptable, not only because of their usually discriminatory nature, but because “*religious freedom, consecrated by international standards, does not include the freedom to have a religion free from criticism and ridicule*”;
- There should be a clear distinction between statements that entail criminal liability, those that do not but which may be subject to administrative restrictions or civil action, and those that, while not restricted by the law, may be a matter of concern with regard to tolerance and respect for human rights.

The Rabat Action Plan also highlights the many problems encountered in enforcement. As such, these issues are beyond the scope of this study, so I will limit myself to pointing out an important component of the recommendations relating to the evaluation mechanism for hate speech. The investigation and the court are invited to assess the following six key factors:

- The context of the speech, both the immediate context in space and time, and the broader context of the historical experience of the country;
- The status of the speaker: clearly, the effect of the speech strongly depends on the speaker’s social status;
- The intent of the crime: international law refers to incitement to hatred, and not the mere distribution of texts;
- The actual content of the speech, including not only its literal content but also the style and other features;
- The extent of the speech: this primarily concerns the reach of public statements, not only in terms of the quantity but also of the quality of the intended and actual audience, whose perception of statements is critical to their evaluation;
- The likelihood of criminal liability: of course, the speech is criminal irrespective of whether the effects materialize (for example, pogroms and incitement to them), but one should take into account the likelihood of more serious consequences than the actual hatred incited.

Finally, the Rabat Plan of Action places great importance on the idea that sanctions –civil or administrative sanctions rather than criminal sanctions- should be a last resort in countering the spread of intolerance. It considers the preferred approach to be systematic prevention on the part of state bodies and of citizens themselves and their associations. In this sense, the document reflects the dominant position both of experts and of government officials in most countries.⁴⁸

⁴⁸ At the same time, the above-mentioned criteria is clearly influenced by ARTICLE 19.

Chapter II. Hate Crimes

1. Arriving at a definition

The concept of hate crime arose from the awareness of the specific danger to society posed by ideologically motivated attacks on minorities. The concept first grew on American soil, where white racists perpetrated attacks against black citizens. Since then, it has undergone significant development and has established itself in the research literature,⁴⁹ so that today there is a broadly unanimous understanding of its definition, reflected, in particular, in a guide published by the OSCE in 2009.⁵⁰

The definition is formulated quite simply: “*Hate crimes are criminal acts committed with a bias motive.*”⁵¹ This means that for a criminal act to be classified as a hate crime, the following two conditions must be met: First, the act must be criminal, regardless of motive or aim. Therefore, the crime of “propaganda,” to be discussed in the next chapter, and the crime of discrimination are not hate crimes: stripped of their motive and aim, these actions are not criminal in and of themselves. And thus combating hate crimes is not – or at least cannot and should not be – selective and politicized: the goal is merely to combat such crimes.

Second, the bias motive must be against a particular social category, and not against the victim personally. This means that determining whether or not a crime is a hate crime does not depend on the characteristics of the offender or the victim: rather, it depends specifically on the motive, which is understood as both the personal motivation and the aim of the perpetrator. There are several important aspects to be considered in determining the motive, which will be discussed in detail below. I will now outline them in brief in order to demonstrate that the definition of “hate crime” covers quite diverse acts.

The bias motive of the crime may be the sole motive, or it may be one of a number of primary or secondary motives. Do all of these cases constitute hate crime? Rather than regulated by law, this question is most often settled by judicial practice.

The motive may not necessarily be hatred, although in most cases it is: what is most important is selectivity with respect to the victim, i.e. a discriminatory attitude on the part of the perpetrator. In fact, the motive may not necessarily be any specific attitude towards the victim(s),

although often this is the case. Selectivity in the choice of the victim can be dictated by a certain purpose, which indirectly targets a certain group. For example, the Criminal Code of Slovakia treats not only the bias motive, but also the purpose of incitement to hatred as aggravation. Further, the lists of biases for these two criteria are not identical, meaning that these criteria are indeed different.

Determination of the criterion of discriminatory attitude is closely linked to the definition of the categories of persons who are considered in anti-hate crime legislation: the type of prejudice is interrelated within the specific feature of the group at risk. Anti-hate crime laws are fundamentally non-discriminatory in that they do not specifically protect a given group, such as African-Americans, Catholics, or others, but they do contain a list of types of bias, most often a closed list, which does not protect all minorities.⁵² Accordingly, the characteristics included in the list, which are used as a basis in the law for the determination of the presence of a bias motive, are often called “protected characteristics.”

In fact, there is not always a link between bias and social groups. Since we are referring here to ideologically motivated crimes, the motivation cannot directly be defined by dislike towards one group or another. There are many examples in which the offender has a bias against all of those in ethnic groups other than his own, rather than against any particular ethnic group. There are also cases in which the offender links a given group with social phenomena such as immigration that he considers to be undesirable. The direct motivation for the crime can generally be linked to ideological biases in a rather indirect way: there are, for example, attacks which are perpetrated for the purpose of “initiation” to gain membership in militant groups. The range of motivations is quite diverse, but they can still be visibly traced to certain biases.

Legislation in different countries regulates these issues in very different ways. As a result, there is a great variety of laws on hate crimes.

One important point worth noting is that the scope of anti-hate crime legislation is actually limited by adjacent types of crime, which might also be regarded as hate crimes, but which in fact are not hate crimes.

First among these is the crime of genocide, which is consistent with the definition but is excluded from the

49 See, for instance, this early publication: Jeanine Cogan, “Hate crime as a crime category worthy of policy attention,” *American Behavioral Scientist*, 2002, Vol. 46, No. 1, pp. 173–185.

50 *Hate Crime Law: A Practical Guide* (Warsaw: ODIHR, 2009), <http://www.osce.org/odihr/36426>

51 See key terms explained, *Ibid.* pp. 16–28.

52 The term “minority” is used here and throughout the text to describe past or present threats or discrimination that the group has experienced, rather than as a mathematical term.

category in question due to the particular scale of the crime.

Second, there is terrorist activity, which often is also quite consistent with the definition of hate crime, but which is treated separately in all jurisdictions, as it is considered more dangerous. The distinction between acts of terrorism and hate crime is not easy to spot: in some cases, hate crime can have the same basic features as a terrorist attack, in that it is aimed at intimidating the government and/or the public for political purposes. This distinction has not yet been studied scientifically, and certainly is not regulated in national legislation. For example, in the Russian Federation, with the exclusion of the Northern Caucasus, enforcement practice is to categorize hate crimes involving explosives as terrorist attacks. It is also possible to qualify a crime as both a hate crime and a terrorist act. In the US, official records of terrorists and hate crime perpetrators overlap by 3 to 5 percent.⁵³ Of course, this issue still requires further clarification.

It is important to determine from the outset why one should bother introducing the concept of “hate crime” into legislation. After all, such crimes are punishable regardless of the motive. Several explanations are usually provided in response.

One group of explanations is found in the socio-political sphere. In this case, the reason emphasized is the need to draw public attention to the issue and to focus law enforcement efforts on it.

Because hate crimes are fraught with the potential for social conflicts and political instability on a much greater scale, it is important for all countries to introduce anti-hate crime legislation. This is particularly true for those countries that have experienced a period of instability in their recent history, especially ethnic- or religiously-tinged armed conflicts.

Hate crimes are both an extreme and a blatant manifestation of discrimination, given the media attention that they attract. They significantly affect the self-awareness of the social groups which are subjected to such attacks, and they cause, or at least ought to cause, a desire in society to protect these minorities. This motivation is more common in countries which are more advanced in terms of equality, anti-discrimination and the protection of minorities.

53 This is the subject of a stand-alone study, *Analysis of Factors Related to Hate Crime and Terrorism. Final Report to the National Consortium for the Study of Terrorism and Responses to Terrorism*, (Washington DC: National Consortium for the Study of Terrorism and Responses to Terrorism, 2012) http://www.start.umd.edu/sites/default/files/files/publications/START_AnalysisofFactorsRelatedtoHateCrimeandTerrorism.pdf

Often, but not always, of course, hate crimes are committed by members of groups that specifically pursue such violence. The groups in question are often linked to the traditions of radical nationalism, neo-fascism, and others. Accordingly, the society might have a strong anti-fascist or similar motivation.

Another group of explanations is purely legal. They take into account two factors – the motive of the crime and the damage incurred.

The motive of hatred may be considered on a par with other particularly reprehensible criminal motivations that are usually treated as aggravation in criminal law.

Apart from causing “conventional” damage to the victim, hate crimes also cause additional harm. First, there is the additional damage to the victim that issues from the common experience of humiliation and fear of a repeat attack. Second, all those who share with the victim the attribute that caused the crime also experience similar feelings of fear and humiliation.

Finally, because experience shows that hate crimes are especially latent in our society, there is a belief that treating them as a separate category somehow compensates for this feature. This argument is related to the major issue of the collection and categorization of statistics on hate crimes. The scope and quality of knowledge about the subject largely influence both the social atmosphere and the practice of law enforcement. This topic is beyond the scope of this book, but it should be kept in mind. It should be noted that important recommendations on data collection have been produced within the OSCE framework.⁵⁴

2. Distinct offence or aggravation?

The legal arguments provided above, with the exception of the last one, all suggest that hate crime should be prosecuted more severely than similar “ordinary” crime. But in reality, this conclusion is neither obvious nor universally accepted. Basically, there are three options for the criminalization of hate crimes:

The first option is to treat the hate motive as a general aggravating circumstance that is applicable to all crimes. In this case, the hate motive is usually listed along with other common aggravating circumstances.

The second option is to treat the hate motive as such only for certain crimes. In this case, the motive is usually indicated in specific parts of the relevant articles of the criminal code and is referred to as “specific aggravation.”

The third option is to classify hate crimes as a separate

54 *Hate Crime Data-Collection and Monitoring Mechanisms: A Practical Guide* (Warsaw: OSCE/ODIHR, 2014) <http://www.osce.org/odihr/datacollectionguide?download=true>

corpus delicti, to be reflected in separate articles of the criminal code, if at all.

The latter option has the advantage of attracting public attention, but it also contains a procedural flaw – when charges are pressed, unless the motive is proven, the accused will escape punishment for the “base offence” as well.

As we will see in the overview of national legislation that follows, there are also countries which combine the different options.

Finally, some countries in the OSCE region do not identify hate crime in their criminal law at all. This is the case for Estonia, Iceland, Ireland, Luxembourg, Monaco, Mongolia, Montenegro, San Marino, the Netherlands, Turkey and the Holy See. There are also several US states in which this is the case: they are Arkansas, Georgia, Indiana, South Carolina and Utah.

There has been and continues to be a debate on the introduction of anti-hate crime legislation in some of these countries and/or US states. For example, in Turkey, in the fall of 2013 the government began discussing draft amendments to the Criminal Code which would define hate crimes as “crimes committed based on someone’s [sic] or some group’s language, race, nationality, skin color, gender, disability, political views, philosophical beliefs or religion.” However, elements such as sexual orientation and ethnicity were omitted, despite the fact that these are the most problematic categories for Turkey.⁵⁵

In Germany the concept of hate crime is also absent from criminal law, but the concept of “motive based on prejudice” does exist in the Criminal Code, and is applicable to murder. Furthermore, in its 1993 decision, the German Supreme Court included the racist motive in this list. Thus, Germany has only recently begun to take the hate motive into account, starting, as have some countries before it, by treating it as an aggravation to murder.

The example of Germany illustrates how the concept of hate crime can exist in a country and be applicable even if is not defined in the law of that country. For instance, it can be used in the development of criminal and other policies and in gathering statistics.⁵⁶

Generally speaking, it is possible for the concept of hate crime to be included in law enforcement practice but not in legislation. This is precisely the approach taken in the Netherlands. Although the Netherlands does not

make the hate motive an aggravating circumstance in the Dutch Criminal Code, the operating procedures of the Dutch prosecutor’s office contain an instruction requiring the prosecutor to seek a 50-100% more severe punishment if the hate motive is established in the crime. This standard was set in November 2011. However, experience has shown that this approach does not always work de facto.⁵⁷ Of course, Criminal Code hate crime provisions may also fail. However, in accordance with the formal approach adopted in this book, we will not consider the Dutch practice or other similar practices to be on a par with the introduction of the concept of hate crime into law.

The approach of defining hate crimes as separate corpus delicti is not as common. While Bulgarian legislation includes such broad-based crimes as violence motivated by hatred (Art. 162 (2) of the Criminal Code) and group attacks with the hate motive (Art. 163 of the Criminal Code), the hate motive as a specific aggravation in cases of murder and grievous injuries was introduced only subsequently. The Hungarian Criminal Code features similar provisions in its Art. 216 as adopted in 2012. In the Czech Republic, para. 2, Art. 352 of the Criminal Code includes a combination of violence motivated by hatred and the threat of such violence or of “causing significant damage.” In Slovakia, the threat of murder or violence against a group of people is considered a distinct offence if it is motivated by hatred towards this group (para. “a” p. 2, Art. 359 of the Criminal Code with reference to Art. 140 of the Criminal Code). In Poland, Art. 119 of the Criminal Code includes both attacks and threats based upon a number of group characteristics and incitement to commit such acts. Murder motivated by hatred is treated separately in the Polish Criminal Code. In Italy, one finds similar wording in a 1993 law, “On urgent measures concerning racial, ethnic and religious discrimination,” (Article 1 of Act 205 of 25 June 1993). However, this same Act introduced the hate motive as a general aggravating circumstance.

At the heart of the debate is the following question: should we consider in the same manner laws that feature violence or the threat of violence as the aggravating circumstance for incitement to hatred? Theoretically, such a norm is too narrow, since it posits incitement to hatred and the act of propaganda as the basic corpus delicti, with violence considered simply as an additional attribute, i.e. as a method of incitement to hatred. At the same time, in those cases in which there are no other legal provisions

55 “Ethnicity, sexual orientation excluded in hate crime draft presented to Turkish Cabinet,” *Hurriyet Daily News*, October 27, 2013, <http://www.hurriyetdailynews.com/ethnicity-sexual-orientation-excluded-in-hate-crime-draft-presented-to-turkish-cabinet.aspx?PageID=238&NID=56925&NewsCatID=339>

56 *Hate Crime Data-Collection and Monitoring Mechanisms*, op. cit., p. 13.

57 *ECRI Report on the Netherlands (fourth monitoring cycle)*, ECRI, October 15, 2013, p. 13 <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Netherlands/NLD-CbC-IV-2013-039-ENG.pdf>

on hate crimes, these norms may effectively play that role. This used to be the case in the Russian Federation, for example. Currently, in the Former Yugoslav Republic of Macedonia (FYROM),⁵⁸ the use of violence and threats to security are considered as one possible means of incitement to hatred (Art. 319 of the Criminal Code): the FYROM Criminal Code includes no other *corpus delicti* that could be associated with hate crimes. The same can be said about Art. 261A of the Criminal Code of Switzerland, but this article generally covers everything relating to the issue of discrimination. Interestingly, the wording of Art. 233a of the Criminal Code of Iceland, which along with insults, threats etc. refers to “other means” of a public attack against a person or a group of persons, apparently does not cover the actual violent crime, but may apply to some forms of harassment. For the remainder of this discussion, I will base myself on the understanding that countries whose legal systems feature special provisions on hate crimes should not resort to using the specific aggravation of violence clauses in articles of the Criminal Code regarding incitement to hatred in their stead. However, it would be impossible for me to say whether or not this assumption corresponds to the enforcement practice of the OSCE region as a whole.

English law⁵⁹ is often cited as an example of a case in which hate crime is introduced as a separate *corpus delicti*, though this description is not entirely accurate. The Crime and Disorder Act of 1998, as amended by the Anti-Terrorism Crime and Security Act of 2001, defines hate crime as a separate crime against the person and against property, respectively, in its Articles 29 and 30. However, it does so only through reference to the concept of the hate motive as a general aggravating circumstance, as defined in Art. 28. However, para. 1c of Art. 29 refers to “common assault,” which would not be a crime by itself, if it were not for the motive of hatred: as a result, this paragraph presents a hate crime as a substantive offence.

The hate motive is treated as a general aggravating circumstance in the following countries: Albania, Andorra, Armenia, Austria, Azerbaijan, Belarus, Canada, Croatia, Cyprus,⁶⁰ the Czech Republic, Denmark, England, Finland, France, Greece, Italy, Kazakhstan, Latvia, Liechtenstein, Lithuania, Malta, Moldova, Norway, Romania, the Russian Federation, Serbia, Slovakia, Spain, Sweden, Tajikistan,

Turkmenistan, Ukraine and Uzbekistan. It is also treated as such in all US states, with the exception of Arkansas, Georgia, Indiana, South Carolina, Utah and Wyoming.⁶¹

An approach involving specific aggravation is used in the legislation of Armenia, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, the Czech Republic, France, Georgia, Germany (see the description above), Kazakhstan, Kyrgyzstan, Lithuania, Moldova, Poland, Portugal, the Russian Federation, Slovakia, Slovenia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

As can be seen from a comparison of the above lists, many combinations of approaches are possible.

The Czech Criminal Code distinguishes hate crime as a separate *corpus delicti* (§ 253, p. 2) and the hate motive as both a general and a specific aggravation. It is noteworthy that the lists of biases in these approaches are not the same: in contrast to the case of general and specific aggravation, the *corpus delicti* of the article provides a closed list of characteristics. While this list does not include the “class” attribute, it does include such characteristics as “political views.” This may reflect the coexistence of the concepts of “extremism” and hate crimes in the Czech Republic.

In neighboring Slovakia, the definition of hate crime as a separate *corpus delicti* appears to be quite confusing. It is based on the concept of crimes against groups that contain neither mention of the actual motive, nor mention of a method to identify the group (Art. 359 of the Slovak Criminal Code). The crime would be considered to be a hate crime under the condition of application of the specific feature that refers to one or another motive considered as an aggravation: these motives include both hatred and incitement to hatred.

In Italy, as already mentioned, there is also a general aggravating circumstance, as well as a separate offence with a description that combines incitement to violence and violence itself. Upon first examination, it would seem that this would mean any kind of violence, but the same article of Act 205 of 25 June 1993 introduces the reservation that this article applies only if the case in question is not a felony; thus, it refers only to cases of racist violence which are not considered to be especially dangerous.

The differences among the various approaches do not necessarily reflect conceptual differences. Often, certain regulations have been adopted on ad hoc basis, and are then superimposed on other regulations. This same process of the formulation of legislation can also proceed at a different rate in different countries. For example, in the Russian Criminal Code, which came into force in 1996,

58 Hereinafter I will use the abbreviation FYROM for the Former Yugoslav Republic of Macedonia.

59 I refer here and in the rest of the text specifically to the legislation of England: other parts of the United Kingdom have slightly different laws.

60 For the purposes of this analysis, I do not refer to the self-declared Turkish Republic of Northern Cyprus, or to any other self-declared states in the OSCE region.

61 See the table provided in the annex for a description of the variety of legislation in different US states.

while the hate motive was originally mentioned only as an aggravating circumstance for murder, later the list of such articles was noticeably broadened. At the same time, in many of the post-Soviet countries whose legal systems hew closely to that of the Russian Federation, the hatred motive has either remained confined within one article, such as in Azerbaijan and Kyrgyzstan, or it has been extended in a limited manner, as is the case in Uzbekistan. And of course, the practical importance of keeping both general and specific aggravation in the Code is highly dependent on the culture and traditions of law enforcement in the country in question. In Russia, for example, the general aggravating circumstance is almost never applied,⁶² but Russian courts actively rely upon similar specific aggravations.

3. Determining the motive

Before we move to the broader subject – to the classification of types of bias, or in other words “protected characteristics,” it is worth taking a moment to examine the different ways in which the motives that constitute hate crime may be understood, regardless of the types of targets of the offence.

Hate crimes, as is evident from the term, suggest that, as a rule, the motive of the offender is hatred. However, in reality, this definition cannot be applied in all cases, as will become clear in the discussion below. There are at least two reasons: first of all, it is often difficult to prove the emotional state of the offender. This creates considerable challenges for investigators.

Secondly, strictly speaking, the perpetrator does not necessarily feel explicit hatred. For example, he/she might harbor the assumption that members of a certain ethnic group or “race” are parasites who are harmful to society and who ought to be eliminated. Of course, a psychologist could find that hatred is a component of such a mindset. However, subjectively, the offender may not be aware of such hatred, and the prosecutor would definitely not be able to prove its existence. Another, no less realistic example is the case of neo-Nazis who murder the homeless. They may be doing so not because they consider it to be their goal, so are not acting upon an attitude towards the homeless, but because they do not value the lives of the homeless and see the killing as a way to “practice” murder before they move on to other victims. It should be noted, however, that ideologically motivated attacks on the homeless are most typical. In the final analysis, such killings are usually considered to be hate crimes, because their motive features a discriminatory approach, usually

called a bias, which is directed against a group, in this case the homeless.

It would seem that referring to the notion of discriminatory selection of the victim is more logical than making reference to the perpetrator’s personal emotions: emotions may vary, but it is impossible to deny the obvious and even grossly unequal treatment of different groups on certain grounds in the motive of the perpetrator, and this unequal treatment is always connected with the rational motive in some way.

At the same time, the other side of the equation also deserves attention: for example, an attack on a homosexual or on a woman might be motivated not by homophobia or misogyny on the part of the perpetrator, but by the assumption that a homosexual or a woman will offer less resistance. How should one characterize such a crime, if a discriminatory motive related to sexual orientation and gender differences is found in the legislation? Is this attack an example of a mixed motive, which is examined in further detail below? Or should one choose between a motivation deriving from the ease of assault and a motivation involving some hostility? And alternatively, could the belief that the chosen victim is an easier target be considered a bias, in the sense that it should lead to harsher punishment? There are no clear responses to these questions.

Therefore, the model of anti-hate crime laws based on the perpetrator’s discriminatory selection rather than on the emotions of the criminal is just as complex in terms of enforcement.

Finally, the purpose of the crime may or may not be directly related to the hate motive. The offender may attack members of a group with the aim or intent of achieving the expulsion of this group from the country, for instance. Or, the aim may be to rob them or to beat them up. However, in a hate crime, it is the motive that is most important, and not the aim. The fact is that it is not always easy to distinguish between the two motives in a given case.

Due to the difficulty of proving the motive in both cases, lawmakers sometimes specify in the law itself that the actions of the perpetrator may indicate the motivation of the hate crime. This is the case in just three European countries. In France, it is assumed that the offender might, before, during or after committing the offence, make statements that in one form or another harm the honor and reputation of the victim or of a group associated with the victim. And Art. 28 of the United Kingdom’s “Crime and Disorder Act” of 1998 states that, “at the time of the offence, or immediately before or after the commission, the perpetrator demonstrates hostility towards the victim based on affiliation (or presumed affiliation) of the

⁶² No official data has been published on the subject, but this conclusion can be drawn from the extensive experience of the “SOVA” Center.

victims with a particular racial or religious group.”⁶³ This formulation is also used in Malta.

The motive of “hatred” or a similar emotional state is used in the definition of hate crimes in almost all of the countries of the Commonwealth of Independent States (CIS), as well as in Greece, Portugal, FYROM, Belgium, Serbia and Lithuania. These emotions are usually defined as “hatred,” “hostility” or “enmity.”

Belarus, Ukraine, Uzbekistan and FYROM have retained the motives of “discord” (or “strife”) from Soviet legislation: these terms can be understood to be “soft” synonyms of “hostility.” In general, the term “discord” is more problematic because it implies some kind of relationship between the perpetrator and the victim, and in order to determine the motives of the criminal, the victim’s ideas are generally immaterial. Georgia has extended the list with the addition of the word “intolerance,” while Belgium also includes the term “contempt.”

Significantly, more and more countries are now using neutral language, in which they limit themselves to suggesting that there is some discriminatory connection between the criminal motive and the identity of the victim. The types of neutral wording used include: the causal relation “because of” (Bulgaria, Poland, Romania and Serbia), “the reason for the crime is rooted in” or “the motive is based on” (Denmark, Norway, Finland, Austria, Bosnia and Herzegovina, Croatia and Albania). In Sweden and Hungary, the criterion is a direct “affiliation” of the victims with a given group as a motive. The wording may also be more elaborate, such as in the case of France – “because of the actual or presumed affiliation or non-affiliation of the victim.”

Germany uses the term bias which is likely to describe the views of the offender rather than his or her emotional state.

A broad interpretation is possible for expressions such as “racist motives,” as used in the legislation of Cyprus and Latvia, or “racist or xenophobic motive,” as used in the laws of Liechtenstein and Bulgaria, as well as, in the laws of Italy and Andorra, though in the latter two countries this formulation exists together with other motives.

Sometimes the chosen wording suggests specifically conscious discriminatory behavior which is directed not only against the victim who has been chosen in a discriminatory manner, which is also aimed at the enunciation of certain discriminatory ideas. In Switzerland, this is called “*assault with intent to discriminate*.” Slovenia assumes the aim of the crime to be the violation of equality on a number of grounds. Spain defines hate crime as a crime committed

“with the motive of racism, anti-Semitism or any other form of discrimination.”

Tajikistan, Azerbaijan and Armenia have added “*religious fanaticism*” to the emotional motives of hatred, though this would seem to be more of an ideological ground than an emotion.

Lithuania uses the term “hatred” as the offender’s ideological message: in this interpretation, the crime is committed “*to express hatred*.”

Of course, there are also mixed approaches. In the Criminal Code of Slovakia, hate crime is defined by indicating “hatred” as the cause, but the general aggravating circumstance is formulated as “*on the basis of race...*”

Canada uses a broad formula: “*the crime was motivated by bias, prejudice or hatred on the grounds of... or any other similar factor*.”⁶⁴

In Italy, the previously cited 1993 law contains wording that refers to the motives of hatred and discrimination, but it also features a broader formulation that simply suggests a link between the motive and ethnicity, race or religion.

Bias is inherently linked to the notion of group identity, but here it is important not to confuse the perspective of the perpetrator with that of the victim, or with certain more or less generally accepted notions of group identity. For example, the victim of a murder may have considered himself a Spaniard, while the killer thought him to be an Italian; or, in another scenario, perhaps the victim considered himself primarily to be Catalan, while most people would consider him to be a Spaniard, and the killer perceived him as a “southerner.”

Only occasionally do we find a direct statement in the law that refers specifically to how the victim and the corresponding group to which he/she belongs is perceived by the perpetrator. This is the case both in England and in Malta. The law in France, in Hungary and in a number of US states refers to the “*actual or perceived*” identity of the victim. Typically, lawmakers do not include these details directly in the law, placing their trust in law enforcement. If anti-hate crime legislation is no longer a novelty in the country, law enforcement authorities are usually able to handle the matter, since it is the motive of the criminal that is important, rather than the views of the victim or of third parties.

However, it should be noted that this does not prevent third parties, i.e. the public at large which is concerned about hate crimes, from trying to draw attention to the “true” identity of the victim, or even of the criminal. This widespread approach assumes the naturalist, inherent character of ethnic or other group identity. One should

63 “Crime and Disorder Act 1998,” Legislation.gov.uk.

64 “Criminal Code of Canada,” Government of Canada, Justice Laws website.

bear this in mind, as law functions in society with all of its prejudices. Among these prejudices there is not only the discriminatory treatment of certain groups, but also the naturalist approach to identities, which are actually quite variable social and socio-psychological constructs.

The laws of various countries reflect in different ways this idea of the “reality” of social groups that are united on ethnic, religious and other grounds. There is no country that would explicitly state in the law that no such “reality” exists, which is understandable: the criminal code is not the place for this kind of discussion. Therefore, a distinction can be made between countries in which laws are formulated either containing or lacking an implication of the “real” existence of groups.

The “realist” countries are a distinct minority. Austria assumes “group membership,” i.e. the group is considered to be something real. The French wording quoted above apparently also assumes the reality of the group. Of course, all of these terms are not necessarily to be understood literally, but this determination is left to the discretion of the court.

The Criminal Code of the Czech Republic refers not to a group, but to the “*real or perceived*” properties of the victim. In my opinion, this sounds much more appropriate considering the true nature of a criminal offence.

Finally, as we have seen above, most countries have neutral formulations as regards the category of “affiliation” of the victim, since they deal only with the emotional motivation of the perpetrator or with the ideas and concepts that he/she uses when choosing a victim.

Anti-hate crime laws identify as victims not only those who, according to the perpetrator, were affiliated with the group, but also those who were somehow associated with it. The simplest examples of this are: being married to a representative of the group hated by the criminal, being a neighbor of a member of such a group at the time of the offence, and being involved in the protection of a member of such a group. However, only English (Art. 28, Crime and Disorder Act 1998) and Maltese legislation explicitly take into account the connection of association. In Slovakia, with reference to the perpetrator’s choice of the victim, the characterization is the “*connection with*” persons, race, and other features, which may suggest an association of a certain kind. Thus, in those countries in which the choice of the victim on the basis of “affiliation” with a given group is not a criterion, consideration of association is left to the discretion of the court.

Another real motive for hate crimes is when the choice of the victim is not made on the basis of associating him/her with any group, but rather on the basis of the non-association of the victim with a specific group. For example, many aggressive racists in Russia attack anyone who is not

Slavic in appearance.

Strictly speaking, this option is included if the law is formulated with reference to the bias, rather than through the definition of a group of victims. One example would be a formulation referring to the choice of victim “on the grounds of attitude towards religion,” rather than a formulation with wording such as “motivated by hatred against a particular religious group.” However, law enforcement authorities may not always understand the difference.

If the law is formulated through affiliation or any other positive relationship of the victim with the group, then the definition it contains will not cover overt hate crimes. Some countries take this into account and add such wording to their definition. Thus, the French Criminal Code expressly states that the motive may be based either on membership or on non-membership in a group. A similar clause is used in the Hungarian Criminal Code.

A separate and no less serious problem is proving the motive of hatred and, for that matter, any other kind of subjective motive. Different countries have quite different ideas about what kind of evidence may be accepted by the court.⁶⁵

The issue of proving the motive is closely connected with another question: what if the offender had several motives? The simplest example would be racially-biased robbery.

In general, anti-hate crime legislation does not directly address proving the motive of hatred, and such proof is achieved through the practice of law enforcement. The exceptions to this rule, which are France, England and Malta, have already been discussed above.

There are frequent instances in which the law does regulate the existence of multiple motives on the part of the perpetrator. In England, a hate crime is treated as such if it is committed out of hatred, in whole or in part. In the Criminal Code of Malta, Article 222A, para. 5 on hate crimes stipulates that the presence of other motives does not remove the offence from the scope of the article. Article 377bis of the Criminal Code of Belgium requires that hatred and similar emotions be “one of the motives of the crime.” Articles 422.55 and 422.56 of the Criminal Code of the State of California suggest that motivation may depend “fully or partially” on the bias; the bias motivation does not have to be either the main motivation or essential for the commission of the crime, but it must be a substantial motivation.⁶⁶

⁶⁵ This rather cumbersome issue is beyond the scope of the present study. For a brief introduction to the subject see: *Hate Crime Laws: A Practical Guide*, op. cit., pp. 51-53.

⁶⁶ For more on the multitude of motives see: *Ibid.* pp. 53-55.

4. “Protected characteristics”

All hate crime laws must indicate the list of characteristics that are the object of the perpetrator’s feelings of hatred, or that are used by the perpetrator to arouse such feelings, or based upon which the perpetrator selects the victim.

In general terms, we can say that these characteristics, sometimes referred to as “protected characteristics,” describe groups of people who are linked through the perception of the characteristics they share. It can be argued that hate crime legislation protects these groups. While the characteristic is always formulated in a non-discriminatory way, so that the aggregate of groups based on any characteristic covers the multitude of people in the country, it is also true that historical circumstances affect which groups are most commonly perceived as protected groups in a given society.

The history of the country in question is generally an important factor in the selection of “protected characteristics” for hate crime legislation. However, no country is free of aggression on religious or ethnic grounds, and in some countries on racial grounds as well. As a result, historically, these characteristics were the first ones to appear in hate crime laws. The conservatism and inertia of legislation are important factors at play here: a significant part of society may believe it important to take some new characteristic into account in the law, but a no less significant part of the society may oppose such a step. One quite prominent example of this phenomenon is the characteristic of sexual orientation. Lawmakers also consider the extent to which the protected characteristics will be applicable in the course of the criminal investigation.

Still, there are some general policy considerations that can be made for the determination of the list of characteristics, even though these considerations may not be taken as universally applicable criteria.

Racism, as defined by skin color and other similarly superficial features, was a starting point for the initial formulation of the concept of hate crime in the US. Since American tradition in this area has strongly influenced European practice, the “immutability” of the characteristic of race has played a major role in the validation of the selection of elements to be used as protected characteristics. The fact that a person suffers due to an immutable characteristic is an aggravating circumstance. Meanwhile, even skin color can sometimes be changed, as can gender. Characteristics such as disability or height are, by contrast, much more difficult to change. And while religion is technically quite easy to change, this characteristic is protected almost everywhere.

Currently, the prevailing idea is that a protected characteristic must be one which, first, is important for the victim, who suffers additional damage in connection with

the attack: it is this damage which leads to the aggravated offence. Second, a protected characteristic is related to a group identity which gives rise to negative side effects. This is as opposed, for example, to an entire category of offences such as crimes against children. Finally, the protected characteristic used in hate crime laws should, preferably, not coincide with the characteristics used to describe substantive crimes of a different kind – crimes against politicians, police officers, and other state officials, that have been extensively used in existing national legislation for many years.⁶⁷

Of course, the many considerations detailed above do not provide any definite, uniform or compulsory system for national lawmakers. Therefore, it is logical that the national legislation discussed below is marked by great diversity.

I will now proceed to analyze the various types of protected characteristics.

§ 1. Race

The term “race” is quite controversial in legal discourse, and is considered to be virtually unacceptable in academic discussions today. Nevertheless, this rejection of the term “racism” does not negate the existence of the phenomenon known as racism and, consequently, racist motivation of crimes in the narrowest sense of the term. Racists usually understand “race” in accordance with outmoded views on this subject, which were dominant in society one or two generations earlier. In the United States, African Americans are still treated as a “race” in official documents, but Latin Americans are an “ethnicity” (and this term is reserved for them). In the UK, natives of the Caribbean island nations are considered a “racial group.” In other words, the characteristic of “race” as encountered in the laws of different countries is defined differently in each instance.

Lawmakers often understand the conditionality of the term, and rely on the common sense of judges in their interpretation. Sometimes, as is the case in Belgium, they indicate the nuance in the law itself by introducing a qualification: “the so-called race.”

Nor can we say that race corresponds to skin color: although historically these two classifiers are obviously related, there may not always be a simple match. Skin color is also a highly conventional concept. For example, in Latin America and in the American South in the 19th century, there was a stable and complex system of skin-color gradation for persons of “mixed blood” who had “white,” “black” and Native American components, but this system was not unambiguously related to skin

⁶⁷ Ibid. pp. 37–40.

color and to general appearance. Attitudes toward people depended on “percentages in their blood,” but this was not determined by appearance. In fact, a momentary act of aggression formally motivated by the same complex system was actually motivated based on appearance.

Thus, separate or combined references to “race” and “color” in hate crime laws refer to the same bias as a motive for the crime.

Of course, in accordance with the linguistic usage established by international law,⁶⁸ terms such as “racial hatred” refer not to race itself, but to a much wider range of features that are related in one way or another to racial, ethnic and even national differences.

For example, the Maltese Criminal Code offers the following formulation in Art. 222A which provides an explanation of the terminology used to describe the hate motive as a general aggravation: “in this article, “racial group” means a group of persons defined by reference to race, descent [ancestors], colour, nationality (including citizenship) or ethnic or national origins.” But the law might as well not define it clearly. For example, the general aggravating “racist motive” in the Criminal Code of Latvia clearly corresponds to the racial, national or ethnic characteristic mentioned in the hate speech article of the same Criminal Code.

Race is one of the most common terms encountered in hate crime legislation. Of all the countries that have hate crime laws containing lists of characteristics, the protected characteristic of “race” is missing in Denmark, in Germany and in FYROM, but in practice this probably just means that the corresponding crimes are classified as being committed with a motive related to ethnicity.

§ 2. Ethnicity, National Origin and Nationality

Protected characteristics in this category are by far the most common ones used in hate crime legislation. However, here again, there is no fixed terminology, and this is not simply a matter of differences between the languages in which the laws are written.

The most significant conflict arises between the terms

“nationality” and “ethnicity.” Although the term “nationality” refers to citizenship in English and in a number of other languages, the expression “national minority” refers to a certain ethnic group within the general population, though not to just any community, and the approach varies by country. Thus, there is some flexibility in interpreting the meaning of the terms “nationality” and “national origin” with respect to the motive of the crime, whether or not they refer to ethnicity and ethnic origin, or to nationality and country of origin. Therefore, in the comparative table of legislation at the end of this book, a check was placed in the “ethnicity” column when the meaning of the term was definitely not a reference to current or former citizenship, but namely to “ethnicity” understood as ethnic origin. In case of doubt as to the original intent of the legislator in using the term, checks were placed in the “nationality” and “national origin” columns. However, I can not vouch that the table is 100% accurate in this respect.

In some cases, lawmakers try to clarify the terminology. English law, for example, uses the term “racial group,” but specifically points out that the term encompasses a group of people based on race, color, nationality (including citizenship), ethnic or national origin. English law also specifies that the term “religious group” is understood not as a religious organization, but as a group of people united on the basis of attitude to religion, or lack thereof.⁶⁹

However, of course, in many cases the enforcement can not effectively distinguish the fine line between the terms “nationality” and “ethnicity” in the law, if the law is not accompanied by a clear and credible clarification in this regard. Enforcement should either focus on a “common sense” that in reality is not the general opinion, or political allusions to certain terms. In many countries, certain groups are referred to as national groups, while others are referred to as ethnic groups, but this distinction is either ordinary or academic (and also not codified). For example, the correlation of the use of both terms – “national hatred” and “ethnic hatred” – in Moldovan legislation, considering the old separatist conflict in Transnistria, is a matter for conjecture, as is a debate on the kinship or remoteness of the Moldovan and Romanian peoples. On the other hand, Art. 177 of the Criminal Code of Turkmenistan or Art. 156 of the Criminal Code of Uzbekistan mention incitement of national and ethnic hatred separated by a comma, but the word “national” here is not a reference to citizenship, as the same article in both countries refers to “humiliation of national dignity,” making the distinction between the terms rather difficult to comprehend.

⁶⁸ This is explained, for instance, in previously cited ECRI General Policy Recommendation No. 7: “Racism” shall mean the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.”

The word “racism” is further qualified in a footnote: “Since all human beings belong to the same species, ECRI rejects theories based on the existence of different “races.” However, in this Recommendation, ECRI uses this term in order to ensure that those persons who are generally and erroneously perceived as belonging to “another race” are not excluded from the protection provided for by the legislation.”

⁶⁹ UK Crime and Disorder Act of 1998 (as amended by the Anti-terrorism Crime and Security Act of 2001), op. cit.

The above characteristics are the most common ones in the legislation on hate crime. In countries that have such legislation these protected characteristics are inevitably present in one form or another. In Germany, no specific characteristics are formulated at all, since the very concept of hate crime is in its infancy, but I suppose if some characteristics were to be considered by the court, these would, first of all, be racial and ethnic ones. The only exception is Portugal, where the statement of aggravating circumstances features motives of hatred on the grounds of racial, religious or political hatred, but perhaps the word “racial” here is used here in the broad sense, as mentioned above.

Presumably, the protected characteristic of the language of the victim is also closely linked to ethnicity. As a rule, the victim’s language may rather indicate that he/she is selected based on ethnicity, but sometimes the language itself is still distinguished as a separate characteristic. This is done in Albania, Belgium, Canada, Lithuania, Romania and Slovenia. The number of countries distinguishing this characteristic appears to be decreasing.

§ 3. Religion

One of the main and oldest biases is religion, but there is also no uniform definition of religion either for our purposes.

In the law, we usually find reference to hatred or other motives in relation to people based on their religion, but there may be other formulations as well. For example, in the Russian Federation two approaches are used: “religious hatred” is mentioned as a hate motive, while the object of hate speech is described as a person’s “attitude towards religion”; it is hard to say whether these two descriptions refer to the same thing. Many countries use the terms “beliefs” or “convictions,” which may also include non-religious, but some other philosophical and ideological perceptions and corresponding identities. In Belgium, the word “religion” does not appear in the list of prejudices at all, as it is replaced by the much broader formulation “beliefs and convictions.”

In the countries of the OSCE it is common for believers not to identify themselves with a particular faith, or to do so, but with only a nominal connection with a specific religious organization. In some cases, such a connection is even denied by the believer. Since the motive occurs in the mind of the offender, who is usually unfamiliar with the victim’s specific views, it makes little sense to determine the motive of hatred through membership in a particular religious organization of which the offender may know nothing. The offender focuses only on the religious signs or symbols that are apparent to him, such as clothing, behavior or physical presence in a church. Notwithstanding this fact, the hate motive in Austria

is formulated through membership in religious organizations, and, in principle, one can imagine situations in which this can be a workable solution.

There are also countries in which the biases associated with religion are not included in the definition of the hate crime, though this is an exception. It would seem that this characteristic is lacking in Germany. It is difficult to say whether the terms “xenophobic motive” and “racist motives” as used in the legislation of several countries as described above also cover religious hostility.

§ 4. Politics and ideology

The motive of hatred is almost always ideological in nature. Even if a hate crime is committed by a person who is far removed from politics, and not involved in any racist or similar group, such a person still harbors some notion of inequality – if this were not the case, the motive would be different and the crime would not be a hate crime. Therefore, determination of the perpetrator’s ideological grounds is usually of no interest to lawmakers. In addition, references to any ideology as an aggravating circumstance are fraught with problematic discussions of a ban on such ideology. Even in countries where there is a prohibition of an ideological nature, these prohibitions are not generally reflected in criminal norms on hate crime. This topic will be examined further in the subsections below on the prohibition of organizations and on anti-extremist legislation.

However, as mentioned above, there are some exceptions. I do not have in mind here expressions like “racist motives,” as they do not mention any specific sets of ideas – there are simply too many possible ideological foundations for racist biases. Spanish law, for instance, mentions anti-Semitism, and in the law of Tajikistan, Azerbaijan and Armenia, reference is made to religious fanaticism.

However, here we are interested in those cases in which what is most important for the perpetrator is a negative attitude not just towards a given group of people, but towards certain political and/or ideological views. Our specific interest, then, is those instances in which such a motivation is reflected in the legislation.

The political or ideological views of the victim are a feature of the hate crime legislation of the following countries: Albania, Andorra, Belarus, Belgium, Bulgaria, the Czech Republic, the Russian Federation and Spain.

The laws of Poland and Romania refer to affiliation with political organizations.

Portuguese law uses the expression “political hatred,” while the laws of the US states of California, Iowa, Louisiana, West Virginia as well as the District of Columbia refer to “political affiliation.” In the US examples, these terms may be interpreted and applied both to the victim’s views and to the offender’s views. However, in

the case of Portugal, the reference seems to be exclusively to the views of the offender.

§ 5. Social and class-specific characteristics

All group differences correlate with property status and other kinds of social status. Therefore, depending on the social theory one applies, they can be considered to be class-specific differences. In this section, we will focus on “classic” signs and symbols of social and class stratification.

Of course, selective robbery of the wealthy is not a hate crime in itself, but simply pragmatic behavior on the part of the thief. This is one case in which a purely discriminatory model of the hate crime definition is not applicable. But there are also offences against different social strata, including against the “rich,” which are motivated by a negative attitude towards these strata.

In Slovenia, this protected characteristic is formulated as two attributes – “financial situation” and “social status,” while in Lithuania, reference is only made to “social status.” In the Czech Republic, this characteristic is called “class.” In Romania, the characteristic is directly referred to as “wealth.”

In Moldova, Turkmenistan and Kazakhstan, legislation based on the concept of a “hate motive” includes the notion of “social hatred,” which in the post-Soviet context is usually understood to be class hatred. The Moldovan law “On Combating Extremist Activity” mentions “*social discord associated with violence or calls for violence*,” which clearly refers to the “class struggle.” The propaganda of exclusivity, superiority or inferiority of citizens is discussed more specifically on the grounds of their “wealth or social origin.” A similar situation is to be found in the Criminal Code of Turkmenistan. In Kazakhstan, a comparison of aggravating circumstances for some crimes, one of which is “social hatred,” and the contents of the article on incitement to hatred and hate speech suggests that the word “social” can, in principle, be understood not only to be “class-specific,” but also related to estates or clans.

The characteristic of “social origin” is closely related to the concept of class-specific hatred although, depending on the historical and social context, it can be understood differently in different countries. This characteristic is found in the legislation of Belgium and of Romania.

Basically, in those countries in which the use of violence is considered as a specific aggravation for the crime of incitement to hatred, and in which this provision is used to penalize hate crimes, if we look at the list of protected characteristics in the articles on incitement to hatred (see the corresponding subsection), we see that in a number of countries (eg. Ukraine) the social characteristics are found in these articles rather than in the articles on hate crimes.

One wonders why the victim’s wealth makes a relatively rare appearance in hate crime legislation. A rather political hypothesis would be that this very legislation often emerged within the anti-discrimination paradigm, which is leftist in origin, and therefore attacks on “the rich exploiters” might least likely fall into the category of hate crimes: attacks on the poor would certainly be unlikely. A more explicit hypothesis of a legal nature is that fundamentally ideological attacks on the rich become diluted in the multitude of cases in which such attacks are motivated on a purely pragmatic basis. In such cases, hostility towards the victim on the grounds of wealth did occur, but it was not of critical importance. Lawyers naturally fear that the introduction of such a hate motive in the law would erode the idea of hate crime and might cause the arbitrary application of hate crime legislation in ordinary criminal cases.

Attacks on the homeless stand out as a common phenomenon here. In many countries, there are groups driven by hate that attack the homeless, seeing them as “biological refuse.” These groups are often but not always on the far right side of the political spectrum. How should one define this motive of hatred? The “wealth” characteristic might at first appear applicable, suitable, but in fact, the motivation is certainly much broader. The evident characteristic of “the absence of housing” is definitely not suitable, as the victim may indeed have housing, but may not live there for one reason or another, and the motive of the perpetrators is not linked with housing per se, but with a certain stereotypical image of the homeless. This image may include associations with filth, ill health, alcoholism, and so on. At this juncture, the characteristic of homelessness is found in the legislation of three US states – Florida, Maine and Maryland – and in the District of Columbia. There is no European country with legislation featuring a specific characteristic related to this category of people. However, that fact in itself does not mean that such attacks are not punished as hate crimes. Law enforcement authorities in a number of countries can find ways to punish such an attack as a hate crime if the list of protected characteristics is an open list (see below) or if the motive of “social discord” is applicable.

§ 6. Gender and sexual orientation

The motives of hatred or discriminatory selection of the victim which are in some way related to gender issues are very diverse in nature.

Hatred towards women or men in general as a motive that defines hate crime might seem problematic, because all too often the distinction between hostility to the group and hostility to a particular representative of the group is far from clear. It is this factor that limits the diffusion of this protected characteristic.

Hostility towards homosexuals is a more obvious motive for the purposes of characterizing a hate crime through legislation. However, a protected characteristic cannot be formulated in a discriminatory way, i.e. the law cannot only protect homosexuals and not protect heterosexuals. Were one to formulate the characteristic as “sexual orientation” or “gender identity,” then law enforcement would immediately be confronted with the increasingly complex palette of sex roles and gender identities, or, more precisely, with their increasing public representation, and this would make it difficult to understand the legal norms.

Public perceptions in this area have undergone rapid change in almost all countries in the OSCE region in the past decade alone. Most importantly, different societies are at completely different stages in this process: in some countries, outlawing homophobia would be out of the question, while, for example, in some US states, hate crime laws already distinguish between “sex” in the biological sense and the “gender” with which a person identifies.

Therefore, the brief overview of national laws below does not reflect the whole variety of legislation in this area. Special attention should be paid to the passages from the laws cited in the footnotes to the table on hate crime legislation in the 57 OSCE countries as well as those in the subsequent table for the US states, both of which are to be found in the annex.

Only a few countries list “sexual orientation” as a protected characteristic for hate crimes. They are: Albania, Andorra, Austria, Belgium, Canada, Croatia, Denmark, France, Hungary, Lithuania, Romania, Slovakia, Slovenia, Spain, England and Finland. In some countries, such as Croatia, “sexual orientation” has already been supplemented by “gender identity.” As you can see, many countries are missing from the table, including half of Scandinavia and almost all of the post-Soviet states. Of course, some countries have open lists of protected characteristics, which, depending on the situation in the country, can also be used for the prosecution of such crimes.

Considerable diversity is seen in the approaches adopted in the United States. “Sexual orientation” and “(trans)gender identity” (as opposed to “sex” or “gender”) have been included in the laws of most of the states that have laws on hate crime, with the exception of Alabama, Alaska, Idaho, Michigan, Mississippi, Montana, North Carolina, North and South Dakota, Ohio, Oklahoma, Pennsylvania and Virginia.

“Sex and/or gender” as a protected characteristic is less common – it is featured in Albania, Austria, Belgium, Canada, Croatia, Hungary, Lithuania, Romania, Slovakia, Slovenia and Spain, as well as in most US states. Among the US states with hate crimes laws, “sex and/or gender”

is not mentioned in the laws of Alabama, Colorado, Delaware, Florida, Idaho, Kansas, Kentucky, Maryland, Massachusetts, Montana, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Virginia or Wisconsin.

In Europe, these two characteristics – the one more associated with sex and the other more associated with sexual orientation – are usually both found in national legislation, if they are taken into account at all; this is the case in 10 European countries in total. In the US, the picture is more complicated: thirty-six states and the District of Columbia take these characteristics into account, with most states recognizing both. The approach of the remaining states is not equally divided: six states acknowledge only “sex” or “gender,” while the other ten states recognize “sexual orientation and/or (trans)gender identity.”

§ 7. Health status

This characteristic is no less problematic in legislation than are the characteristics of sex/gender or wealth, and for precisely the same reasons: attacks on people with visible disabilities are usually motivated by their perceived helplessness. On the other hand, there are ideologically motivated attacks on certain categories of persons with disabilities, who are seen by the perpetrator as “subhuman.” Such attacks are also perpetrated against the HIV-positive, who are perceived as circulators of moral or other threats. Not all lawmakers are willing to consider a discriminatory attack on the physically or mentally ill as a kind of hate crime. This may be due to their reluctance to present the police with too difficult a task, i.e. how to determine the specific motive for attacks on this category of people.

In the US, this protected characteristic is already quite frequent in various types of motivations – it is to be found in the legislation of fully 31 states. In Europe, this characteristic is featured only in the legislation of Albania, Andorra, Austria, Belgium, Croatia, Hungary, Lithuania, Romania, Spain, Finland and England.

The terminology in this area is also not yet clearly established. For example, English law understands disability as both physical and mental. Art. 30.6 of the Criminal Code of Andorra refers to “illness” and “physical or mental disability.” Spain identifies both “disability” and “health status.” The amendments recently adopted in Albania, mention “genetic predisposition,” among other things, and in Romania, the law refers to “HIV-positive status.” Belgium, the law of which features an especially long list of biases, also recognizes “physical characteristics,” as well as “genetic characteristics,” and even “future health.” In general, one could say that health-related characteristics

are found almost exclusively in those countries in which the relevant legislation contains long and detailed lists of protected characteristics.⁷⁰

§ 8. Rarely protected characteristics

There are variants of bias stipulated in hate crime legislation that are even more rare, so much so that they can be considered rather exotic and even on the sidelines of current trends.

The easiest case with which to start their review is the legislation of Belgium, since the list of protected characteristics in Belgian law is a particularly long one. This list also includes age, matrimonial status, “birth” and “origin.” These characteristics, as well as an extremely wide range of prejudices related to health, entered Belgian hate crime laws from laws on discrimination. A similar situation occurred in Slovenia, where a specific aggravation to hate crime is defined as an attack on equality, with the latter qualified by a variety of characteristics, including “genetic heritage.” Most likely, this was also for the purposes of countering non-violent discrimination. In my view, this approach to the formation of the list of protected characteristic raises certain doubts.

Of course, intentional crime against those who are married, single or divorced, and possibly, for example, against those married for the fifth time is theoretically possible, but clearly this occurs so rarely that it hardly deserves special mention in the law: ultimately, one cannot foresee all possible motives. Still, matrimonial status is found in Belgian law, and in the District of Columbia in the United States.

Crimes committed specifically against the old or the young, for example are easier to imagine, although their motivation will probably turn out to be more pragmatic than ideological in nature: for example, an elderly person may be easier to rob. Ideological crimes based on “ageism” are no less exotic than those targeting bachelors. Notwithstanding this logic, the age attribute is found as a protected characteristic in hate crime laws in the following countries: Belgium, Austria, Canada, Lithuania and Romania. It is also found in the laws of 12 US states: California, Florida, Hawaii, Iowa, Kansas, Louisiana, Maine, Minnesota, Nebraska, New Mexico, New York and Vermont, as well as in the District of Columbia.

The terms “birth” and “origin” in Belgium, consequently, refer to the formal circumstances of one’s birth and to

certain characteristics of one’s ancestors.⁷¹ If we look at other countries, the legislation of which contains these or similar terms, we must bear in mind that their meaning obviously depends on the social context of the country in a given period, adjusted for the inertia of law enforcement tradition. In Belgium, the characteristic of “birth” in discriminatory actions is understood as the distinction between those born in or out of wedlock, for example, or as those who live with one or both parents. The term “origin” refers here to the individual characteristics of the parents or sometimes of other ancestors; such characteristics may include their ethnicity, criminal record, and many other factors. As these characteristics can only be known through personal acquaintance, and as people rarely form some sort of collective identity based on such characteristics, such a hate crime would be unusual, to say the least. It would certainly be difficult to argue that this particular prejudice was the main motive for the crime.

However, the characteristic of “family origin” in relation to hate crimes does occur: it is a feature both of Belgian law, as well as of Slovakian law, in which one of the aggravating circumstances is not just hatred based on family origin, but incitement to hatred on these grounds. In Finland, the list of characteristics has been expanded by, *inter alia*, “status by birth.”

The term “origin” in a sense other than that of ethnic origin or national origin is widespread in a variety of post-Soviet countries. The term “national origin” has been treated as an indication of ethnicity and/or nationality.⁷² It was inherited from Soviet criminal law, in which it meant “class-specific origin.” However, this term is not used in hate crime legislation. (For further detail, see the chapter on incitement to hatred.) “Social origin” as found in the Criminal Code of Romania is, apparently, a modern replacement for “class-specific origin.” In Lithuania, the term “origin” is listed between “language” and “social status,” thus this term is likely to be interpreted both in the social and in the ethnic sense.

The criminal law of Slovenia also features the unusual protected characteristic of “level of education.” And, in the United States, District of Columbia legislation also has a similar characteristic – “university enrollment.”

The Criminal Code of Tajikistan distinguishes the motive of “local” hatred – that is hatred towards the residents of a particular region, although they are also Tajiks. This motive is actually understandable: it was one of the

⁷⁰ The countries of Central and Eastern Europe figure prominently among this group. This phenomenon can be explained by policy: however, the political genesis of legislation is outside of the scope of this book.

⁷¹ This subtle nuance was explained to me by an activist from the organization “MRAX Belgique.”

⁷² In Estonia, the term “origin” is used without further explanation, and is listed along with ethnicity, religion and others, so “origin” in this case can be understood more as a reference to ethnicity than to family.

main drivers behind the Tajik civil war of the 1990s. As mentioned above, in Kazakhstan, tribal or class-specific hatred is reflected, albeit indirectly, in the concept of “social hatred.”

On the other hand, a motive such as “blood feud” should not be included among hate crime motives, as this motive is directed to a very narrow group. In the Criminal Codes of Kazakhstan and Tajikistan, this motive is found as a specific aggravation along with other motives of hatred, but this in itself does not mean that crimes committed as part of a blood feud should be considered to constitute hate crimes.

Many rare characteristics are to be found in the diverse legislation of the US states. In Vermont, attacks motivated by hostility to the military are prosecuted. The District of Columbia prosecutes crimes driven by the fact that another member of the family is the object of hatred, and in Oregon the sexual orientation of a family member is listed as a characteristic. However, these are, strictly speaking, not individually protected characteristics; rather, they are a codification of a specific choice of victim made by association on the part of the offender.

§ 9. Open lists

Finally, the laws of some countries may contain an open list of biases. This list may be formulated differently in different countries.

If the law uses an approach relying on the emotional motivation of the perpetrator (hatred, for instance), then, in principle, such a motive can be stated as vaguely as possible. In such cases, the question of what kind of hatred must be considered is left to the discretion of the court, and the question of what actually constitutes a hate crime loses legal meaning. This is the German approach, as described above.

This approach can be combined with a specific list of types of hatred that can be seen as motives. For example, in Azerbaijan the list of common aggravating circumstances features the following wording: “a crime motivated by ethnic, racial or religious hatred or fanaticism, revenge for lawful actions of other persons, for personal gain or other base motives” (Para. 1.6 of Art. 61 of the Criminal Code of Azerbaijan). In this case, the “other motives” are unlikely to be interpreted as other biases that underpin hate crime, as a diverse range of motives are listed, and the Azerbaijani courts will hardly seek to expand the list of motives for hatred.

On the other hand, Austria, in § 33 of its Criminal Code, refers specifically to common aggravating circumstances for hate crimes, so the expression found therein, “*other particularly reprehensible motives*,” makes the list of biases a virtually endless one: in point of fact, almost all crimes are driven by reprehensible motives. The Austrian

law leaves the question of what is particularly reprehensible in the context of the hate crimes concept to the discretion of the court. However, it is possible that, in Austria, the judges are guided by the list of biases found in the article on hate speech (§ 283). This list is quite long in its current iteration, though it is a closed list. It also includes “sexual orientation.”

In Liechtenstein, Part 5, Art. 33 of the Criminal Code lists “*racist, xenophobic or other particularly reprehensible motives*” as aggravating circumstances, without providing any further information that would clarify this notion. The Maltese Criminal Code states that a “xenophobic motive” may be a common aggravation, also without providing a more specific description. Two other countries in which the motive is formulated just as vaguely are Cyprus and Latvia, as referred to above.

This kind of motive can also be provided as a complement to a very specific list, as is the case in Andorra, Bulgaria and Italy, where it is seen more as a reference to that particular list than as a supplement.

In Canada, the list of prejudices in art. 718.2 (a)(i) of the Criminal Code simply ends with the words “*any other similar factor*,” leaving the matter to the complete discretion of the judges. Denmark, Finland and Sweden have similarly-worded legislation.

A different approach is observed when paramount importance is attributed to the protection of certain population groups rather than to the emotions of the offender.

The Penal Code of Norway directly appeals to the connection between the list of biases seen as aggravating circumstances and the list of social groups who, for one reason or another, should be considered by society as requiring special protection by the law. That is the exact wording found at the end of the short list of hate motives in Art. 77 of the Norwegian Criminal Code: “*any other circumstances relating to groups in need of special protection*.” But such certainty of wording remains exceptional, since the non-discriminatory approach to the formulation of the law suggests that it is the characteristics which are protected, and not the groups. The Norwegian wording could possibly be clarified or interpreted in a non-discriminatory manner.

In the Slovenian Criminal Code, in which the hate crime motive is based on grounds of discrimination, one finds the following formulation: “*any other circumstance, which deprives or limits the person in his/her human rights and freedoms recognized by the international community, the constitution or any other law*.”

In the Czech Republic and Hungary, the list just ends with the words “*a different group of people*.”

As mentioned above, the division of the laws into those which address the emotions of the offender and those which describe the victim's protected characteristics is not a strict one.

The Russian Criminal Code and its list of the motives of hatred (and hate speech objects) include the hate motive *"in respect of a particular social group,"* which can also be considered to be a hybrid formulation. Formally, the key concept here is the hatred of the perpetrator, but in the course of proving such hatred the prosecution must *"construct"* the social group that is the target of the hatred, which actually shifts the center of gravity towards the model of protected characteristics.

Furthermore, in Russia, neither the law nor any other acts and official documents provide the definition of a *"social group."* There is also no more or less common understanding of the term in sociology, not to mention in everyday language. In practice, this means that the list of hate motives is transformed into an open list. Neither the law, nor its understanding in Russian public discourse features the notion of groups in need of special protection, as mentioned above in connection with Norway.

It is noteworthy that this wording is not copied in the criminal codes of other CIS countries, with the exception of Belarus, despite the fact that this was to be expected in the course of adoption of similar anti-extremist legislation, described further below in the corresponding subsection.

Thus, apart from Germany, where there is no list at all, the open list is used in Canadian law and in those of 12 European countries of the OSCE.

§ 10. Difficulty in defining a characteristic and confusion of characteristics

There are also, of course, disputes regarding the definition of discriminatory characteristics. For example, anti-Semitism is understood in different countries as a type of religious or ethnic (or racial) xenophobia, and it is often understood to be all of these things at once. It would seem that this is due to different understandings of Jewish identity. However, from the point of view of the law, hate crime is not commonly seen through the victim's identity or the dominant idea about the group to which the victim belongs. The focus is more commonly on the motive of the criminal and on his/her ideas about the identity of the victim. There are cases in which the offender would interpret Jews as being a religious community, or as being a racial community, or in which the offender would apply his own ideological constructs, for example, describing Jews as a criminal community.

This example leads us to a delicate issue in the definition of the hate crime motive. The offender may have quite bizarre perceptions, but hate crime, although

determined by the motive, is penalized more severely not because of what is in the perpetrator's head, but because of the public danger involved. The latter, in turn, is directly related to the way the identity of the victim is understood in society. If, as in this example, Jews are seen as a racial group (as was the case in Nazi Germany) – that is one thing; if they are seen as a religious group (as in the past in Europe, except for Spain,⁷³ at least until the 19th century) – that is another issue. In present-day societies in the countries of the OSCE, both self-identification and outward ethnic identification of Jews is no longer as straightforward as it has been in the past, making it difficult to determine the type of motive of anti-Semitic crime.

The same situation is observed in the case of much larger groups that are usually victims of hate crimes – people whose outward identity, and often their internal identity as well, is connected both with immigration and with Islam. Protests against the construction of mosques, which are not criminal by themselves, of course, are definitely related not only to the rejection of Islam, but to the rejection of immigrants. The motivation for some of the criminal attacks on the group described is the same.⁷⁴

Basically, the police and the courts are capable of sorting out the most common cases of mixed motives or otherwise confusing motivation. Of course, lawmakers can themselves emphasize the variety of hate crime motives, but as a rule, they do not do so for one reason or another. For example, in Canada, article 430 (4.1) of the Criminal Code, which was adopted after a series of acts of vandalism committed in response to the September 11th attacks, introduced penalties for any destruction or damage caused in churches, places of worship, cemeteries or similar locations. The provision identifies the motive in this case not only as religious, but also as racial and ethnic. Thus, possible attacks on objects of religious significance are quite rightly evaluated on the basis of a variety of possible motives, but rarely does the law include such a variety of bias motivations.

5. Vandalism

Vandalism motivated by hatred or other discriminatory causes is a kind of hate crime, since damage to property is criminal in itself. Because in this book actions are classified according to their legal characteristics, this subsection is included in the chapter on hate crimes. On the other hand, because such acts of vandalism are in fact

73 Spain is a unique country with respect to European tradition: already in the 15th and 16th centuries, people in Spain were identified based on *"percentages of blood,"* irrespective of their religion.

74 Paul Iganski, *"An agnostic view of 'faith hate' crime," Safer Communities*, 2009. Vol. 8. No. 4, pp. 51-59.

often directed not at damaging or destroying property per se, but rather at making a public statement in a radical way, we can consider that these actions are akin to incitement to hatred and hate speech. Historically, laws on ideologically motivated vandalism have appeared frequently in connection with laws on public statements or on the protection of religion. This is because the first and still the most common form of criminalization of ideological vandalism is criminalization of attacks on religious objects and religiously-affiliated cemeteries.

If a country applies the hate motive or discriminatory motive as a general aggravating circumstance, this basically eliminates the need for inclusion of separate norms about vandalism in the law. Nevertheless, such norms are often adopted, as is the case in Albania, Armenia, the Russian Federation, Liechtenstein, Canada, Italy, Kazakhstan, Lithuania, Moldova, Slovakia and Tajikistan.

In some countries, the criminal code provides a general aggravating circumstances clause (general aggravation) or a definition of hate crime as a separate *corpus delicti*, but at the same time it specifically mentions damage to property. This is the approach in England, Andorra and Bulgaria.

Special criminal norms on vandalizing religious buildings or objects of worship are frequently encountered, i.e. norms on religious vandalism. Such standards are found in Albania, Austria, Canada, Cyprus, Germany, Hungary, Italy, Turkey and Ukraine. I have not taken into account here those norms which refer to desecration rather than to damage. Such actions are to be distinguished from vandalism, since property is not damaged; they will be considered in the subsection "Contradictions in the protection of religion."

It is also possible to apply even broader norms. For example, Art. 292 of the Criminal Code of Norway concerning vandalism refers to the racist motive, *inter alia*, and treats the fact that the damaged object has "historical, ethnic or religious significance to the public or to a large number of people" as an aggravating circumstance. Similar wording regarding the significance of the objects in question is found in the laws of Latvia and in Moldova. A broad definition of ideological vandalism through the inclusion of a separate norm is also the approach taken in the Russian Federation and in Kazakhstan. Ideological vandalism is criminalized in all US states except for Alaska, Iowa, New Hampshire, North Dakota, Utah, Vermont, West Virginia and Wyoming.

In some cases in which there are no special rules, the articles on incitement to hatred consider as aggravating circumstances not only words, but also any actions aimed at specific objects, including "damage to property." This approach is seen in Bosnia and Herzegovina, FYROM, Montenegro, Serbia and Slovenia. It is worthy of note that

in some post-Soviet countries, the norm on incitement to hatred and hate speech still refers to an "action" rather than to a "statement." In countries in which separate provisions emerged on hate crime, including on ideological vandalism, the use of such a formulation of aggravating circumstances loses its meaning, as these "actions" are already understood as statements in the broadest sense, statements that should not be associated with hate crimes. However, in the countries listed above, this same wording applies to acts of ideological vandalism. The exception here is Serbia, which recently included the hate motive in its criminal code as a general aggravating circumstance

The laws of many countries specifically refer to vandalism in cemeteries. Of course, such vandalism may be motivated by simple hooliganism, so it makes sense to focus here only on those norms that openly refer to ideological motivation. Such provisions exist in Armenia, Belgium, France, Kazakhstan, Liechtenstein, Georgia, Lithuania, Luxembourg, FYROM, Montenegro, Moldova, Serbia, Slovakia, Tajikistan and Slovenia.

In the Russian Federation, the relevant article, Article 244 of the Criminal Code, is supplemented by the words "*and likewise in respect of a sculpture or architectural structure devoted to the struggle against fascism or victims of Nazism, or burial-places of participants in the struggle against Nazism,*" which adds special meaning to this norm. This same norm applies in Tajikistan.

Finally, it is interesting that in Belgium, for example, the law specifically stipulates that not only damage to the object, but also drawing on the object (graffiti) is considered to be vandalism. This interpretation of vandalism is quite controversial in itself. Graffiti may be no less effective as hate speech than many other media, but the damage inflicted to property is usually slight, so it is doubtful that this can be considered a hate crime. Nevertheless, the enforcement of laws on vandalism often includes graffiti, even if the law does not contain an explicit reference to it.

In conclusion, we can point to three countries that have provisions on ideological vandalism, but which otherwise have no other rules on hate crimes. These are Luxembourg, Turkey and Montenegro. And that brings us back to the question of whether or not ideological vandalism is a hate crime, and of whether or not, alternatively, it can be treated separately as a type of criminal statement. This dilemma has yet to be resolved in a consistent manner.

Chapter III. Incitement to hatred and hate speech

Legislation on combating statements that can be qualified as incitement to hatred or hate speech is perhaps even more varied in terms of approaches and wording than legislation on hate crime. Here I refer to statements in the broadest sense of the word, including certain symbolic actions.

The fundamental differences in this area have already been discussed in the chapter on international law, so I will limit myself to listing them here in order to then proceed to an examination of how these differences are reflected in national legislation:

1. The law may consider or not consider the words themselves to be criminal. In the former case, the utterance of a negative attitude in one form or another can itself be criminalized: this is hate speech. In the latter case, only those statements that are actually or potentially fraught with and/or directed at consequences are criminalized: this constitutes incitement to hatred. Of course, in some cases, it is difficult to distinguish one from the other, but that does not negate the fundamental difference. It would be correct to say that the concept of hate speech formulated in this way encompasses the concept of incitement to hatred rather than serving as an alternative, but for the sake of simplicity I will treat these concepts as distinct.
2. The consequences that are considered may also be different, i.e. real consequences and/or potential consequences. In most cases, the very fact of hostility, even potential hostility, incited in one group toward another group is considered to be the consequence in question. However, the criterion may be more stringent when only acts of violence and/or discrimination and/or some other action are considered to be real or potential consequences that are sufficient for prosecution.
3. Statements can be criminalized under such legislation only to the extent that they directly or indirectly target certain groups, and not an individual. Accordingly, there may be a variety of lists of such groups, as we have seen in the chapter on hate crime.
4. The wording used to describe hate speech and incitement to hatred in the law may also vary greatly, including according to the degree of detail offered. The terms used may themselves either narrow or expand the applicability of the norm and may link it with other norms, such as those on discrimination, hate crime, or on the protection of religious feelings.
5. It is important to distinguish between rules that are clearly based on goals, which can be considered political, such as for example the prevention of ethnic and other group conflicts, or the limitation or banning of a certain kind of ideological propaganda, and norms that

are free from this kind of wording.

Of course, there are other actions that can be considered similar to those discussed in this chapter, but they harbor significant differences.

The most important of these categories is incitement to some criminal acts against a given group in a situation in which such actions, or an attempt to commit such actions, have taken place. If the connection between the crime and the incitement to it is established, regardless of how public this incitement was, then the speaker becomes a standard instigator, i.e. another accomplice to this crime. This situation is described by common criminal law and is not characterized as incitement to hatred. If we must draw parallels, it would be called “public instigation,” which, in my opinion, also conveys quite well the meaning of the concept of incitement to hatred.

However, some countries, such as Romania and Finland, have specific articles in their criminal codes criminalizing public incitement to commit any crime, even if the situation cannot be described as one of complicity, i.e. when no attempt was actually made to commit the crime. Of course, such articles may apply to incitement to hatred as well, if incriminating statements are specific to that degree,⁷⁵ yet they should not be considered to be in line with the norms regarding incitement to hatred and hate speech, and will not be included in this analysis.

Another major category is that of public threats based on certain group criteria, i.e. discriminatory criteria. A sufficiently serious threat, such as the threat of murder, is criminalized in all countries. Publicity regarding this threat may or may not be taken into account as an aggravating circumstance. However, an important criterion for criminalization of an act is the concept of the threat in question being addressed to a specific individual or individuals, i.e. whether the threat is addressed in a

⁷⁵ In Romania there is a rather peculiar situation. In addition to the above-mentioned provision, Romanian legislation includes two additional provisions. Incitement to hatred proper is considered an administrative offence rather than a criminal offence. The following is considered to be a criminal offence: “*the systematic dissemination via any means of ideas, concepts or doctrines calling for the creation of a totalitarian state, including incitement to murder of persons who are declared belonging to an inferior race.*” Organizational activity of this kind as well as “*popularization of the beliefs of persons guilty of committing crimes against peace and humanity*” are also criminal in Romania. Such corpus delicti seem problematic: on the one hand, for example, it is easy to imagine the popularization of German Nazism with no mention of its racist component, while on the other hand, modern racist propaganda often easily does without direct references to well-known historic totalitarian concepts and regimes.

sufficiently clear manner to one person in particular, rather than to a racial, ethnic, and other group.

This is precisely how the concept of a “direct and immediate threat” is understood in the US. The following states criminalize the action of burning a cross: Alabama, Arizona, California, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Oklahoma, North Carolina, South Dakota, Virginia, Washington and the District of Columbia. Cross burning is a typical practice of the Ku Klux Klan. However, under these laws, not all public cross burnings are considered to be a crime; rather, it is only those instances in which someone in particular may perceive the act as a threat directed personally at him/her. In some states, this is explicitly described in the text of the law, while in others it is not specified. The prevailing present-day approach formulated above is recorded in the Supreme Court ruling on the case of *Virginia v. Black* 2003.⁷⁶ Moreover, the First Amendment to the Constitution protecting freedom of speech does not allow the United States to enact laws that criminalize incitement to hatred, let alone hate speech.

Finally, there are special laws concerning protection of religion or religious feelings. These will be reviewed in another chapter. These are similar to laws on hate speech, but also contain clear differences with respect to hate speech laws, as will be demonstrated in the appropriate chapter.

There is also another category of statements – those which are prosecuted because of their political or ideological aim. Such statements are outside the scope of this chapter and will be considered separately.

As we will see below, national laws vary widely in the degree of detail provided in their definitions. In any event, in such matters it is the court that assumes great responsibility. It is the court that should apply the six criteria mentioned in the Rabat Plan of Action, which was described in the closing section of the chapter on international law. This is only possible for the court to do if national legislation and law enforcement practice comply with these recommendations. Only certain of these criteria are regulated by law, and even then not in all countries, as will be discussed below. However, the law can and should be supplemented by formal comments, including explanations by higher courts and case rulings, especially decisions of the ECtHR. Finally, the court should not turn a deaf ear to prevailing public opinion, if the topic of hate speech and incitement to hatred is discussed at the level of notable personae, be they officials,

political leaders, scientists, jurists or public figures. Since this whole subject is a relatively new and often politically sensitive issue, it has been under debate in many countries in recent decades. Consequently, laws and practice in this area vary widely.

Finally, it should be noted that only three countries do not criminalize hate speech and incitement to hatred at all. These are the United States, San Marino and the Holy See. San Marino has developed standards on blasphemy, while the Holy See does not have any laws on its books regarding hate crime, incitement to hatred or hate speech.

1. Form and Object

As previously mentioned, national legislation in this area is very diverse. As a result, a variety of parameters can be used to analyze it. For a start, let's examine what might be considered to be the fundamental properties of these kinds of criminal acts. A statement has two main characteristics – what is said and who is addressed. Both of these characteristics can also be analyzed by more than one parameter, and therefore it is important to start by categorizing statements by what is being said, independently of any reference to the content of the statement which may or may not be present in the law. The next step is to examine how the object of the statement is described, regardless of the specific list of protected attributes, which can then be analyzed later.

Let's start with the form of the statement. Probably the most important distinctive feature here is the “intensity” of the statement or the extent of its radicalism. In general, it is clear that legislation must somehow distinguish between gradations in the range from slightly hostile remarks regarding any group to calls for its extermination. The problem is how to formulate laws in such a way so that they fit into the national legal tradition, so that they meet the requirements of international law, so that they can be applied by the police and the courts, and so that they meet the long-term needs of society.

§ 1. Considering the aftermath and preventing the conflict

The criterion of conforming to the needs of the society, although not a legal criterion, is politically important.

On the one hand, this criterion is largely the cause for the creation of this type of legislation, as states have historically primarily been concerned about national security and political stability, and only in second place have they devoted their attention to protecting their citizens or subjects from insults and similar attacks that are not considered to be quite so dangerous. Many states continue to act according to these priorities.

⁷⁶ The text of the ruling is available on the webpage of the Legal Information Institute, <http://www.law.cornell.edu/supct/html/01-1107.ZO.html>

On the other hand, in societies which put a high value on freedom of speech, the idea is widespread that restricting such freedom is permissible only in the event of the risk of serious consequences, which taken to the extreme yields the concept of “direct and immediate threat.” In the latter case, the law may directly provide for “limited restrictions.”

The former type of motivation was definitely represented by Soviet legislation, which criminalized “incitement of discord” on ethnic and other grounds. The word “discord” as used in the Soviet criminal code passed into the Russian Constitution, and then into the Russian law “On combating extremist activity,” as well as into similar laws in other countries of the former Soviet Union. (See the sub-section on anti-extremism for further discussion on this topic) Undoubtedly, “discord” is not the same as “hatred,” because hatred is a feeling that may not be mutual, while discord always involves two parties. Indeed, “discord” implied or meant a conflict of varying degrees of intensity between certain groups, usually ethnic groups or religious groups. But this is not the only difference: the word “discord” can signify a much less negatively intense emotional state than “hate.” For example, Catholics and Protestants may, of course, experience discord, but they may not feel hatred towards one another. In other words, such a legal norm is the safeguard that prevents any group friction, let alone serious conflicts. And, at the same time, this norm actually criminalized any negative statements about groups, since negative statements are, of course, fraught with the possibility of “inciting discord.” Since not allowing any negative statements is not possible, only through enforcement does it become clear how selectively such a broadly defined norm is applied. This inevitable and inherently selective application proves once again the political nature of the norm.

In Russia, the term “discord” was dropped from criminal law, but has remained in civil law. However, this Soviet term was preserved in Belarusian law as “inciting hatred or discord...,” as well as in the laws of Kazakhstan, Turkmenistan and Tajikistan. The same wording is found in the Criminal Code of Bosnia and Herzegovina. In Moldova, the word “differentiation” supplements the formula, while in Uzbekistan the word “intolerance” is added to the phrase. FYROM and Montenegro share the same approach as Uzbekistan. As you can see, all of these countries describe criminal statements differently, so we cannot say that they have used the same legal approach. However, what is common to them is that the terms used are focused to some extent on preventing the conflicts from gathering momentum. They also target statements that can be considered relatively “weak,” meaning that criminal law in such cases has a conflict prevention function as well.

In post-Soviet countries, the terminology may have

survived simply out of inertia. However, if we consider that both Moldova and Tajikistan experienced civil wars in the post-Soviet period, and that both Uzbekistan and Kazakhstan also faced significant ethnic conflicts in the late Soviet years, we can see that these countries have good reasons to be thinking about conflict prevention. One would think that Bosnia and Herzegovina, a country which was born of civil war, would have been clearly focused on conflict prevention in the first place. However, Bosnia and Herzegovina has no concept of hate crime: its law only makes reference to provoking the conflict, as described in detail in Art. 150 of the Criminal Code. This includes the desecration of graves as an aggravating circumstance to incitement to hatred, and not vice versa, as is the case in most countries.

In the Former Yugoslav Republic of Macedonia (FYROM), incitement to hatred and hate speech are criminalized in two ways, both in relation to the concept of the protection of citizens and to the concept of conflict prevention. There is a penalty for incitement to racial discrimination and related statements (Art. 417 of the Criminal Code). The law also criminalizes various actions, including vandalism and desecration of religious symbols, which are aimed at inciting “*hatred, discord and intolerance*” (Art. 319 of the Criminal Code). It is specifically the consequences in the form of violence, unrest, large-scale property damage that are considered as specific aggravation to this crime. However, in Montenegro, Art. 370 of the Criminal Code features text which is virtually identical to that contained in FYROM’s Art. 319.

Not all the countries of the former Yugoslavia have this or similar wording in their codes. It would seem that reflection on the experience of the civil war has produced different results. In Serbia, the idea of counteracting the conflict is expressed indirectly in Art. 317 of the Criminal Code. “*Inciting hatred*” in the language of this article is understood not as incitement to hatred against some people, but rather hatred between “*nations and ethnic communities living in Serbia*.” However, I would venture that this wording does not limit the actual enforcement.

Cyprus, which also survived civil war, criminalizes incitement of discord and enmity between “communities,” religious groups or classes. Another article in the same Criminal Code also criminalizes defamation on racial, ethnic and religious grounds, as well as the creation of organizations involved in the propaganda of racial discrimination. It was only later that a standard article on incitement to hatred and violence was added.

In Albania, “incitement to conflict” is criminalized without further description. In Georgia “instigating hatred or conflict” is considered a crime.

The same idea may be expressed in a less explicit manner. Certain statements may be criminalized if they

can lead to rioting, disturbing public order, or clashes. In Canada this is one possible criterion used in defining incitement to hatred in Art. 319 of the Criminal Code, but not the only one: Paragraph 1 of this article refers to “incitement to hatred” and includes the words “*where such incitement is likely to lead to a breach of the peace,*” while para. 2, which refers to “promoting hatred,” does not include this qualification. We can say that in this case, the possible consequences are not a necessary attribute of the criminalized speech.

A similar approach was adopted in German legislation. Incitement to hatred, infringement upon personal dignity, calls to violence and denial of the Holocaust are criminalized only if such statements are made “*in a manner capable of disturbing the public peace.*” The corresponding Article § 130 even carries a title that refers to conflict management: “Pitting one part of the nation against another.” The law also contains separate sections on the distribution of materials and other statements that offer guidance for committing a crime (Art. § 130a), and that violate the public peace by threatening to commit one or another criminal attack (Art. § 126).

In Turkey, the wording used is even tougher: incitement to hatred is a crime only if these actions “*subject the public to clear and immediate threat.*” Similarly, the defamation of groups is criminalized “*if the offense can cause a public disturbance.*”

In Portugal, the connection with the possible “disturbance of the peace” is listed only in relation to the specific actions connected with religion: these are both unlawful interference with a religious service and insulting a person on the basis of their religion or religious functions. Such a specific aggravation as risk of breaching public order in Art. 216 of Turkish Criminal Code also applies to defamation in connection with the religious values of the victim.

In Austria, “incitement of conflict” is mentioned in a number of other forms of incitement to hatred and hate speech. In Canada, statements that “*may cause a breach of the peace*” are mentioned separately from other statements, but yield the same penalties. In Finland, one of the specific aggravations of incitement to hatred is specific calls for violence ranging from serious acts of violence to genocide. However, calls to the former, with the exception of murder, are considered to be a specific aggravation only if the violence could “*pose a serious threat to public order and security.*”

In England, the laws on incitement to hatred and hate speech are quite diverse. There is reference to “incitement to hatred” (Art. 18 of Part III of the Public Order Act of 1986, Supplemented by the Racial and Religious Hatred Act, 2006), which is typical for continental law, but the hate motive may also apply as an aggravation in cases of private and public threats that are criminal (Articles 4, 4a, and 5 of the Public Order Act). In fact, the latter norm is a typical provision for hate crime, since threats are criminal

in themselves. However, the language of the relevant articles allows them to be used more widely, since they refer to statements that “caused harassment, alarm or distress” and create a perception on the part of the victim of impending violence, from either party in the current conflict. As a result of the debates about possible abuses in 2013, the concept “insulting” was dropped from this list. It seems that these norms relate more to provoking conflicts than to inciting violence.

In some countries, materialization of the serious criminal consequences of statements is a prerequisite for the criminalization of the statement itself. In Estonia, public incitement to hatred, violence and discrimination is considered criminal only if “*it has led to the creation of a threat to the life, health or property of any person.*”

There can also be a guideline stipulating that effects in the form of violence or riots is not necessary, but that they serve as specific aggravation for inciting hatred. This is the description found in the codes of FYROM, Montenegro, Serbia and Tajikistan.

§ 2. Appeals to violence or discrimination

The criterion of legal certainty is very important for the effectiveness of law enforcement as well as to ensure that the rights of citizens are observed, including the rights of potential defendants. It is possible that this criterion is most respected in those cases in which the law criminalizes specific “appeals” to certain actions, such as to violence against any group or discrimination against certain groups, rather than criminalizing “incitement” or “instigation.” On the other hand, obviously, there are many statements that may not contain an appeal, but that nevertheless have significant power to mobilize aggressive behavior or hatred towards certain groups. There are several parameters involved along with the actual text of the statement: a brief formulation of these parameters is provided at the end of the chapter on international law. As a result, enforcement that takes into account all of these parameters will potentially be more effective, but will also be more fraught with all sorts of possible errors and infringements.

In this section, I will focus on those countries that have chosen the path of a narrower interpretation of hate speech, defining it as public appeals to violent or discriminatory action.⁷⁷

77 For the purpose of comparison, one can refer to the comparative review of the laws of the EU according to similar but slightly different characteristics which was undertaken in the following 2014 study: *Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law*, pp. 3-8, http://ec.europa.eu/justice/fundamental-rights/files/com_2014_27_en.pdf

Appeals to violence on discriminatory grounds in their true form are described relatively often in the text of relevant laws. They are mentioned in the legal codes of Belgium, Estonia, Liechtenstein, Lithuania, Luxembourg, Portugal, Slovakia, Spain, the Netherlands, Austria, Croatia, Cyprus, France, Germany, Greece, Italy, Monaco, Uzbekistan, Poland, Slovenia and Finland. The Czech Republic, in its expanded Art. 355 of the Czech Criminal Code, does not contain precisely this wording, but the body of the article includes mention of any support to an organization that promotes violence or hatred.

In countries with anti-extremist legislation, as described in the corresponding subsection, there may be an article in the criminal code on calls to extremist activity which also criminalizes public incitement to hate crimes, including violent crimes. However, there are almost no such countries – the only two are the Russian Federation and Tajikistan. What is more, Tajikistan can be considered to do so only partially, since its definition of extremism does not feature all hate crimes, and refers only to riots, hooliganism and vandalism. On the contrary, public incitement to hate crimes is directly criminalized in Poland.

In Italy, statements that directly appeal to racist violence are criminalized on a par with any statements that may cause such violence. In this case, it is not clear whether such statements need to contain a negative message; the concern thus arises as to whether the law can punish someone who did not demonstrate any criminal intent. On the other hand, the norm in Denmark, which refers to statements that may lead to threats toward a group, is apparently no different from what is commonly understood as incitement to hatred. As a result, Denmark is not to be included in the list of countries which define hate speech as public appeals to violent or discriminatory action.

Given the above considerations, we can conclude that appeals to violence appear in the laws on public incitement in 25 countries.

The use of violence or the threat of violence may be considered to be a specific aggravation for the article of the criminal code relating to incitement to hatred and hate speech, or it may be considered as just one of the means of incitement mentioned in the law. This characteristic may apply to different situations, such as violent actions in combination with the incitement of witnesses to hatred, but it also applies to specific threats of violence included in the statement in question. In the latter case, such a provision will also criminalize public incitement to violence. This is the approach taken in Sweden, England and Iceland, as well as in some countries of the ex-Yugoslavia (FYROM, Montenegro, Slovenia and Bosnia and Herzegovina) and in some of the countries of the

former Soviet Union (the Russian Federation, Armenia, Azerbaijan, Kyrgyzstan, Latvia, Tajikistan and Ukraine).

Appeals for discrimination are covered by the laws of Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, Italy, France, Georgia, Greece, Liechtenstein, Lithuania, Luxembourg, FYROM, Moldova, Serbia, Slovakia, Slovenia, Switzerland and the Netherlands.

It is worth noting that public incitement to discrimination may be addressed in the criminal code in the articles on discrimination rather than in the articles on incitement to hatred. Of course, the former articles are outside of the scope of this study. It is also possible that public incitement to discrimination is to be found in both types of articles, as is the case, for example, in Moldova. In Mongolia, on the contrary, incitement to hatred is included in the article on discrimination, but these corpus delicti are actually considered to be separate.

Such appeals are also indirectly criminalized in the Russian Federation, since public calls for extremist activities are a crime and the definition of the latter involves discrimination.

Thus, in total, public appeals to discrimination are criminalized in 19 OSCE participating States.

It should be emphasized that in no country does the legislation limit itself only to addressing appeals to violence and discrimination.

Indirect formulations are also possible. Thus, the criminal law of Greece seems to link the statements with violence and discrimination, but in the form of an indirect appeal: *“calls for action, which could lead to discrimination, hatred and violence.”* This formulation cannot be considered to criminalize only calls to violence or discrimination, since it is clearly much broader.

§ 3. Differentiating between “strong” and “weak” forms of intolerance

Obviously, direct appeals to violence and discrimination and public threats are all strong manifestations of intolerance. The question arises as to how to classify the remaining forms of intolerance. For example, it would clearly seem that the wording “incitement to hatred” suggests a more assertive, “stronger” form of statement than does the concept of “humiliation” based on group characteristics. At the same time, there are certainly people who may think that humiliation hurts the targeted group and even threatens public safety no less than does incitement to hatred toward the group in question. In addition, much depends on the interpretation of the rules in judicial practice, especially if the law is formulated quite succinctly.

Still, I will attempt here to further classify the provisions of relevant national laws, based on the representations prevalent among the authors who write on these issues.

I will begin with those countries that formulate their legislation as succinctly as possible, and will move on to countries which feature more complex legislative formulations.

Many countries use phrases like “incitement to national, racial or religious hatred” or “enmity” without providing additional explanation. Such statements can be considered to be “strong” forms of intolerance. The word “incitement,” of course, has various shades of meaning in different languages and in different legal traditions, though none of these differences appear to be especially significant. Also, there does not seem to be much of a difference between the words “hatred” and “hostility” in the legal discourse to be found in English translations of relevant European national laws or in international legal documents and related commentary. It would appear that legislators in various countries have sought to describe the issue in broad terms, but that this has had little effect on judicial practice. Those cases in which lawmakers emphasize an ongoing conflict between certain groups rather than the motive of the offender have already been discussed above in the section on conflict prevention.

The tersest formulations are to be found in the laws of Albania, Canada, Latvia, Mongolia and the Republic of Ireland, though Irish law also contains an article on religious defamation. Croatia and Monaco add the words “hatred” and “hostility,” while Estonia, Bulgaria and Luxembourg add the words “discrimination” and “violence.” I consider incitements to property damage as a subset of incitements to violence.

The laws of many countries include wording that somehow describes hate speech, meaning the expression of a negative or disrespectful attitude toward certain groups. This also should include statements of exclusivity and/or supremacy of some groups. The same range of “weak” forms of intolerance also includes humiliation and defamation of people based on group characteristics. These variations may occur both individually and in various combinations.

The laws of certain countries address only “weak” forms of manifestations of intolerance. This is true in Andorra (abusive language), Austria (public insults and humiliation) and Denmark (speech, “*as the result of which the group of people becomes the object of threats, contempt or humiliation.*”)

On the whole, however, in the laws of a majority of countries, both “strong” and “weak” forms of intolerance are covered, and here the variety of combinations is quite vast.

The laws of the countries of the former Soviet Union, today the Commonwealth of Independent States, are characterized by rather simple language. Armenia

combines the standard “strong” wording with the phrase “*propaganda of racial superiority and the humiliation of ethnic dignity.*” The wording of the corresponding articles in Azerbaijan, Tajikistan and Turkmenistan is quite similar. The same is true in Belarus, however Belarusian law lacks the concept of “superiority.” The situation is similar in the laws of Georgia and Moldova, to which the word “discrimination” is added. In the Russian Federation, we find both “*incitement to hatred or enmity, as well as the humiliation of a person or group of persons*” and appeals to extremist activities, including hate crime and discrimination. Ukraine criminalizes “*incitement to ethnic, racial or religious enmity and hatred, humiliation of ethnic honor and dignity or insulting the feelings of citizens in connection with their religious beliefs.*”

Kazakhstan is an example of a post-Soviet country with laws that provide the broadest possible definition. Its law includes incitement and hatred, “*propaganda of exclusivity, superiority or inferiority of citizens*” and “*insulting the ethnic honor and dignity or religious feelings of citizens.*” Kyrgyzstan differs only in that its law does not refer to religious feelings, while the law of Uzbekistan, on the contrary, adds “atheistic beliefs.” However, in the formal sense, the laws of Kyrgyzstan and Uzbekistan are quite similar to Kazakh law.

In Bosnia and Herzegovina, in Montenegro, as well as in a number of post-Soviet countries, the word “hostility” is supplemented by the word “discord” or a close synonym, as mentioned above. The term “discord” can be interpreted very broadly, including, apparently, as indicating a slight controversy lacking in emotional intensity. Therefore, I am inclined to think this type of legal formulation combines both the “strong” and the “weak” forms of intolerance. The same can be said about the laws of Cyprus, though the term used therein is “ill will” rather than “discord.”

In the Czech Republic, the relevant law contains a “strong” article about inciting hatred and discrimination and a “weak” article on defamation. In a similar manner, French law criminalizes “*actions leading to discrimination, hatred and violence*” and defamation. The Criminal Codes of Greece, Spain, and the Netherlands contain almost the same wording, only instead of defamation they refer, respectively, to “offensive ideas,” slanderous statements about groups and insults based on group characteristics. In three articles of the Criminal Code of Slovakia, the list of actions referred to by French law is supplemented by the addition of threats. In Poland, in addition to actual incitement to hatred, appeals to commit hate crimes and insults towards groups are also criminalized. In Serbia, the law refers to incitement to hatred and intolerance, seeming to distinguish between the “strong” and “weak” forms; reference is also made to incitement to discrimination.

Norway addresses several forms of statements, from threats to “incitement to contempt for anyone,” and in Swedish law, the references are to “threats” and “contempt.” A broader formulation is found in Slovenian law, which includes “incitement to hatred, violence or intolerance,” “provoking any other inequality” and “disseminating ideas on the supremacy of one race over another.” Lithuanian law, similarly, contains the wording “ridiculing or expressing contempt,” while it includes all forms of statements in one article and ranks them according to the degree of public danger.

In FYROM, one article in the law refers to the “instigation” of hatred and discrimination, while another refers to the incitement of “hate, discord and intolerance,” but the methods indicated include a wide range of activities – from violence to “ridicule of national, ethnic or religious symbols.” It would seem that the latter article includes de facto references to both “strong” and “weak” forms of intolerance.

The Maltese Criminal Code seems to achieve the same result by using a combined description of the purposes and means of statements. The offender is described as “Whosoever uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up violence or hatred against another person or group on the grounds of gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion or whereby such violence or racial hatred is likely, having regard to all the circumstances, to be stirred up.” The legislation of England, as has been shown above, is more complicated, but it stipulates exactly the same principle.

Perhaps Finnish law should be mentioned in the same group. Chapter Ten, Sec.11 of the Finnish Criminal Code refers to “threats, defamation or insults”: threats can be considered a rather “strong” form of intolerance, as Art. 10 (a) of the Criminal Code makes no reference to appeals to violence. At the same time, the headings of the articles, unlike their content, do include the phrase “incitement to hatred.”

In Turkey, the wording in the corresponding article of the relevant law includes both humiliation of groups of people and humiliation of individuals in connection with their own religious beliefs or with those of the perpetrator, as well as in connection with their political and other views. However, the scope of the incitement to hatred is rather limited: the reference is to anyone “who openly provokes a group of people to be rancorous or hostile towards another group ...”

There are also countries in which the legislation does not refer at all to concepts of “hatred” or “hostility”: one

such country is Italy, as described below. Portuguese law refers specifically to inciting violence and promoting discrimination, as well as to insulting a group. Similarly, Icelandic law contains the phrase “public assault by means of ridicule, slander, insult, threat or otherwise assault.”

Belgian lawmakers take two different approaches to the issue. On the one hand, they criminalize incitement to discrimination, hatred, violence, and public announcement of the intention to discriminate. On the other hand, the hate motive is considered to be an aggravating circumstance for offences such as libel and insult, and is determined on the basis of a very broad list of characteristics. The desecration of graves, for instance, is treated in a similar manner, but this is typical for many countries. (See Sec. 5 of the Criminal Code of Belgium).

In Germany, public appeals to commit a variety of crimes are criminalized, regardless of the discriminatory nature of these crimes. In addition, incitement to hatred, incitement to violence and “arbitrary acts,” which may also include acts of discrimination, are all considered to be crimes. It is also a crime to “assault the human dignity of others by insulting or maliciously maligning an [aforementioned] group.”

In some countries, such as Iceland, for example, the relevant laws also mention such forms of hate speech as the “mockery” of people. “Mockery of symbols” is mentioned as a component of hate speech in the laws of FYROM, Montenegro, Bosnia and Herzegovina and Serbia. Mockery of religious dogmas or rituals and other beliefs is criminalized in Spain, Iceland, Liechtenstein and Switzerland. This does not mean, of course, that mockery is not listed as one of the criminal forms of hate speech in other countries.

Special rules against National Socialism or totalitarianism are outside of the scope of this discussion and will be dealt with in another chapter. However, there may be an ideological component to the corpus delicti that we are examining here. Italian law does not mention “incitement to hatred”: instead, the wording used is “dissemination of ideas based on racial or ethnic supremacy or hatred,” which is supplemented by a reference to incitement to violence and discrimination. We can assume that this wording is broader than the conventional formulation, as it also criminalizes statements which do not directly advocate intolerance, but only relate to it ideologically.

This more targeted ideological legislation may not replace, but does complement the more “conventional” norms. For example, in Switzerland and Liechtenstein, in addition to hatred, discrimination and public humiliation, the Criminal Codes also contain the following wording: “publicly disseminates ideology aimed at systematic humiliation or defamation.” In Hungary, the norm on incitement to hatred is limited by the very concept of “hatred.” But

Hungarian law also criminalizes any display of the symbols of totalitarian regimes, if such symbols offend the dignity of the victims of these regimes.

It is worth highlighting the relationship between defamation and hate speech. One common objection to any hate speech legislation is that the statement in question may either be true or false: in the event the statement is false, it is sufficient either to apply or to expand existing law on libel or defamation. However, if the statement is true, then it is not punishable.

Yet none of the legislation in which hate speech or incitement to hatred provisions include references to libel and/or defamation takes this issue into account. Rather than considering whether or not the statement of the accused is true or false, this legislation focuses on the intentions of the accused. It also focuses on the possible consequences of the statement of the accused. Many such examples have been provided above. Essentially, the statement of the accused is judged on precisely the same basis as any other action.

There are several countries in which libel is considered to constitute a means of incitement to hatred and similar actions (the separate issue of blasphemous libel is dealt with in a later chapter). However, in these cases libel is listed along with other kinds of statements which may not be false, and certainly do not have to be deliberately false. This is true of the legislation in Iceland, Monaco and Uzbekistan.

Only a few countries reflect this conflict in their legislation. I have already referred to the example of Belgium, the legislation of which considers the hate motive to be an aggravating circumstance in ordinary defamation. In Spain, incitement to violence, discrimination and hatred are criminalized whether or not the statements themselves are true or false. However, the “dissemination of insulting information” regarding various groups is punishable only if it “*is false or recklessly disregards the truth.*” Similar provisions are contained in Dutch law, in which hate speech, like incitement to hatred, is subject to two exceptions: these are a) if the purpose of the statement was simply to provide information, and b) if the person did not know or could not have known that the statement was or would be offensive to a particular group.

The Criminal Code of Canada takes a more comprehensive approach to the issue. In its Art. 319, a number of statements are removed from the scope of the article, in the event that they constitute “only” incitement to hatred by the accused, rather than public incitement to dangerous consequences. The exact wording of the provision, with reference to exceptions applicable to the speaker in question, is as follows:

“a) if he establishes that the statements communicated were true;

b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;

c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true;

d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.”⁷⁸

Special attention should be paid to sub-paragraph “b,” which is evidently aimed at decriminalizing religious debate and the denial of homosexuality for religious reasons.

§ 4. Other aspects related to the form of the statement

A. Public statements

One of the most important such aspects is the public nature of the statement. Sometimes, national legislation does not clearly state that it is referring to public statements. Such is case of Italian legislation, for example. As a rule, an understanding of the public nature of the speech is implied. However, in some countries there are very strict rules that also criminalize private statements. This can be understood, for example, from the fact that the public nature of the statement is listed as an aggravation directly in the text of the article of the criminal code: this is the case of art. 397¹ of the Criminal Code of Armenia and is true of a number of articles in the Criminal Code of Slovakia. Alternately, the public nature of the statement is evident directly from the text of the law itself, as is the case in Cyprus. It should be noted that in such cases the law criminalizes domestic conflicts, and possibly conflicts within the family, which are characterized by ethnic, religious or other such differences that, in fact, do not correspond to the concepts of incitement to hatred or hate speech as established in international law and in the academic and public debate on this topic.

Some doubt is caused by Art. 319 of the Criminal Code of FYROM, where the following definition is provided:

“A person who by force, mistreatment, endangering the security, ridicule of the national, ethnic or religious symbols, by damaging other people’s objects, by desecration of monuments, graves, or in some other manner causes or excites national, racial or religious hate, discord or intolerance...”

It is possible to imagine that, for example, abuse may cause hate in some people, including in the event that such abuse takes place in a private context. The same wording is found in Montenegro and Serbia. However, in

⁷⁸ The group to which reference is made in Article 319 of the Criminal Code of Canada is any group of people who are identifiable based on their race, color, religion, ethnic origin or sexual orientation.

Slovenia, for example, such statements also exist, but they are combined with a reference to the public nature of the speech, so that all doubts are removed.

The public nature of statements is rarely defined directly in the text of the law and should be assessed by the court. It is important to understand that the criterion that a statement be public is not binary in nature: a public statement takes many forms and has varying degrees. All things being equal, the wider and thus the more targeted is the audience of public incitement, the more dangerous the incitement is. This consideration should be reflected in the penalty and in its general liability, because the social danger may be too limited for prosecution.

Russian law, for example, contains no definition of the public nature of statements. Comments on the Russian Criminal Code almost unanimously argue that a public statement is defined as a statement addressed to “an indefinite number of people,” i.e. it is not a statement made in a narrow circle of targeted communication. Nonetheless, this definition is not particularly clear. For example, one could send a letter to several thousand very specific people in one’s address book, and one could address an uncertain but very narrow circle of drinking buddies in a bar, but it is not in the least obvious which of these statements represents greater public danger.

Alas, often the lawmaker understands the public nature of a statement as a binary parameter, rather than as a parameter with a range of values. An awareness of this factor is suggested by the seventh recommendation of the Commission of the Council of Europe to combat racism and intolerance (ECRI), which provides the following explanation: “*member States should ensure that it should not be too difficult to meet the condition of being committed in “public.” Thus, for instance, this condition should be met in cases of words pronounced during meetings of neo-Nazi organisations or words exchanged in a discussion forum on the Internet.*”⁷⁹

At the same time, a number of countries do attempt to provide a more operational definition of the public nature of a statement.

The Belgian Criminal Code provides a very detailed definition of public statements in a separate article, no. 444, according to which a public statement is made:

“Either in public meetings or places;

Or in the presence of several people, in a place that is not public but accessible to a number of people who are entitled to meet or visit there;

Or in any place in the presence of the offended person and in front of witnesses;

Or through documents, printed or otherwise, illustrations or symbols that have been displayed, distributed, sold, offered for sale, or publicly exhibited;

Or finally by documents that have not been made public but which have been sent or communicated to several people.”

Equally detailed is the definition in Luxembourg:

“(by) statements, shouting or threats uttered in public places or meetings, or via hand-written or printed materials, drawings, engravings, paintings, posters, texts or images in the media, sold or distributed for sale or exhibited in public places or at public meetings, or publicly demonstrated placards, or (by) any means of audiovisual communication.”

However, the last item on this list appears questionable to me: after all, audiovisual communication can take place between two people.

Canada’s Criminal Code (Art. 319) defines public statements very broadly: it refers to a public place as meaning any place open to the public by law or by explicit or implicit invitation. This means that the real presence of the public is not required. Thus, a public statement is any statement that is not communicated in a private conversation.

The Irish *Prohibition of Incitement To Hatred Act* even considers a statement that takes place in a private room to be criminal if it is seen or heard outside and if the accused is aware of this. Accordingly, any statement or action outside a private room is considered public. A similar formulation is found in English law.

Together with the dissemination of illegal public statements, the Finnish Criminal Code also mentions certain actions which are described as the storage of such statements in a way that makes them available to the public.

Croatia considers the statement to be public if it is made “*through the press, radio, television, computer network, in front of a number of persons, at a public assembly, or in another public way.*” The last three words in this definition, in fact, indicate the uselessness of such a list in the first place. However, a number of countries consider it necessary to point to different methods of communication of the statement, without attempting to create an exhaustive closed list, while others, like Italy, include phrases such as “*through different means.*”

Some countries make attempts to rank the degree of the public nature of the statement directly in the law. We can assume that statements in the mass media are more “public” than other public statements, that they represent a great danger to the public, and that this form of speech should be considered as an aggravating circumstance. With regard to printed media this may be anachronistic: any given rally may attract a crowd which includes more people than the number of readers of a particular issue of a newspaper. On the other hand, there are blogs or websites that are much more popular than some newspapers.

79 ECRI General Policy Recommendation No. 7.

Given this last consideration, the law can equate publication on the internet with mass media publications, although there is no denying that many blogs and websites have audiences smaller than that which might be present to hear a speech down at the pub.

In any event, the use of mass media and the Internet and sometimes other media is considered to be a specific aggravation in a number of countries. It should be noted that, although mass media and the Internet overlap, they are always mentioned separately. The Czech Republic uses the wording: “*by (the) means of content of printed matter or the distributed file, or by film, radio or TV broadcasting, or other similarly effective manner.*” In Latvia, dissemination of the statement “*utilizing automated data processing systems*” is considered a specific aggravation.

In Moldova, incitement “of enmity, hatred or discord” is considered to be criminal, regardless of the media used, but “encouragement or support” of discrimination is criminalized only if it occurs in the media. Since in this case reference is made not to minor and major offences, but to two different corpus delicti, it is possible that the distinction is a random one. Still, since penal codes develop gradually, at different times different legislative ideas may be taken into account, and these ideas do not always apply to the entire criminal code.

In Russia, the use of mass media and the Internet is a specific aggravation under two articles, first, under the article on calls to extremist activity, which includes incitement to commit hate crimes, terrorism, discrimination, incitement to hatred, hate speech, and others, and second, under the article on calls to separatism. Use of the media is not a specific aggravation for incitement to hatred in and of itself or for the public justification of terrorism.

B. Motive, goal and means

Like any crime, except as specifically stated in the code, a crime committed by virtue of a statement is intentional and the court must establish the intent of the accused. The wording of the articles of the criminal code, as a rule, suggests the definition of the purpose of such intent: to incite hatred toward a certain group per se. The distinction as to the underlying type of ideological, political or other considerations is not important for the justice system. In this sense, the situation is exactly the opposite of that described above with respect to hate crimes.

In particular, it is not important whether or not the accused felt hatred towards the group against which he was advocating, although during the trial this subjective aspect of the crime is likely to be analyzed as well. The motive of hatred as such is rarely mentioned in the laws on such statements. In Art. 424a of the Criminal Code of Slovakia, the corpus of which includes incitement to violence and hatred, discrediting groups and “historical

revisionism,” the hate motive based on a number of group characteristics serves as a specific aggravation, meaning that there is an implied way of committing such a crime without a motive of hatred. The other two articles on threats and discrimination (Art. 424) and on defamation (Art. 423) based on group characteristics contain no such distinction. Apparently, this would seem to suggest that the presence of a specific hate motive is also not necessary under these articles. We see a similar situation in a comparison of Articles 10 and 10 (a) of Chapter 11 of the Criminal Code of Finland.

As we have seen in the examples above, in some countries, the wording of the articles assumes goal-setting through actions which themselves may be regarded as a crime. In other words, some of the actions that may be criminal in one country are criminalized in another country only in the event that certain goals have clearly been set. In Malta, under Art. 82A of the Criminal Code, “*threatening, abusive or insulting words or behaviour*” are criminal insofar as they are “*aimed at inciting racial hatred,*” though in many countries all or part of such actions constitute a crime in and of themselves. However, in Turkey, the corpus of Art. 216 includes the formulation “*who openly provokes a group of people to be rancorous or hostile against another group*” (based on a number of characteristics).

As was mentioned above, in some countries the law includes a list of actions used in the technical sense, such as Luxembourg for example, but such lists are not exhaustive and, therefore, in general, their presence does not create any new legal situation as compared to their absence. However, there are two specific types of action that may occur as methods of incitement to hatred, but which are, in fact, specific crimes. The first of these is participation in “extremist groups” or other illegal associations and support of corresponding ideologies, while the second is denial of recognized historical crimes. These two types of actions are addressed separately in the next chapter.

Finally, some countries consider it necessary to provide for reservations and/or exceptions in their legislation, in order not to criminalize statements that do not constitute hate speech, although they may be similar to it in form. Statements may differ both in motivation and according to certain formal characteristics. Reservations can be constructed in a more or less complicated way.

Andorra directly stipulates the need for “*malicious intent.*”

In Canada, there are no reservations regarding incitement to hatred which could lead to a “breach of the peace,” while in other cases the reservation is formulated rather broadly. Please refer to the previous section for the specific wording.

In Liechtenstein, the dissemination of racist and similar materials is not a crime *“if the propaganda material or the act serves the purposes of art or science, research or education, appropriate reporting on current events or history or similar purposes.”*

It is very rare that countries explicitly introduce into the law the concept of hate speech “out of negligence.” This is explicitly stated in the law of Ireland, but it is assumed that the lack of knowledge about the offensive, inflammatory, and other similar content of the disseminated material renders the person exempt from liability, if it can be proven that the dissemination was made with no intent to incite hatred. This last reservation is important: this may be precisely the intent of a person distributing a book that he/she didn’t read.

In England, the reservations in the law may even seem excessive, as they are designed to ensure that restrictions on freedom of speech not be subject to abuse. Offensive statements or actions including written or other materials are decriminalized unless the goal of inciting hatred is proven, and unless the defendant intended to insult or knew that the statement or speech would be offensive. It is specifically stated that the use of offensive material in a radio or television program is not criminalized. Here follow additional provisions regarding statements concerning religion or sexual orientation:

“Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.” (Section 29J)

“For the avoidance of doubt, the discussion or criticism of sexual conduct or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening.” (Section 29JA)

All other countries not listed above do not feature descriptions of objectives and means in their legislation.

C. Different ways of making a statement

It is worth specifying once again that the term “statement” is understood as broadly as possible in this study. There are countries that consider it necessary to enumerate types of statements and even different technical means of communication directly in the law, but it is unlikely that such a list can be exhaustive. Generally speaking, a “statement” does not necessarily correspond to what this word means in everyday language. For example, any person who has published a book by another author has not said or written anything themselves, yet they have still made a public statement. The laws of many

countries refer to such non-obvious forms of speech as “actions” in order to avoid misunderstandings. However, this is of little consequence, as those “actions” still include a “statement” in a narrow sense: a publisher publishes a text, the organizer of a concert allows the performance of the songs, and the legal assessment of the “action” will depend specifically on the content of these texts and songs. So I will not make any further reference to this distinction. The most widespread means of a public statement in national legislation and in actual practice is the distribution of written and other materials, the content of which corresponds to the corpus of the article of the criminal code, as well as their manufacture, storage for distribution, and other actions. With certain variations, this instrument is specifically mentioned in the laws of Albania, Germany, Ireland, Cyprus, Kyrgyzstan, Liechtenstein, Lithuania, Luxembourg, Slovakia, the Netherlands, Ukraine, Croatia, England and Uzbekistan. The Criminal Code of Finland should also be considered as containing the same provisions.

In Russia, the corresponding offence is addressed in the administrative code rather than in the criminal code, and the provisions refer to the mass distribution of the prohibited materials. Belarus distinguishes a similar offence, but without the criterion of mass distribution.

The justification, glorification or denial of historical crimes, which are other fairly common means of incitement to hatred and hate speech, are discussed later in a separate subsection.

§ 5. The object of the statement – a person or a social group

The person or persons indicated as the victim(s) of the crime of incitement to hatred or hate speech are very important. The situation is generally similar to that discussed above with respect to hate crimes, with two important differences. First, the victims of hate crimes are specific individuals, while statements of this kind, on the contrary, do not usually mention anyone in particular, given that they use impersonal group characteristics. This means that the definition of the “protected group” becomes more important. Second, as a general rule, the criminalization of statements, while taking into account the motive of the perpetrator, is still focused primarily on understanding who is the object of the statement. In this sense, the concepts of the “protected characteristic” and the “protected group” actually coincide in cases of incitement to hatred. However, the laws on incitement to hatred and hate speech may explicitly protect not only the group, but also society as a whole, as seen above in the case law in which the important or essential criterion was the violation of public order or of “social peace.”

The corpus of the corresponding articles is based on

group characteristics, but the objects of the crime may either be groups, people associated with such groups, or both. This tends to cause a number of difficulties. It is easier to see a person or a multitude of people as victims of a crime than it is to see a given social group as a victim, since the boundaries between the ethnic groups and other groups described by the characteristics referred to in such laws are always blurred, and the debate regarding these boundaries is definitely not a legal matter. Expressions such as “members of the group” are just simplified expressions, since the law does not provide for any procedures in order to establish “membership” in the group concerned. There do exist possible exceptions for registered membership, but these are really and truly exceptions. The content of the statements is related to the intent of the speaker, as well as to conventional perceptions in society or in that part of the society to which the speaker intentionally or involuntarily appeals.

If the law specifies that the object of the criminal statement is a given group, this may not mean that the law objectifies this group. The law may still refer to people who are conventionally or otherwise associated with this group as the object. Therefore, it is not easy to classify national laws based on the “people or groups” criterion. Consequently, I will highlight only those countries in which the law explicitly refers to groups, and not to people.

This is the case of Hungarian criminal law, which refers to incitement to hatred toward ethnic, racial or other groups. In principle, I understand the law to refer only to those persons included in these groups, but another passage in the same Art. 332 of the Hungarian Criminal Code mentions the “Hungarian nation” as a whole as being the object of hate speech. This demonstrates that the provision is clearly meant to be understood as a norm for the protection of national dignity and, therefore, any other group is, apparently, also protected by the law as a whole.

In Bosnia and Herzegovina, one can initiate “national, racial or religious enmity or discord” or “hostility between constitutional nations and other residents of Bosnia and Herzegovina or the Federation”; this suggests that “constitutional nations” are treated as real communities. However, the emergence of such a rule in this country, which was formed with great difficulty through just such “constitutional nations,” is understandable.

In those cases in which the law refers specifically to people, there exists a dilemma between the “reality” of the groups and “affiliation” with them, as already discussed in relation to hate crimes.

Those countries that simply list the groups tend to avoid this dilemma in the law. They are: Andorra, Canada, Germany, Spain, and Sweden.

The same is true of countries in which the protected characteristics form the basis of the law. In this case, the group may not be explicitly mentioned in the law, but this does not preclude a review of any attacks against the group. This is the case in 24 countries: Albania, Armenia, Azerbaijan, Belarus, Belgium, Bulgaria, Estonia, Georgia, Ireland, Italy, Kazakhstan, Latvia, Malta, FYROM, Moldova, Mongolia, Norway, Slovenia, Tajikistan, Turkmenistan, Ukraine, Finland and England. Kyrgyzstan is to be included in this list as well, despite the fact that its law features the essentially meaningless phrase “racial affiliation”: I believe this is best ascribed to the negligence of the legislator rather than being intended as a statement of “membership” in the race.

Another frequent approach is to mention both people and groups in the law. This is stipulated in quite simple terms in the law of Iceland, Denmark, Liechtenstein, Lithuania, Luxembourg, Poland, Portugal, Romania, the Russian Federation, Switzerland and Uzbekistan, as well as the Netherlands and Turkey. Dutch law contains an interesting distinction: incitement to hatred applies to people, while hate speech applies to groups. Turkey makes the same distinction, but vice versa: incitement to hatred is assumed to be done by “*part of the population ... with respect to the other part of the population,*” and the rather narrow definition of defamation applies only to individuals.

There are a number of countries in which social groups are clearly treated by the law as more important than individuals, or at least as equally important, but the problem of the relationship between individuals and groups is avoided. The law of Bosnia and Herzegovina, as has been noted, does not consider the dilemma of the reality of membership in a group, since it covers both “constitutional nations” and individual citizens. The Criminal Code of Montenegro mentions “*people, national minorities and ethnic groups living in Montenegro*” in the same context. Cyprus takes a similar approach, but in addition to nationals it refers to communities, religious groups and classes; later, however, another norm was added to Cypriot law that mentions both the group and its members. The Criminal Code of Serbia features two relevant articles: one refers to “*hatred or intolerance among the peoples and ethnic communities living in Serbia,*” while the other refers to incitement to racial discrimination and racist statements in a fairly broad sense.

In some countries, the fact of “belonging” to a group is formulated as a kind of reality. Such “realists” include Austria, Croatia, Greece and Slovakia: the law of these countries treats both the groups and their members as the objects of statements. What is more, in Austria this also applies to organizations.

However, there are ways to avoid the possibility of the

mistaken association of an individual with a group in the text of the law. For example, French law refers to “membership or non-membership” in a given group, which is quite sensible wording, given that often statements are not aimed at a particular group, but rather at everyone who is not part of a specific group, usually including the defendant. In Monaco, this same wording is supplemented by a reference to the “real or perceived sexual orientation” of the object. In the Czech Republic, both large groups (racial, etc.), and any group of people who are united by a real or perceived trait are considered to be objects of statements.

2. Types of bias

The types of biases that underpin the corpus of the corresponding articles of criminal law vary no less for hate speech than they do for violent hate crimes. This issue has already been covered in sufficient detail in the relevant chapter, but we cannot omit it altogether, since the lists of biases for hate crimes and criminal statements differ in many countries. Please see the large comparative table at the end of the book for more detailed information.

§ 1. The main biases – race, ethnicity, nationality and religion

A variety of terms related to race, ethnicity, nationality or religion are used in the legislation of almost all countries. These four categories may be understood differently in different countries and may suggest different relationships, including a possible language characteristic. Please see the chapter on the classification of hate crimes for further details.

These are the only characteristics that are protected by the Criminal Codes of Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Greece, Italy, Kazakhstan, Latvia, Liechtenstein, FYROM, Malta, Moldova, Mongolia, Serbia, Sweden, Switzerland, Ukraine, and Uzbekistan. This list includes only those countries in which legislation features at least one of the characteristics related to ethnicity or nationality and race, as well as an element relating to religion.

As of today, the pertinent legislation of all countries contains these characteristics. However, it is possible that one of the characteristics may be missing: for instance, neither Andorra nor Germany uses the concept of “race,” while in Malta there is no prosecution for incitement to hatred connected with religion.

It should be borne in mind that in some countries, the terminology used may expand in order to adapt to local conditions. This applies to the above-mentioned terms “community” and “constitutional nations.”

As a rule, racial, ethnic or national and religious categories are listed in one article of the code, separated by commas, though there are exceptions, such as Bulgaria,

where the promotion of religious hatred is the subject of a separate article of the Criminal Code. In this specific case, the article somehow does not cover incitement to discrimination, in contrast to racial discrimination. There are also cases in which religious hate speech is covered together with other types of hate speech in a separate article, such as in Portugal. It would seem that such a combination of standards simply developed for historical reasons and has no real effect upon the legal regime.

In some cases, rather odd combinations of characteristics may arise due to the inclusion of the term “racial discrimination” in the text of the law, to be understood as discrimination based on a number of grounds relating to race, ethnicity, etc., in a context in which the word “race” also occurs in a narrower sense. For example, Art. 319 of the Criminal Code of FYROM criminalizes incitement to hatred on the grounds of race, ethnicity, religion and even nationality, which is apparently understood to mean citizenship, given the mention of “national symbols.” But Part 3 of Art. 417 separately criminalizes specifically racist hate speech and incitement of discriminatory hatred. Exactly the same conflict is found in Art. 317 and in Part 2 of Art. 387 of the Serbian Criminal Code.

§ 2. Religion, politics and worldview

Hostility on the grounds of religious belief or religious identity is not as clearly understood as a phenomenon, which is due in part to uncertainty surrounding the concept of “religion.” If, for example, a certain religion is recognized by State A and not recognized by State B, and the adherents of such a religion tried to register their religious organization and were denied because their belief system was not recognized as a religion, does this mean that promotion of hatred towards such people is criminal in country A and not criminal in country B? Some countries have concluded that the protected characteristic should be worded broadly in order to include attitudes not only to religion but also to any worldview.

However, if such an approach is applied in a sufficiently consistent manner, this quickly leads to a situation in which political views or political identity are then also equated with philosophical and religious views. In truth, the former often determine the self-identification of people and groups and cause as much hostility, certainly to no less a degree than the latter. In addition, political strife is certainly no less frequent a cause of attacks and is no less fraught with the destabilization of society than are religious or ethnic hatred. It should be noted that statements qualified by the views of the subject, as opposed to the object of the statements, will be discussed in another chapter.

Indeed, sometimes no less an important role may be played by still other views, such as the perception of

art, but this concerns only a small group of people. Most importantly, the law can not cover the full diversity of philosophical, ideological, and similar identities which are important to certain people, and, therefore, it cannot encompass the diversity of conflicts deriving therein. So, the choice is either to ignore the subtle differences in the legislation, or to attempt to formulate the corresponding protected characteristic in as broad a manner as possible. In practice, only a few options are used.

Some countries seem to opt for a predominantly political focus. The Czech Republic and Estonia associate the protected characteristics with religion and political convictions. Moldova criminalizes incitement to discrimination against “views and political affiliation.” Luxembourg supplements “political opinion” with “trade union activities.” Andorra mentions “work groups,” which in the given context refers to unions rather than to classes.

It is also possible to expand the concept of religion within these rules to a broader, more philosophical concept: Spain refers to ideology, religion or beliefs, while the Netherlands and Finland both refer to religion or beliefs. Luxembourg complements religion with such characteristics as political or philosophical opinions and morality, which likely refer not only to views but also to behavior. Andorra defines the protected characteristic through groups, including religious ones, but adds the phrase “*persons expressing dissenting beliefs or ideologies.*”

The broadest formulation is used in Turkey, but only insofar as it relates to statements not about the group, but about the person. Equally punishable are humiliation of a population group on the basis of religious differences and humiliation of a person in connection with his or her values. The defamation of a person is punished even more severely if it occurs under the following circumstances: “... *due to the disclosure of, change in or attempt to spread one’s religious, social, or philosophical beliefs, opinions or convictions or due to following the prescriptions and restrictions of one’s religion*” or “...*through mentioning the sacred values of one’s religion.*”

In general, incitement to hatred and/or hate speech which are somehow connected with religion are criminalized in all OSCE participating States, except for the United States, the Holy See, Malta and San Marino. It should be noted, however, that San Marino criminalizes blasphemy.

§ 3. Other characteristics

Protected characteristics that are related to social status, gender, sexual orientation, health status, and other factors are generally not problematic in the formulation of norms on public statements, as opposed to norms on hate crimes, given that these characteristics have been associated with a variety of actual aggressive and hostile discourses.

The variety of wording here differs little from that used in legislation on hate crimes, so a simple list of those countries which have included certain protective characteristics in their legislation on incitement to hatred and hate speech will suffice for our purposes.

References to distinctions in social status are only infrequently found in these laws and are formulated differently in the legislation of different countries. The protected characteristic is referred to as “wealth” in Belgium, “class” in Cyprus, “property or social status” in Estonia, “social status” in Georgia and Spain, “caste superiority” in Kazakhstan, “social status” in Lithuania, “income, social origin” in Romania and “social class” in Turkey. Some post-Soviet countries feature the concept of “social discord,” which originally contained only a class-specific meaning which it has still largely retained; this formulation is to be found in the criminal law of Kazakhstan, Moldova and Turkmenistan.

Sexual orientation is referred to more frequently in national legislation. Sometimes the wording varies, with further indications provided parenthetically. Based on available data, such references currently exist in the laws of 21 countries: Albania (“sexual orientation”); Austria, Belgium, Canada, Croatia, France and Hungary (“sexual orientation, gender identity”); Denmark, Estonia, Iceland, Ireland, Lithuania, Luxembourg, Monaco and Norway (“homosexuality, lifestyle or orientation”); Romania, Slovenia, Spain and the Netherlands (“heterosexual or homosexual orientation”), and finally, Finland and the UK, in which the following clarification was considered necessary: “with respect to persons of the same sex, opposite sex or both.”

The protected characteristic referred to as “sex” occurs less often, in the legislation of only 15 countries: Austria, Belgium, Croatia, Estonia, France, Lithuania, Luxembourg, Romania, Russia, Slovakia, Spain, the Netherlands and Turkey. It is also used in Hungary, though the term is not “sex,” but rather “gender identity,” which is listed along with sexual orientation, and in Moldova, the legislation of which uses the term “sex” in the article on incitement to discrimination, but not in the article on incitement to hatred.

A group of relatively similar protected characteristics concerning health is found in the legislation of nine countries. The exact terms used are provided in parentheses: Austria, France, Hungary and Finland (“disabled”); Belgium (“the current and future state of health, disability or physical characteristics”); Luxembourg (“state of health, disability”); Spain (“disease or disability”); Slovenia (“physical or mental disability”) and the Netherlands (“limited physical, mental or intellectual capacity.”)⁸⁰

⁸⁰ This phrase should be understood in a medical sense. Expressing views that are insulting to fools is not a crime.

As in the case of hate crime legislation, laws on incitement to hatred and hate speech also contain more exotic protected characteristics. Sometimes it is for the same reason: such characteristics are present in the norms on discrimination, and, accordingly, it is criminal to promote discrimination on such grounds. This seems only natural. However, one might consider the matter from an even broader perspective: couldn't these protected characteristics be usefully transformed into more broadly worded norms on incitement to hatred, and especially on hate speech? After all, derogatory statements on the basis of marital status, for example, are not so dangerous an action as to constitute a crime.

There are only two countries that specifically criminalize the promotion of discrimination on atypical grounds. Belgium has the longest list of such protected characteristics, which apply both to appeals for discrimination and to incitement to hatred. Worth mentioning are such characteristics as age, wealth and matrimonial status, as well as "birth," especially status at birth, depending on whether the parents were married, and "origin," i.e. all the characteristics of the parents and other ancestors. Luxembourg also includes such characteristics as origin, age and matrimonial status.

Here follows a classification of such rare characteristics according to type of statement.

Incitement to hatred can be attributed to:

- origin⁸¹ (Croatia, Estonia, Lithuania, Luxembourg, Russian Federation, Slovakia, Finland),
- region of residence or origin (Kyrgyzstan, Tajikistan, Turkey⁸²),
- age (Lithuania, Luxembourg, Romania), and
- marital status (Luxembourg).

Hate speech refers to:

- age (Austria, Lithuania, Romania),
- origin (Lithuania, Russia, Slovakia, Finland), and
- region of residence or origin (Kyrgyzstan, Tajikistan, Turkey).

The criminalization of degrading and similar statements (hate speech) targeting certain characteristics would seem to be problematic. While, for example, in post-civil war Tajikistan it is certainly understandable that the law reflects tough measures aimed at preventing any negative statements regarding the regional characteristic, negative

statements targeting wealth probably would not be criminalized, as they are in Belgium. In the case of Belgium and Luxembourg, one might expect that they would not automatically transfer the list of characteristics protected from discrimination into the norms on public statements. There are yet other countries that would be more likely to consider whether or not to criminalize hate speech in relation to age, and in respect of exactly what age groups.

Another possibility is for the list of protected characteristics in the law to be an open list, though this raises questions as to the legal uncertainty that may be created by such rules. Regarding statements, the diversity of formulations used and approaches taken recalls our analysis in relation to hate crimes. However, the variety is smaller, as in this case the lawmaker only focuses on the protected characteristics, and not on the motives of the perpetrators.

Here follows a description of national laws according to the type of wording used to create an open list:

Croatia simply uses the phrase "any other characteristics," rendering the list infinitely expandable. A similar approach is adopted in Moldova, but without the word "any." The Czech Republic and Lithuania mention "another group of people," while Germany refers to "part of the population."

Finnish legislation makes reference to "similar grounds," implying that any similar protected characteristics must be definable through a comparison with other characteristics already listed in the law.

Hungary uses the term "particular social group," which leaves ample room for enforcement, but still presupposes a certain consistency in these "social groups" which are not arbitrary "groups of people." Of course, the concept "social group" in this case does not have a clear meaning in the law, nor is it clearly defined in the academic environment, so the word "particular" may not mean that much here either. Accordingly, Hungarian law is quite similar in this respect to Russian and Romanian legislation, which also refer to "social groups" without qualifying them in any way.

3. Penalties

Penalties for hate speech also vary widely across the OSCE region. In some cases, the relevant articles of the criminal code stipulate different degrees of gravity for the act, while in others these articles establish a wide range of penalties. In the latter case, the question of the severity of the act is left completely to the discretion of the court. Typical aggravations include the abuse of one's official position, serious consequences of the crime itself, and the use of violence or the threat of such use.

The maximum penalties envisaged by the different laws also vary widely, and are very severe in certain countries. In Albania, Bosnia and Herzegovina, FYROM, Mongolia, Montenegro, Serbia, Latvia and Uzbekistan,

81 The ambivalence of the term "origin" was discussed in the chapter on hate crimes.

82 It is possible that this is the Turkish way of masking ethnic differences: the Kurds, for example, are not called Turkish Kurds, but rather Mountain Turks. It would appear that, in the spirit of consistent republican principles, the difference is referred to not as a national distinction but rather as a regional one.

the ceiling is set at 10 years in prison, while in Tajikistan the maximum sentence is 12 years. Of course, application of the maximum penalty suggests serious aggravating circumstances.

However, in other countries the maximum sentence is quite short by comparison. In Belgium and the Netherlands, for instance, the maximum penalty for incitement to hatred or hate speech is one year in prison. In Malta, the same crime would lead to a sentence of a maximum of a year and a half. In Canada, Denmark, Greece, Iceland, Luxembourg, Liechtenstein, Sweden and Ireland,⁸³ the maximum sentence is two years in prison.

One would assume that the punishment for hate speech would be lesser than those for inciting hatred, for public incitement to discrimination, or for more violent acts. However, in the great majority of cases, when the law includes wording regarding incitement to hatred and hate speech, the exact term of punishment is not provided, and the matter is left to the discretion of the court. Please see the relevant table in the Annex for further details. Since there are few exceptions, it will be useful to examine the options chosen by various countries.

In the Principality of Monaco, public incitement to hatred and violence is punishable by up to five years in prison, and slander of a social group by up to one year in prison. In Turkey, the same terms are three years and one year. In the Netherlands, incitement to violence, discrimination and hatred can lead to imprisonment of up to one year, while insulting remarks against groups are punishable by up to six months' imprisonment. In Poland, public incitement to commit hate crimes also leads to up to five years of imprisonment, and publicly insulting a group is punishable by up to three years in prison, while incitement to hatred is only punishable by up to two years in prison for some reason. The Latvian Criminal Code refers exclusively to religious hate speech, with a maximum sentence of two years, while the maximum sentence for incitement to hatred is 10 years.

In some countries, the distribution of maximum penalties for various types of statements is puzzling. The Austrian Criminal Code explicitly states that the punishment for insulting statements should be similar to that stipulated for attacks of a discriminatory nature. In Cyprus, inflammatory statements lead to a lighter sentence than do statements that may arouse inter-communal and other similar strife. In France, "historical revisionism" is punishable by up to five years in prison, while all other forms of public manifestations of intolerance earn a sentence of up to a year. For a discussion of this French

term, please see the corresponding subsection.

Of course, other penalties can always apply, such as fines, community service and so on, and it would seem that they often do, although there has been no comprehensive research of enforcement in this area.

Additional penalties may be useful. For example, Italy provides such additional punishment for hate speech and hate crimes as community service and temporary restrictions of voting rights and access to sporting events. Similar provisions are also envisaged by Russian legislation.

Imprisonment is provided as one of the possible penalties in all countries that have laws criminalizing statements. If one takes into account the laws regarding the burning of crosses in the United States, then this statement is true of all OSCE countries, with the exception of the Holy See.

Acts may also be divided into more or less dangerous kinds, and in such cases some actions may be covered by the legislation concerning minor offences rather than by criminal legislation. In Russian terminology, these are referred to as "administrative violations." For example, in the Russian Federation, the mass distribution of any prohibited "extremist material" is a minor (administrative) offence if the intent to incite hatred is not established. Another example is provided by the unusual combination of criminal and administrative liability in Romania which was referred to at the beginning of the present chapter.

⁸³ Except in the case of blasphemous slander, which is punishable by up to seven years' imprisonment.

Chapter IV. Special Laws

1. Criminalization of “historical revisionism”

The specific content of the statements in question, which determines whether or not they constitute incitement to hatred or hate speech, can be very different in nature. Of course, the law cannot and should not enumerate all possible statements. However, there are some types of statements that legislators consider it necessary to mention. There are several possible reasons for such an approach:

- The norms on statements in and of themselves are difficult to apply: when a particular type of statement is frequently encountered, the legislator can facilitate enforcement by specifically pointing it out;
- The particular type of statement is one that causes an especially significant disturbance in the society or in some part of it: as a result, the legislator considers it necessary to include this type of statement specifically in the law for political reasons related to current events or to recent history;
- The particular type of statement eludes enforcement and the legislator is seeking to remedy this problem.
- There is often a reference in the text of such laws to the ideological connotations of statements: this will be discussed in detail in the next section. The focus here is on what is commonly referred to as “historical revisionism,” a prime example of which is Holocaust denial. It should be noted that in the text of such laws, there may be slight deviations from the exact words “denial” and “Holocaust”. Holocaust denial has gradually become one of the most common subjects of such propaganda, and of course it is painfully perceived. In many countries that survived World War II, Holocaust denial is commonly understood to be one of the most cynical forms of promoting racism and is directly associated with Nazism.⁸⁴ After all, the modern system of democracy and human rights protection have largely developed from the experience of the Second World War. As a result, Holocaust denial can be understood to be an indirect attack on the very foundations of the established order.

Even more important for the purposes of this study is the fact that the prosecution of “deniers” is a kind of tight-rope act between the desire to protect society from hate speech and the need to preserve freedom of expression. The latter imperative is particularly relevant to freedom

of scientific research, since “deniers” are often historians, if amateurish ones. Accordingly, the main argument made in their defense is that a researcher has the right to make mistakes and to question universally recognized issues. The counterargument is that their conclusions are not a mistake, but rather a deliberate manipulation of the facts, and that by drawing such conclusions, they are consciously attempting to incite hatred. Here, I would refer the reader to the previous chapter for a discussion of the correlation between the concepts of “libel” and “hate speech.” This debate, therefore, largely turns upon the motive of the alleged offender as opposed to the conventional approach to the criminalization of statements, when the objective action itself is of primary importance, and the motivation is considered to the same extent as in ordinary crimes.⁸⁵

The process of updating the respective criminal codes in the participating States of the OSCE began in the early 1990’s, which is when many of the legal aspects of the problem were discussed. Consequently, the scope of the earliest laws is often much broader than Holocaust denial alone. As of the beginning of 2014, 23 OSCE participating States criminalized “historical revisionism” in one form or another.⁸⁶ These countries not only criminalize “negation” of the Holocaust: they also criminalize praise for or justification of historical crimes, meaning using such crimes as references in appeals to commit similar acts. As a result, these laws cannot be considered to refer only to “historians.”

The EU Council Framework Decision of 2008, which was discussed in the subsection on the law of the European Union, explicitly requires EU member states to respect their obligation to establish criminal provisions devoted to “revisionism” only in those cases in which such revisionism is associated with incitement to hatred. Nevertheless, as of 2014 there were still eight EU member states which had no such rules.⁸⁷

85 For the debate regarding “historic revisionism,” see David Frazer, “On the Internet Nobody Knows You’re a Nazi,” in Ivan Hare and James Weinstein (Eds.), *Extreme speech and Democracy*, (Oxford: Oxford Univ. Press, 2009), pp. 511–537, and Michael Whine, “Expanding Holocaust Denial and Legislation Against It,” *Ibid.*, pp. 538–556.

86 “Historical revisionism” can also be countered without using criminal legal instruments. For example, as of 2015, denial of the Holodomor in Ukraine was banned but not criminalized.

87 *Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law*, pp. 5–6.

84 Stephen Atkins, *Holocaust Denial as an International Movement* (Westport: Praeger, 2009) and Ludovic Hennebel and Thomas Hochmann (eds.) *Genocide Denials and the Law* (Oxford: Oxford Univ. Press, 2011).

There are some countries that deliberately refuse to adopt “anti-revisionist” laws, citing the fact that such actions are often already covered by existing legislation on incitement to hatred and hate speech. After all, the supreme court may provide an adequate explanation, as is the case, for example, in the Netherlands⁸⁸.

In Austria, the issue of “historical revisionism” is intrinsic to the task of de-Nazification. The detailed anti-Nazi law of 1947 was amended in 1992 through the addition of an item that provides a good starting point for this discussion. The *corpus delicti* is formulated as follows: “Any person who denies, grossly minimises, approves or seeks to justify the National Socialist genocide or any other National Socialist crimes against humanity in a publication, a broadcasting medium or in any other medium publicly and in any other manner accessible to a large number of people will also be punished.”

The reference here is only to the crimes of the National Socialists, and only to those crimes that are crimes against humanity. This excludes many war crimes and other specific crimes of the Nazi regime from consideration. In order for the statement to be punishable, Nazi crimes against humanity must not only be advocated or provided with attempted justification, which can be considered a form of approval, but must also be “grossly” denied and downplayed. As a result, discussion of specific acts and of the number of victims still remains possible.

Similarly, the French Press Freedom Act criminalizes the denial, approval and justification of crimes against humanity, as defined in the Charter of the Nuremberg Tribunal.

In Belgium, the subject is formulated more narrowly: reference is specifically to the genocide committed by Germany during World War II, rather than to crimes against humanity in general.

In Germany, the scope is further narrowed:

“Whoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in section § 220A, para. 1 (which contains the definition of genocide – A.V.), in a manner capable of disturbing the public peace.”

Thus, Germany would seem to criminalize denial or approval of any genocide, but because the reference in the law is to an offender specifically motivated by National Socialism, only in exceptional cases could the law relate to the justification of any real genocide other than that committed by the authorities of the Third Reich. The same clause narrows the scope of the *corpus delicti*, as

the perpetrator may not be motivated by Nazism, and the further the realities of the Third Reich are from German society, the more racist ideas not directly related to “National Socialism” may (and do) appear.

The absence of an epithet for the word “downplays” is also noteworthy. Even more important is the wording found at the end of the formula: the statement becomes criminal only if it poses a threat to civil peace and public security. It is clear that debates attempting to clarify the number of victims of the Holocaust pose no such threat, but the clause on consequences is generally designed to separate any inflammatory public statements on historical topics from ill-intended or malicious but essentially harmless chatter on the same topic.

For obvious reasons, some countries in Central and Eastern Europe consider the crimes of the Nazi and Communist regimes to be on a par: in the event they have laws on “historical revisionism,” they formulate them accordingly.

In the Czech Republic, a person is considered an offender if he or she “publicly denies, questions, approves or tries to justify the Nazi, Communist or other genocide or other crimes of the Nazis or Communists against humanity.” A similar though more simply formulated provision exists in Hungary, where an offender is: “Any person who denies before the general public the crime of genocide and other crimes committed against humanity by Nazi and Communist regimes.”

On the other hand, with reference to the object, Lithuania significantly alters the *corpus* of what is basically the same offence. First, relevant Lithuanian law addresses offences acknowledged by the reputable authorities, as well as those that were not recognized as such, but which were committed in the territory of Lithuania or against Lithuanian citizens. The full text of the provision reads as follows:

“Whoever publicly approves the crime of genocide and other crimes against humanity or war crimes, established by the legislation the Republic of Lithuania, acts of the European Union, final (*res judicata*) decisions of the Lithuanian courts or decisions of international courts, denying or grossly understating such crimes, if the acts are committed in a threatening, abusive or insulting manner or caused the breach of public order; also, whoever publicly approves the aggression of the USSR or Nazi Germany against Lithuania, as well as the crime of genocide or other crimes against humanity and war crimes committed by the Soviet Union or Nazi Germany in the territory of the Republic of Lithuania with respect to residents of the Republic of Lithuania, or approves serious or grave crimes committed in the years 1990-1991, or who denies or grossly understates them in a threatening, abusive or insulting manner or causes public disorder.”

As we can see, the political specificity is manifested

⁸⁸ ECRI Report on the Netherlands (fourth monitoring cycle), ECRI website, 15 October 2013: see <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Netherlands/NLD-CbC-IV-2013-039-ENG.pdf>, p. 12.

here in the fact that, together with the historical crime typical for this subsection, the law lists aggression of the USSR and of Nazi Germany against Lithuania as well as crimes committed during the struggle for independence in 1990-1991, although the latter crimes are dwarfed by comparison with the crimes of the 1940s or with the other crimes against humanity that have been distinguished by the decisions of international courts.

Furthermore, this Lithuanian law has significantly expanded the scope as compared with the laws above, given that it includes war crimes as well as genocide and crimes against humanity. Most importantly, the law goes radically beyond the chronological and geographical limits of the Second World War: it appeals to a more global concept – that of banning statements in support of any officially recognized large-scale “political” crimes, rather than banning only those statements pertaining to the ideological confrontation that resulted in the building of modern Europe.

Poland’s approach is very similar to the Lithuanian approach in two of these three aspects, but it differs radically in the third instance: the scope of Polish law is not only more narrow, but the law itself even contains a certain ethnocentricity in that it considers only historical crimes against Polish citizens and ethnic Poles.

Slovakia, on the contrary, not having listed Communist crimes together with Nazi crimes, defines acts that cannot be denied, justified or downplayed as follows:

“(the act of) genocide, a crime against humanity or a war crime under Articles 6, 7 and 8 of the Rome Statute of the International Criminal Court, or an offence that is deemed to be a crime against peace, a war crime or a crime against humanity under Article 6 of the Statute of the International Military Tribunal annexed to the Agreement of 8 August 1945 for the Prosecution and Punishment of the Major War Criminals of the European Axis, if such crime was committed against such a group of persons or an individual, or if a perpetrator of or abettor to such crime was convicted by a final and conclusive judgment rendered by an international court, unless it was made null and void in lawful proceedings.”

Thus, the Criminal Code of Slovakia appeals to the decisions and even the statutes not only of the Nuremberg Tribunal, but also of the current International Criminal Court, if the crimes were committed against the categories of persons referred to in the Slovak law on incitement to hatred. It is worth noting that this position is consistent with the recommendations of the 2008 Framework Decision of the EU Commission on this issue, and that since then, references to the Statute of the International Criminal Court (ICC) or similar wording have been applied with increasing frequency in EU member states.

It is unusual to include the rulings of certain international courts directly in the law as a source of

determining exactly which crimes cannot be denied or praised. Typically, definitions are provided in the most general terms possible. For example, Romanian law refers to “public denial of the Holocaust, genocide or crimes against humanity or their consequences.” The question of whether or not a certain action constitutes genocide is thus left to the discretion of the court. One can assume, however, that the local courts are still likely to rely on earlier decisions in such cases rather than to provide an historical and legal assessment of such large-scale events on their own.

The Criminal Code of Slovenia lists “denial, diminishing the significance of, approval, disregard, making fun of, or advocating genocide, holocaust, crimes against humanity, war crimes, aggression, or other criminal offences against humanity” among the elements which criminalize hate speech.

One of the newest laws on historical revisionism is to be found in art. 4573 of the Luxembourg Criminal Code, adopted in 2012. It stipulates a punishment of up to two years in prison for those who “challenge, minimize, justify or deny” crimes under the Charter of the Nuremberg Tribunal, as well as all other crimes in the sphere of international humanitarian law; such crimes form the subject of an entire chapter that was also introduced into the Luxembourg Criminal Code.

Cyprus followed the recommendations of the EU Framework Decision by literally reproducing its wording in Cypriot legislation. Thus, Cyprus criminalizes “revisionism” in relation to crimes within the jurisdiction of both the Nuremberg Tribunal and the ICC, if the incriminated statements contain incitement to hatred and violence.

The laws of Switzerland and Liechtenstein clearly refer to any crimes against humanity and to genocide, while the Criminal Code of Latvia supplements the list with crimes against peace and war crimes.

The Croatian Criminal Code that entered into force in 2013 contains equally broad wording, which is, however, complemented by a reservation: “...if done in a way that may contribute to violence or hatred toward such a group or members of such a group.” The same wording is found in the Bulgarian Criminal Code with respect to crimes against peace and humanity.

In Malta, a similar clause is supplemented by another possible consequence – violation of public order. However, the statement is only considered to be criminal if it is threatening or insulting. The Criminal Code of Malta has two other important features. The article on denial, glorification or trivialization of genocide, crimes against humanity and war crimes lists the types of groups against whom the crimes were directed. There is also a separate article on “revisionism” in relation to the outbreak of an illegal war, though its list of types of groups differs significantly if compared to the former.

Given the importance of the issue of the genocide of Armenians in 1915 for the national political culture of the country, it is interesting that in Armenia the relevant article of the Criminal Code is formulated in almost the same manner as it is in Croatia.

The subject of the corresponding article in Spain is more narrow. It refers only to acts of genocide, and there are no reservations referring to methods used in making the statement. Accordingly, one may be jailed for the denial or justification of any act of genocide.

In Portugal, the theme of “historical revisionism” was not provided as an individual *corpus delicti* in the Criminal Code: rather, it has been woven into the topic of hate speech and discrimination as an aggravating circumstance. The corresponding action is defined as: *“denigrating and insulting a person or group of persons because of their race or ethnic or national origin or religion, particularly by denying war crimes or crimes against peace and humanity, intending to contribute to racial or religious discrimination or to encourage it.”*

Art. 354¹ of the Criminal Code of the Russian Federation on the “rehabilitation of Nazism” is chronologically beyond the scope of this book: it entered into force in May 2014. Part 1 of this article reads as follows:

“Denial of the facts established by the verdict of the International Military Tribunal for the trial and punishment of the major war criminals of the European Axis countries, approval of the offenses established by said judgment, as well as dissemination of knowingly false information about the activities of the Soviet Union in World War II, committed in public.”

The first part of this wording is quite typical, and is clearly and narrowly formulated, compared with the laws of other countries that have been adopted in recent years. The second part, however, gives rise to doubts, since it only criminalizes criticism of the history of one’s own country, even if on allegedly false grounds.

With respect to the above norm, the following general observations can be made. First, these laws have only been adopted in European countries, and almost exclusively in EU member states. Neither Canada nor the United States have any such laws, nor do the Asian countries within the OSCE. The only exception is Armenia; given its particular history, it would be strange indeed not to see this kind of law there.

Second, while European countries have adopted these laws for largely political reasons, there has also been a clear politicization of the rules which is gradually being superseded: although the new laws may still contain narrow historical formulations, they tend to become more universalist in their aspirations with the passage of time. As of today, laws making reference to specific historical

crimes remain in just seven of the 23 countries listed, with the exclusion of the Russian Federation. The remaining laws refer to types of crimes rather than to specific crimes.

Furthermore, eight of the 23 countries have chosen to criminalize only those statements that include insulting remarks aimed at inciting hatred, or that threaten a breach of civil peace.

2. Contradictions in the protection of religion

The legislation of all countries in the OSCE region includes rules on the protection of freedom of religion or freedom of conscience. These general declarations are often supplemented by rules on the protection of religious activities from undue interference.

These regulations are not the subject of our research as such. Furthermore, they are adequately analyzed by the example of Council of Europe member states. Laws that criminalize religious vandalism of places of worship or sacred items, interference with religious services or any other obstruction of religious ceremonies do not unduly restrict freedom of expression, but merely protect the physical integrity of believers and their property. Additionally, the reason for such restrictions on an individual's actions is widely recognized as legitimate, although the presence of the restriction itself should be acknowledged.

However, a number of countries in the OSCE region contain provisions in their criminal law which are more problematic. These are, for instance, legislative norms regarding statements offensive to God, to the dogmas of faith, or to religious organizations. These provisions will be discussed in this subsection. Achieving balance in this delicate area of law has been the subject of much discussion among theorists; for instance, "defamation of religion" has been a topic that has been frequently debated in the UN framework over the past two decades. Nevertheless, it is fair to say that no such balance has yet been definitively established.

In 2007, PACE advocated that member states revise laws relating to blasphemy, taking into account the historical experience of law enforcement. The PACE resolution uses "blasphemy" and "defamation of religion" interchangeably:

*"Blasphemy, as an insult to a religion, should not be deemed a criminal offence. A distinction should be made between matters relating to moral conscience and those relating to what is lawful, matters which belong to the public domain, and those which belong to the private sphere."*⁸⁹

The Venice Commission of the Council of Europe, an eminent council of European lawyers, has agreed with the PACE position.⁹⁰

The practice of the ECtHR, which is most important for the OSCE region given its broader remit as compared

to PACE, reveals contradictory tendencies. On the one hand, the ECtHR has spoken critically regarding the concept of blasphemy and the protection of religious beliefs:

*"State supervision is all the more necessary given the breadth and open-endedness of the notion of blasphemy and the risks of arbitrary or excessive interferences with freedom of expression under the guise of action taken against allegedly blasphemous material."*⁹¹

*"Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith."*⁹²

However, at the same time, in dealing with perceived conflicts of freedom of speech and freedom of religion, and taking into account all circumstances, including the definition of the limits of its competence, the ECtHR has usually refrained from defending freedom of speech from states that would restrict it based on various religious considerations. Jeroen Temperman believes that the ECtHR has wrongly developed the concept of "the right not to be insulted in one's religious feelings," and although the Court has gradually begun moving away from this formulation, it simply uses the "rights of others" provided for by the Convention, although this substitution is problematic.⁹³ In essence, the ECtHR largely leaves this controversial issue to the discretion of states.

Most countries in the OSCE region do not criminalize attacks on religious convictions as such. There are 29 OSCE participating States that have no such norms. This is the case in Albania, Azerbaijan, England, Armenia, Belarus, Belgium, Bulgaria, Bosnia and Herzegovina, FYROM, Georgia, the Holy See, Hungary, Kyrgyzstan, Lithuania, Malta, Moldova, Mongolia, Portugal, Romania, Serbia, USA, Tajikistan, Turkmenistan, France, Croatia, Montenegro, the Czech Republic, Sweden and Estonia.

§ 1. Blasphemy

Historically, the oldest norms are those that criminalize blasphemy per se, meaning attacks on God. Such norms are increasingly disappearing. However, the word

89 PACE Recommendation 1805 (2007), Blasphemy, religious insults and hate speech against persons on grounds of their religion, PACE webpage, 2007: see <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?file-id=17569&lang=en>

90 The analytical approach of the Venice Commission is presented in: *Blasphemy, insult and hatred* (Council of Europe: Strasbourg, March 2010), pp. 22–33.

91 *Judgment on Wingrove v. The United Kingdom*, Human & Constitutional Rights: see http://www.hrcr.org/safrica/expression/wingrove_uk.html

92 *Judgment on Otto-Preminger-Institut v. Austria*. This judgment was against criticism that was deemed excessive. See the ECtHR web-site, <http://hudoc.echr.coe.int/eng?i=001-57897#%7B%22itemid%22:%5B%22001-57897%22%5D%7D>

93 Jeroen Temperman, "Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech," *BYU Law Review*, Vol #3, 2011 pp. 729-756: See <http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=2604&context=lawreview>

“blasphemy” is often used broadly as a full or partial synonym for any insult of religious significance. In this regard, I note the PACE resolution referred to above. Strictly speaking, however, the presence of the word “blasphemy” in the law does not necessarily indicate a reference to blasphemy against God.

In Finland, one can be put behind bars for “public blasphemy against God,” while in Greece the punishment is for “insulting God.” In this case, the presence of malicious intent is not a necessary condition, but rather an aggravating circumstance.

The Criminal Code of San Marino mentions “blasphemy” without further explanation. In Dutch law, reference is made to offending religious feelings through malicious blasphemy. In these two cases, there is no certainty that blasphemy is understood in the narrow sense of the word.

The presence of an established church, and especially the presence of a constitutional norm on the dominant religion, as is the case in Greece⁹⁴ renders the wording even more specific, as it obviously refers not to any deity, but to God in the understanding of the dominant church. In Greece, this difference is clearly underlined by the fact that Art. 198 of the Criminal Code on blasphemy simply mentions “God,” and Art. 199 on insulting religion refers to “the Eastern Christian Church and other religions recognized in Greece.” Interestingly, “religions” here are clearly identified with the corresponding religious organizations.

§ 2. Defamation of religion as such

The term “defamation of religion” will not be considered here to be a synonym for blasphemy, although such an interpretation is widespread. The terms “defamation of religion” and “humiliation,” “insult” and the like in this context are used if the purpose is to condemn remarks either against a particular religion as an institution or dogma, or against the individual elements of such a religion, elements which are perceived as sacred by believers of that faith. This includes the religious service itself, but not sacred objects as such, as described below.

In legislative practice, reference to “defamation of religion” can be found in a number of different contexts. For example, the same article of the Austrian Criminal Code prohibits insulting believers, religious institutions, sacred objects, rites and even religious beliefs or doctrines themselves. The very title of the article in Austrian law can

be translated as “*Destruction of religious doctrines*,” which provides an insight into the lawmakers’ priorities. This applies only to duly registered religions, meaning that unregistered religious organizations and groups are not protected against blasphemy and sacrilege. Art. 188 of the Criminal Code of Liechtenstein, which is entitled “Neglect of religious prescriptions,” contains a similar provision which includes people, sacred objects, dogmas, rituals and legal institutionalized churches and religious societies in the same list.

It should be noted that only four countries in the OSCE region specifically criminalize defamation against religious organizations, including the two countries mentioned above. In other OSCE participating States, defamation is considered to be part of allowable public discourse and may be subject to civil action at best. In Greece, it is considered a crime “*in public and with malicious intent, in any way [to] offend the Orthodox Church or any other religion recognized in Greece*.” And in Germany, insulting religious organizations or groups adhering to a certain “philosophy of life,” or insulting the actual beliefs of the same is punishable by up to three years in prison, if such actions can lead to a breach of public order. It should be noted that this provision only applies to religious organizations or groups in Germany.

Iceland criminalizes “*ridiculing or insulting the dogmas or worship of a lawfully existing religious community in this Country*” (Art. 125 of the Criminal Code). The formulation used in Danish law is similar in substance.

The legislation of Cyprus refers to printed statements “*which any class of persons consider as a public insult to their religion, with intent to vilify such religion...*”

In Slovakia, defamation of religion is criminalized on a par with defamation of a nation or a race, as provided for in p.1, Art. 423 of the Criminal Code. Part 2 of the same article refers to defamation of people or groups of people, and lists a broader range of characteristics. Such a practice is typical of the criminalization of hate speech. The division of the article into two parts explicitly shows the distinction that is being made between “defamation of religion” and statements against believers.

Irish law contains an article that criminalizes “*blasphemous or obscene libel*” in the form of publication (Art. 13.1 of the Defamation Act of 1961). It also provides for the seizure of the blasphemous material in question. Additionally, the Film Censorship Act of 1923 still requires the withdrawal of the screening license for blasphemous films.

The Criminal Code of Canada also refers to the offence of public “blasphemous libel.” This is obviously not with reference to defamation of God, but to defamation of something considered sacred. Since libelous statements are inherently false, those who can demonstrate that they

94 In other countries, the very constitutional foundations single out some religion or religious organization, but they have already eliminated from their books any criminal provisions relating to blasphemy as such. The two main examples here are England and Italy.

believed in good faith that they were telling the truth are exempt from liability. Additionally, those who, without resorting to indecent expressions, were conducting a religious argument are also exempt in this case.

In Norway, Art. 142 of the Criminal Code refers both to insulting the doctrines and worship of religions existing in the country, and to the expression of contempt toward such doctrines and worship “*in an insulting or hurtful manner.*” However, the article also contains a clause stipulating that such acts are prosecuted only if it is in the public interest to do so.

Insulting the religious service per se, including through the profanation of religious objects during the service, is separately criminalized in Switzerland and Spain. Further details are provided in the next section.

Defamation of religion can also take place through defamation of a member of the clergy when he or she is acting in that capacity. This legal norm is particularly problematic: first, it may be considered unreasonable to protect only this group of people, and, second, the norm creates considerable uncertainty: in effect, it is difficult to distinguish between attacks on a member of the clergy as such and attacks on a member of the clergy as a believer, or as member or employee of a religious organization. This norm is clearly not a reference to insulting the clergy through illegal interference with the religious service or with a religious rite: as mentioned at the beginning of this subsection, criminalization of such interference is widespread and is not considered here.

Defamation of the clergy is still referred to in the legislation of four OSCE participating States. It can be considered to be a relic of traditional relations between church and state. In Monaco, defamation of the clergy is criminalized with respect to all religions, although the Catholic Church is specifically mentioned in relevant articles of the Criminal Code. Italy is historically one of the European countries that has the strongest relationship with Catholicism: at the same time, there is also a rich history of conflicts between Italy’s secular governments and the Vatican. Postwar Italy assumed the existence of a state religion, but this concept was radically altered in the 1990s and 2000s, including through a number of amendments to the Italian Criminal Code. However, insulting religion by offending individual believers and especially the clergy, or attacking religious property, are still punishable offences in Italy. This is also the case in San Marino.

In Luxembourg, the provision on the clergy is clearly of a mixed nature: Art. 145 of the Criminal Code refers to insulting the clergy during a religious rite “by allegations of facts, statements, shouts or threats, texts or images,” while the second part of the article mentions violence as well. This article clearly combines protection of a member of the clergy as an individual, protection of services

against unauthorized interference, and protection of a member of the clergy from unpleasant remarks.

Finally, there are certain actions against a particular religion, such as the “poaching” of its adherents, or proselytizing, that may also be covered by the law. Since limitations on proselytizing are contrary to the human right to choose and to change one’s religion, it is not surprising that the only OSCE participating State to retain such limitations at the legislative level is Uzbekistan, the legislation of which contains a prohibition on proselytizing and missionary activity, specifically in Art. 5 of the Law “On Freedom of Conscience and Religious Organizations.” This is akin to a ban on incitement to “*religious and other fanaticism and extremism*” or to “*enmity between different faiths,*” meaning that it is included in the conflict management paradigm of combating hate speech. At the same time, this provision is clearly meant to protect the religious identity of citizens from such “fanaticism and extremism.” Proselytizing and missionary activities are considered to be criminal offences in Uzbekistan according to para.2, Art. 216² of the Criminal Code,⁹⁵ as are the illegal import and distribution of religious materials (Art. 244³). These measures are clearly directed against radical forms of political Islam, which are allegedly “imported” into the country, but they also apply to many other religious movements.

§ 3. Insulting significant religious objects

Some countries criminalize the mockery or other ill-treatment of religious symbols or other religious objects. This is not a reference to vandalism as such, understood as destruction of or damage to cultural and material values. We have already cited such examples as part of wider restrictions, in particular, the insult of worship, but here we are interested not in worship in general, but in those physical objects involved in the act of worship.

In Finland, anyone who, “*for the purpose of offending, publicly defames or desecrates what is otherwise held to be sacred by a church or religious community,*” is punishable by law. It is worth noting that the context of the relevant article refers to religious objects and symbols, rather than to religious dogma.

Italy criminalizes insults to religion through attempted attacks on various objects, including items considered sacred to the religion or which are simply necessary for the religious service, if such attempt was made in public or even in private, but in the presence of a clergyman.

⁹⁵ However, all religious groups must register, and carrying out any religious activity lacking registration is a criminal offence under para. 1 of the same Article.

San Marino understands “insults to religion” as meaning the desacralization of religious sites and places of worship, as well as the mockery of works of religious art and, as already mentioned, attacks against the honor and prestige of the clergyman while performing religious services.

In Art. 144 of the Belgian Criminal Code, “actions, words, gestures and threats” addressed to the object of worship are considered to be a crime, if these were carried out in designated place of worship, whether permanent or temporary. A similar provision is contained Art. 144 of the Luxembourg Criminal Code. In Monaco, this norm is also present in very similar terms.

In Art. 261 of the Swiss Criminal Code, mockery of cults or of places of worship and the profanation of objects of worship are criminalized.

There is also a broad formulation contained in Art. 524 of the Criminal Code of Spain, according to which “profane acts that offend the feelings of a legally protected religious confession” are punishable by up to six months’ imprisonment, if the act in question is committed in a place of worship or during a religious ceremony. The specific definition of the act itself is not provided.

In Iceland, “indecorous treatment of objects belonging to churches and to be used for ecclesiastical ceremonies” is described in Art. 124 of the Criminal Code, the main corpus delicti of which is desecration of cemeteries and corpses.

It is noteworthy that the Greek Criminal Code contains no search articles. This does not mean, of course, that any attack on a church or on sacred objects will go unpunished in Greece. It simply means that these actions will be regarded as a form of blasphemy or religious insult.

Some countries treat such actions within the framework of a separate Code of Administrative Offences or its equivalent, which is beyond the scope of this study.

For example, in Hungary it is a violation of the law, but not a crime, to “desacralise [an] object of worship” or any object “used for religious ceremonies inside or outside the premises intended for such ceremonies.”

In the Russian Federation, the current wording of p.2 of Art. 5.26 of the Administrative Code reads as follows: “Deliberate public desecration of religious or theological literature, objects of religious veneration, signs or emblems symbolizing a worldview and paraphernalia or their damaging or destruction.”

Other post-Soviet countries also feature similarly worded administrative offences.

In many of the above provisions, the very terms “desacralization,” “desecration” and “profanation” are seen as problematic, as they can only be understood according to the rules determined by the religious organization itself:

of course, these words have common colloquial meanings, but they may be inaccurate and even dependent upon the views of the religious organizations involved. It would be logical to assume that “the premises intended for religious ceremonies” may be subject to their own rules, which must be respected. It would also be possible to commit unintended desecration, but, in any case, the intent must be determined in the course of the investigation, and any unintentional action apparently does not constitute an offence. It is true that, outside the specific area governed by special rules for the maintenance of order, it is not clear on what grounds actions like “desacralization” would be considered to be illegal. However, in practice, the rules for sacred objects usually are such that desecration of these objects, as perceived by believers, would be difficult to achieve without disturbing public order. Perhaps that explains why this kind of rule does not give rise to major protests.

Finally, there are controversial cases that I would classify as conventional prohibitions, though they are sometimes likened to “defamation of religion.” Art. 137 of the Criminal Code of FYROM and Art. 297 of the Criminal Code of Slovenia both mention the mockery of religious symbols among other actions aimed at inciting hatred, discord and intolerance. It should be understood in this instance that it is not mockery in and of itself that is criminalized, but only mockery that pursues such aims. In essence, then, this is merely a more detailed description of religious hate speech.

§ 4. Insult to religious feelings

Derogatory remarks about a group of people united on the basis of their attitude to religion is a very common element of the definition of hate speech. Of interest here is the humiliation of the people themselves, and not any insult of their religious views. The question of how some offensive or otherwise hostile speech against religious beliefs or against the basic tenets of the faith can be considered to constitute hate speech directed against the believers themselves is quite a controversial issue. There is no doubt that religious beliefs form a part of the religious identity of many believers. At the same time, other believers may consider certain rituals or the coincidence of their religion with the religion of their ancestors to be equally or even more important. Certainly, then, any attacks against those elements of subjective self-identification are perceived by believers as personal attacks. However, the perception of the object of a statement may radically diverge from the perception of the subject: from the point of view of criminal law, the motive of the offender is more important than the victim’s perceptions. Of course, one should also weigh the protection of believers against the protection of freedom of expression.

We have already reviewed statements against God, religion, religious institutions and the clergy, as well as the profanation of sacred rituals and objects. All of these actions can be interpreted as indirectly hurting the feelings of believers. However, in the secular societies of all OSCE participating States, excluding the Holy See and perhaps Greece, it is still more natural to formulate the law so that people are the object of protection, rather than some other entity, including those listed above. If lawmakers do not want to confine themselves to conventional laws on hate speech, then they resort to the notion of “religious feelings.” Of course, incitement to hatred and appeals to commit illegal actions are much more radical statements and are not pertinent in this discussion. Thus, people become the object of protection due to their specific needs; in this case, it is assumed that religious individuals have a particular need for the protection of their feelings about religion.

Only a few countries formulate such *corpus delicti* as “an insult to or humiliation of religious beliefs and/or feelings” directly and without reservations: they are Switzerland, Andorra, Latvia, Ukraine and Kazakhstan. In Cyprus, one article of the Criminal Code is devoted to oral statements and another to printed statements, while in Uzbekistan the law provides equal protection to “*the feelings of citizens based on their religious or atheistic convictions.*”

Austria and Liechtenstein address insults to the feelings of believers through insults to their beliefs. On the contrary, in Italy, Art. 403 of the Criminal Code criminalizes insult to religion through the public insult of believers, including the clergy. Apparently, the meaning of the law in both cases is the same, as it would be hard to distinguish between feelings and beliefs in this case.

In Poland, insults to the feelings of believers are criminalized, but only such insults that are inflicted through public desecration of an object or place of worship. Art. 525 of the Criminal Code of Spain criminalizes mockery of dogmas, beliefs, rituals and ceremonies of believers, but only if these insults were meant to offend believers. Part 2 of the same article protects non-believers, and since they have neither dogmas, nor rituals, the article criminalizes the direct ridicule of such individuals, which actually creates greater protection for non-believers than for believers. One can therefore assume that this whole article is aimed at protecting the feelings of the people themselves rather than protecting the actual dogmas and rituals.

An unusual *corpus delicti* was added to the Criminal Code of the Russian Federation in 2013: “*public actions, expressing obvious disrespect for society and committed to insult the religious feelings of believers.*” The phrase “*acts expressing obvious disrespect for society*” is taken from the

definition of hooliganism in the corresponding article of the Russian Criminal Code. Thus, this new crime refers to some undefined hooliganism, but which is specifically “committed to insult the religious feelings of believers.”

It bears repeating that references to insults of beliefs or rituals as a way of humiliating and insulting people according to their religion constitute a “pure” norm on hate speech and do not belong to the special laws on the feelings of believers. Such references are found in many countries, as mentioned above.

On the other hand, some parts of the laws on hate speech in post-Soviet countries retain wording like “*propaganda of exclusivity, superiority or inferiority of citizens based on their attitude to religion.*” Such provisions are explicitly present in the laws of Kazakhstan and Kyrgyzstan. In the Russian Federation, such actions are only partially and indirectly criminalized: they are included in the definition of extremist activity, incitement to which is considered criminal. Meanwhile, such wording can be quite ambiguous in a secular society, since its intention is clearly broader than simply banning the propaganda of discrimination. Even religious doctrines, which recognize the fundamental equality of people before God, imply inequality in the religious sense, meaning differentiating between true believers and heretics, the righteous and the sinners. Corresponding statements in religious rhetoric are often quite strict in tone. Whether such rhetoric, which has no other signs of hate speech, is still considered as such is a matter left to the discretion of the courts.⁹⁶

Still other countries have norms that cannot be formally classified as means of protection of religious feelings, despite the fact that they refer to the ridicule of religious values, characters or objects. Perhaps such statements themselves could be considered to belong to the category of protection of feelings. Such provisions are found in the laws of Austria, Spain, Iceland, Liechtenstein and Switzerland. However, “*ridicule of a minister of religion in the lawful performance of his duties*” is criminalized in the Netherlands, and is likely a reference to unlawful interference with the performance of religious services.

In reviewing the laws on religious feelings, it becomes clear that the laws of 13 OSCE participating States refer

⁹⁶ An extreme example of the use of such an interpretation is the case of Kazakhstan, where Elizabeth Drenicheva, a missionary of the “Unification Church,” was convicted of propaganda of the inferiority of people on the grounds of belonging to the human race, since according to the doctrine of the “Unification Church,” almost all people are imperfect, an idea which is accepted by many religious teachings. See the text of the judgment (in Russian) in Bogolyub’s blog, February 6, 2009: <http://blogs.privet.ru/user/bogolyub/53814218>

specifically to feelings. It should be noted that seven of these countries were not included in the aforementioned list of 20 countries with less secular formulations in their legislation.

3. Anti-Extremism

Combating hate crimes and hate speech can be seen in the general context of preserving public safety and preventing anti-constitutional attacks on the existing authorities, in the form of either rebellion, terrorism, the formation of rebellious groups or incitement to commit such acts. In the past, this was referred to as countering political crimes, but such terminology has since been discredited and is no longer in use. However, the fact that a generally accepted term to describe it no longer exists does not mean that the phenomenon itself has disappeared. It is precisely in post-war Europe that the political necessity of suppressing the possible revival of fascist movements has been closely linked to countering the propaganda of hatred and later of hate crimes.

The term “extremism” is usually not mentioned in the law due to its politicized nature.⁹⁷ Over time, post-war anti-fascist laws were expanded in the political sense in a number of countries, while in other countries new laws were simply adopted. These laws targeted different movements that were perceived to be encroaching on the foundations of democracy as established by the Constitution, but no common terminology to describe them has been developed. I include here the use of the term “extremism.”

Politically-motivated legislation of this nature will be reviewed in the next subsection. Our focus here is on attempts to re-conceptualize political crimes as “extremist” crimes. This topic is especially important in the Russian Federation, where the first such attempt was made. However, it is of broader significance as well, given that the “extremist” frame is the only currently available legal framework within which the body of law examined in this book has developed in the OSCE area. In the section that follows, I will provide a country-by-country analysis, rather than focus on the wording used in the various laws. However, I would like to start with an examination of what is understood today by those using the term “extremism,” both inside and outside the OSCE region.

§ 1. Terminology of international organizations

The word “extremism” is found in international legal instruments, notably in a number of UN documents.⁹⁸ In its most explicit form, the term “extremism” is linked to

⁹⁷ See, for instance, Peter T. Coleman and Andrea Bartoli, *Addressing Extremism*, The International Center for Cooperation and Conflict Resolution (ICCCR), Teachers College, Columbia University and The Institute for Conflict Analysis and Resolution (ICAR), George Mason University, 2003: http://www.tc.columbia.edu/i/a/document/9386_WhitePaper_2_Extremism_030809.pdf

⁹⁸ (In Russian) I. Bikeev and A. Nikitin, *Extremism: An Interdisciplinary Legal Study* (Kazan: Poznaniye, 2011), p. 268.

the notion of an organized threat to democracy as found in Resolution 1344 of the Parliamentary Assembly of the Council of Europe, entitled "Threat posed to democracy by extremist parties and movements in Europe."⁹⁹ The concept is provided with a relatively narrow definition in this document, one which only relates to the right-wing and fundamentalist portion of the spectrum of radical social and political movements:

"3. Extremism, whatever its nature, is a form of political activity that overtly or covertly rejects the principles of parliamentary democracy, and very often bases its ideology and its political practices and conduct on intolerance, exclusion, xenophobia, anti-Semitism and ultra-nationalism.

4. The Assembly notes that some extremist movements seek justification for their actions in religion. The danger of this current trend is twofold: on the one hand, it fosters intolerance, religious fanaticism and fundamentalism, and on the other, it leads to the isolation of entire religious communities for the sake of individuals who abuse the universal values of religion."

In the next subparagraph, it is unclear whether the reference is to ultra-left movements or to the same right-wing movements referred to in the previous subparagraphs.

"5. Extremism relies on social discontent to propose simplistic and stereotyped solutions in response to the anxieties and uncertainties felt by certain social groups in the face of the changes affecting our societies. It shifts responsibility for these difficulties onto the inability of representative democracy to meet the challenges of today's world, and the incapacity of elected representatives and institutions to address citizens' expectations, or it designates a particular section of the population as responsible or as a potential threat."

The threat posed by extremist movements is described as follows:

"Even if it does not directly advocate violence, it generates a climate conducive to the escalation of violence. It is both a direct threat because it jeopardises the democratic constitutional order and freedoms, and an indirect threat because it can distort political life."

To counter this threat, PACE calls upon states, in particular:

"a. to provide in their legislation that the exercise of freedom of expression, assembly and association can be limited for the purpose of fighting extremism. However, any such measures must comply with the requirements of the European Convention on Human Rights;

b. to apply or introduce if they do not exist:
a. effective penalties where cases of proven damage caused by an extremist political party or one of its members are established;

b. proportionate and dissuasive penalties against public incitement to violence, racial discrimination and intolerance;

c. the suspension or withdrawal of public funding for organisations promoting extremism;

d. the dissolution of extremist parties and movements, which should always be regarded as an exceptional measure.

It is justified in the case of a threat to a country's constitutional order, and should always be in conformity with the country's constitutional and legislative provisions;

e. to monitor, and if necessary to prevent, the reconstitution of dissolved parties or movements under another form or name;

...

h. to establish at the same time national legislative and administrative measures and closer international co-operation in order to discourage any propagation of extremist ideologies, notably through new information technologies."

Clearly, PACE does not recommend introducing special anti-extremist legislation: rather, it calls for comprehensive measures against the threat of extremism, subject to the observance of the rights and freedoms guaranteed by the Council of Europe. As the analysis in this book clearly evinces, different countries show varying degrees of compliance with these recommendations. The countries discussed below are those that have chosen the path of developing an anti-extremist legal framework. These countries generally follow the PACE recommendations: however, the safeguards provided in this legislation to protect the rights and freedoms of citizens are clearly insufficient, and abuse of enforcement as such is outside the scope of this study.

Several CIS countries, namely Russia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan, together with China in 2001 signed the Shanghai Convention on Combating Terrorism, Separatism and Extremism.¹⁰⁰ This convention became a real foundation for the co-operation of these governments in combating all sorts of movements that are classified as terrorist, separatist or extremist movements, especially those associated with political Islam. It should be noted that the signatories actually recognize each other's decisions on the recognition and designation of certain organizations as extremist or terrorist.

The convention offers sufficiently clear definitions. In particular, extremism is defined as follows in Sec. 3, Art. 1 of the Convention:

"An act aimed at seizing or keeping power through the use of violence or changing violently the constitutional regime of

⁹⁹ Resolution available on the PACE webpage: <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=17142&lang=en>

¹⁰⁰ Shanghai Convention, available on the Refworld website: <http://www.refworld.org/docid/49f5d9f92.html>

a State, as well as a violent encroachment upon public security, including organization, for the above purposes, of illegal armed formations and participation in them, criminally prosecuted in conformity with the national laws of the Parties.”

However, as you will see below, the definition in this form has not found its way into national legislation, and some lawyers understand this to mean that the Convention did not create a legal norm, but only represented a political declaration.¹⁰¹

In the Russian Federation, discussions about a legal framework to counter attacks against public and state security, of which there were many in the 1990s, quite unexpectedly resulted in the current legislation that has emerged subsequent to the law “On Countering Extremist Activity,” which was adopted in 2002.¹⁰²

This legislation was largely borrowed by a number of countries of the Commonwealth of Independent States in subsequent years. As a result, today a large part of the OSCE region has established a more or less unified approach to combating hate crimes, incitement to hatred and hate speech as well as to many other actions which are described as being extremist in the framework of this approach. However, the CIS countries that have adopted this approach also demonstrate clear differences as well. Accordingly, this subsection will first describe the anti-extremist legislation of the Russian Federation as a prototype for the other CIS countries, as it pertains to the subject matter of this book, followed by an examination of the differences with respect to the anti-extremist legislation of other countries.

§ 2. Russia

The purpose of anti-extremist legislation is to establish measures in order to counter a specific set of actions which are regarded as extremist, including terrorism, attempted rebellion, hate crime and hate speech, as well as other actions. These measures range from criminal repression to precautions aimed at prevention, and are intended not only to prevent extremist actions, but also to show the public exactly what extremism is and that is not acceptable.

The key feature of Russian anti-extremism legislation is the lack of a conceptual definition of extremist activity in the framework law “On Countering Extremist Activity,”

as well as in any other legislation. The concept of “extremism” is defined in the law as a synonym for such activities.

The obvious implication is that there is a generally accepted conceptual definition in everyday language, in the media or in scientific discourse, or at least in the legal sphere. If this were true, the lack of a definition in this specific law itself would not have given rise to any problems. Of course, the law in general uses many concepts which are not defined but which nevertheless are clearly understood, and surrounding which there is little confusion; in the event any confusion does exist, it can be resolved through the judicial practice. The most obvious such example is the crime of murder. However, the word “extremism” does not have any more or less universally accepted meaning in any kind of public discourse, despite the fact that it is possible for such a meaning to emerge in discussions among small groups. The common understanding of extremism used in the Shanghai Convention, oddly enough, was clearly not used in the Russian law “On Countering Extremist Activity,” and is not applied in actual enforcement.

The definition of extremism is provided in Article 1 of the Russian law. Not only is this definition not linked to any mundane or even to any specialized meanings of the word “extremism,” such as may be used in political science, but it is also presented through a simple list of actions. Such a list is always a subject to modifications, and in fact, the list was already substantially modified twice, in 2006 and 2007. Because the law establishes no conceptual framework, the list of actions that it contains should be interpreted literally.

In order to demonstrate that the intention of the law is to provide a framework for extremist hate crimes, for hate speech, and for related actions, it is most useful to cite the law in full, in its wording as of August 2014. For the sake of convenience, Article 1 of the Act is provided here as follows with numbered paragraphs, as contrasted to the actual text of the law which lacks such numbering:

“For the purposes of the present Federal law, the following basic notions are used:

1) extremist activity/extremism:

forcible change of the foundations of the constitutional system and violation of the integrity of the Russian Federation;

public justification of terrorism and other terrorist activity;

stirring up of social, racial, ethnic or religious discord; propaganda of the exceptional nature, superiority or deficiency of persons on the basis of their social, racial, ethnic, religious or linguistic affiliation or attitude to religion;

violation of human and civil rights and freedoms and lawful interests in connection with a person’s social, racial, ethnic, religious or linguistic affiliation or attitude to religion;

101 (In Russian) G. V. Kirsanov, “Shanghai Cooperation Organization: Legal Aspects of the Development of Regional Anti-Terrorist Institutions,” *Journal of Russian Law*, 2004, No. 3, pp. 129–137.

102 I have described this process in detail (in Russian): A. Verkhovskiy, *State Policy towards Nationalist-Radical Groups, 1991 – 2002* (Moscow: SOVA Center, 2013).

obstruction of the exercise by citizens of their electoral rights and rights to participate in a referendum or violation of voting secrecy, combined with violence or threat of the use thereof;

obstruction of the lawful activities of state authorities, local authorities, electoral commissions, public and religious associations or other organisations, combined with violence or threat of the use thereof;

committing of crimes with the motives set out in indent “f” [“e” in the original Russian] of paragraph 1 of article 63 of the Criminal Code of the Russian Federation;

propaganda and public show of Nazi emblems or symbols or of emblems or symbols similar to Nazi emblems or symbols to the point of confusion between the two; or public show of attributes or symbols of extremist organizations;

public calls inciting the carrying out of the aforementioned actions or mass dissemination of knowingly extremist material, and likewise the production or storage thereof with the aim of mass dissemination;

public, knowingly false accusation of an individual holding state office of the Russian Federation or state office of a Russian Federation constituent entity of having committed actions mentioned in the present Article and that constitute offences while discharging their official duties; organisation and preparation of the aforementioned actions and also incitement of others to commit them;

funding of the aforementioned actions or any assistance for their organisation, preparation and carrying out, including by providing training, printing and material/technical support, telephony or other types of communications links or information services.

2) extremist organisation: a public or religious association or other organisation in respect of which and on grounds provided for in the present Federal law, a court has made a ruling having entered into legal force that it be wound up or its activity be banned in connection with the carrying out of extremist activity;

3) extremist materials: documents intended for publication or information on other media calling for extremist activity to be carried out or substantiating or justifying the necessity of carrying out such activity, including works by leaders of the National Socialist worker party of Germany, the Fascist party of Italy, publications substantiating or justifying ethnic and/or racial superiority or justifying the practice of committing war crimes or other crimes aimed at the full or partial destruction of any ethnic, social, racial, national or religious group;

4) the symbols of an extremist organization: the officially registered symbols of the organization in respect of which on the grounds specified by the present Federal law the court made an effective ruling on liquidation or prohibition of activities in connection with the extremist activity.”

The key for our discussion is to be found in item 8

of p.1 of this Article, which refers to a particular set of motives for the crime. According to para. “f” p. 1, Art. 63 of the Criminal Code of the Russian Federation, the following motives constitute aggravating circumstances for any crime: “[a crime motivated by] political, ideological, racial, ethnic or religious hatred or enmity or hatred or enmity against any social group.” I must admit that, in practice, the hate motive as a general aggravating circumstance is rarely used, but there are similarly-worded specific aggravations that are used which are listed in the following 11 articles of the Russian Criminal Code: art. 105: “Murder,” art. 111 “Intentional infliction of serious bodily harm,” art. 112 “Intentional infliction of moderate bodily harm,” art. 115 “Intentional infliction of bodily harm,” art. 116 “Battery,” art. 117 “Torture,” art. 119 “Threat of murder or causing serious bodily harm,” art. 150 “Involvement of a minor in the commission of a crime,” art. 213 “Hooliganism,”¹⁰³ art. 214 “Vandalism,” and art. 244 “Desecration of the dead and their burial places.”

Thus, hate crimes are a form of extremism, as are public calls to commit them, assistance in committing them and organizational activity aimed at committing such crimes. The same applies to incitement to hatred: this may provide a partial understanding of the content of cl. 2, 3 and 10. It also applies to hate speech, as seen in cl. 3, 4, 9, 10, and to discrimination, since cl. 5 copies the corpus of the relevant article on “discrimination” from the Criminal Code.

The definition of hate crimes in the Russian Criminal Code is a customary one, and gives rise to no immediate problems. There are two specificities deserving of attention here, both of which are common in Europe. The first is the use of an open list of signs of hostility through the inclusion of the notion of a “social group,” a term without any common understanding or definition. The second is the inclusion of the motives of political and ideological hatred.

Understanding extremist statements is more complex, since one must remember that not every extremist action is a criminal offence. The controversial question that arises here is whether or not all non-criminal manifestations of extremism are to be considered as administrative offences. A related issue is whether or not they are fully covered by the Code of Administrative Offences (CAO) of the Russian Federation. Again, such a question is outside

103 The corresponding corpus delicti of Art. 213 of the Criminal Code on “Hooliganism” appears quite problematic: “a gross violation of the public order manifested in patent contempt of society and attended: ... b) by reason of political, ideological, racial, national or religious hatred.” This corpus does not involve the use of violence and can be interpreted very broadly, as was demonstrated in the “Pussy Riot” case.

the scope of this study of purely criminal law. The relevant articles in the Russian Criminal Code only partially meet the definition of hate speech as provided in the law “On Countering Extremist Activity,” as will be shown below.

First of all, the criminalized statements include such extremist actions as incitement to group hatred and “propaganda of exclusivity, superiority or inferiority” of a group of people based on a variety of group characteristics. These two items are partly matched by Art. 282 of the Russian Criminal Code, though there are significant differences. The corpus of this article reads as follows:

“Actions aimed at the incitement of national, racial, or religious enmity, abasement of human dignity, and also propaganda of the exceptionality, superiority, or inferiority of individuals by reason of their attitude to religion, national, or racial affiliation, if these acts have been committed in public or with the use of mass media.”

The use of violence or threat of violence, the use of official position and actions as an organized group all constitute specific aggravations.”

Firstly, any act described in the law other than the Criminal Code, even if it is described similarly to the corpus delicti, may not be criminal, if it has no public danger.¹⁰⁴

Secondly, the term “strife/discord” was taken from the Constitution, which inherited it from the Soviet Criminal Code. This term is definitely broader than the terms “hate” or “hostility” featured in Art. 282. “Discord” can be incited as an indirect consequence of actions or statements which may not have had discord as their aim and which had no anti-social content, while the corpus of Art. 282 refers to an intentional course of action. Thus, “inciting discord” may not be a crime, which is in keeping with the interpretation of the European Court of the Human Rights.¹⁰⁵ This is all the more so because in the absence of a common understanding of the term “social,” the expression “inciting social discord” may refer to actions that are not explicitly illegal.

Thirdly, the definition of extremism as provided in the law “On Countering Extremist Activity” and the text of Art. 282 contain mismatching lists of signs of incitement to hatred or discord. We see that incitement to hatred and hostility and humiliation of or towards people based on gender and origin is criminal, but not extremist: however,

this is only half true for a characteristic such as language. It should be noted that the term “origin” is not entirely clear in this context. At the same time, one can assume that the terms “social discord” and “hatred against a social group” refer to the same understanding of social differences, but this does not appear in the law or in any comments on the law.

Fourthly, while Art. 282 refers to the “humiliation of people,” the definition of extremism makes reference to the propaganda of exclusivity, superiority or inferiority of a person. It remains unclear why one should criminalize any claim of exclusivity or superiority of persons based, for example, on their social status, such as education or income, or on their beliefs, although certain forms of statements of superiority on the part of some may, of course, be equivalent to the humiliation of others.

Of great importance in the definition of extremism is the concept of the public justification of terrorism, which is defined as: “[the] ideology of violence and the practice of influencing the decision-making of the bodies of the government, local authorities or international organizations by terrorizing the population and (or) other forms of illegal violent action.”¹⁰⁶ This item corresponds to Art. 205² of the Russian Criminal Code “Public Calls for Committing of Terrorist Activity or Public Justification of Terrorism,” which contains the following important note: “*In the present article, “the public justification of terrorism” means a public statement on the recognition of the ideology or practices of terrorism as correct, and in need of support and a following.*” However, this note does not apply to the definition of extremist activity, which thus appears to be much broader in scope.

Finally, the public calls for action outlined in items 1-8 of the definition of extremism, which are, inter alia, discrimination, hate crimes, terrorism, rebellion, the use of violence against the authorities, but also the above manifestations of hate speech, also constitute extremism. Art. 280 of the Russian Criminal Code “Public calls to extremist activity” contains language that corresponds to this section of the definition: for instance, the use of mass media¹⁰⁷ is considered a specific aggravation. The wording of the article, if interpreted literally, suggests that it covers public appeals to any kind of extremist activities, including non-criminal ones, and including “appeals to” [sic] appeals to violence. However, in practice, the article is not applied in such a recursive manner.¹⁰⁸

104 P. 2, Art. 14 of the Russian Criminal Code states: “*inaction, although formally containing the indicia of any act provided for by this Code, but which, by reason of its insignificance, does not represent a social danger, shall not be deemed a crime.*” This provision is a typical norm for criminal law.

105 See, for instance, Ceylan v. Turkey, 1999: <http://www.legislationline.org/documents/id/4120>

106 P. 1 Art. 3 of the law “On Combating Terrorism”.

107 As of 2014, this also includes the Internet.

108 Since the definition of extremist activity includes public calls to actions listed in the definition, criminalization of incitement to extremist activities in another law would also suggest criminalization of “appeals to the appeals.” This seems to be a case of sloppiness on the part of the legislator.

Mass dissemination of extremist materials of any kind, such as books, leaflets, web pages or videos, and other materials while making the same appeal is not considered to be a crime if, by virtue of the additional circumstances, these actions do not constitute a crime under Articles 280 or 282 of the Russian Criminal Code. Mass distribution of such materials is punishable, however, under Art. 20.29 of the Administrative Code, while non-mass distribution is not prohibited at all by the law. The materials themselves are prohibited by the courts depending on the location of discovery and are subsequently included in the federal list of extremist materials. In practice, such prohibitions have taken place on a large scale for a long time: the federal list of extremist materials now features more than 2,800 entries, making it rather problematic to use as a source of information about what can or cannot be distributed. Of course, it is not within the scope of the present study to review either the validity of prohibitions or the many procedural problems in this area.

Special attention is paid to actions positively associated with German Nazism and Italian Fascism, as can be seen from the law “On Combating Extremist Activity,” in its cl.9. p.1, which corresponds to Art. 20.3 of the Administrative Code, as well as in p.3 of Art. 1 of the law. However, these actions do not constitute criminal offences by themselves.

The definition of extremist activity also includes organizational efforts aimed at extremist actions. The basic mechanisms of the law “On Combating Extremist Activity” are civil and administrative in nature and are aimed at preventing and suppressing such activity on the part of registered organizations and the media.¹⁰⁹ However, there are also criminal sanctions that may be applied. Two types of acts are punishable: first, the creation of a group aimed at committing “crimes of extremist nature,” i.e. crimes motivated by hatred: these crimes are listed in Article 63 of the Russian Criminal Code, as noted above. Participation in such a group is also a punishable offence, according to Art. 282¹ of the Criminal Code “Organising an Extremist Community.” The second punishable action is any attempt to continue the activities of an organization that has been banned by the court for extremist activities, as per Art. 282² “Organising (the) Activity of an Extremist Organisation.”

The law “On Combating Extremist Activity” is

109 Analysis of the norms and practices in this area is available in the SOVA Center’s annual reports. See: <http://www.sova-center.ru/racism-xenophobia/publications/> and <http://www.sova-center.ru/misuse/publications>. See also (in Russian) A. M. Verkhovskiy, M.A. Ledovskikh and A. R. Sultanov, *Attention: Extremism! An Analysis of Legislation to Fight Extremist Activities and of its Enforcement* (Voronezh: Elist, 2013).

politicized only to a very small degree: as has been noted, this law explicitly specifies only certain actions that are allegedly fascist in nature, and even those are only mentioned as part of a series. This law is the legacy of a series of previously adopted norms, in particular the law “On Perpetuation of Victory of the Soviet People in the Great Patriotic War of 1941-1945,” which was adopted in 1995. In particular, the law does not specifically single out such oft-discussed extremist activity as that motivated by religious and political ideas, although the notion of “religious extremism” is widespread, including in statements by the authorities. Amendments to Russian legislation introduced in 2013-2014 which deal with the protection of religious feelings and historical revisionism have proven even more subject to politicization. These rules are discussed in the above subsections and can also be included into the scope of anti-extremist legislation, though only indirectly so.

The other CIS countries have similar laws.¹¹⁰ These laws are undoubtedly based on Russian legislation. Any differences with Russian legislation can be explained by the time sequence of adoption of certain national laws, among other factors. However, such historical information is not particularly relevant for the purposes of this review. Therefore, I will now examine national legislation in geographical order, starting in the west and moving eastward.

110 Previously, such a comparative review was done by I. Bikeev & A. Nikitin, *op. cit.*, pp. 275-280. Though this work is slightly outdated, the authors did draw attention to an interesting document, which has no regulatory power, and is therefore not included in this review: I refer to the CIS model law “On Countering Extremism,” adopted May 14, 2009, by the Inter-Parliamentary Assembly of the participating states of the CIS. The law is available on the website of the Assembly. See: http://iacis.ru/upload/iblock/857/zakon_14_05_09.pdf It should be noted that the definition of “extremist activity” in this draft resembles both the archaic and the slightly modified version of the Russian definition. The generic concept of “extremism” is defined in a rather odd manner, as follows: “Extremism [is an] assault on the foundations of the constitutional order and security of the state, as well as a violation of the rights, freedoms and legitimate interests of individuals and citizens, conducted as a result of the denial of legal and (or) other generally accepted norms and rules of social behavior.”

§ 2. Belarus

The legislation of Belarus also includes a law “On Combating Extremism.” This law was definitely influenced by the Russian law of the same name: the basic definition of the object only marginally differs from that contained in the 2006 version of the Russian law, which is the year that the law was originally introduced in Belarus.

There are not many significant differences between the two laws. First, “inciting social discord” is considered to be an extremist activity only if it is “associated with violence or calls for violence”: however, the definition includes “humiliation of national honor and dignity.” Second, only Nazi symbols are considered to be extremist symbols. Third, and most importantly, only the hate crimes of “riots, acts of hooliganism and vandalism” are associated with extremism.

Nevertheless, there are differences in the related laws. The main difference is that the Belarusian law does not criminalize membership in “an extremist community/organisation.” In fact, the word “extremism” is found in the Belarusian Criminal Code only in the article on foreign financing. Obviously, the Belarusian Criminal Code was not harmonized with the law “On Combating Extremism.”

Incitement to hostility on the grounds of language was transferred from the criminal law to the administrative law, in Art. 9.22 of the Administrative Code. In the corresponding Art. 130 of the Belarusian Criminal Code, the list of affected groups is narrower than in Russian law. It reads: “*Deliberate acts aimed at inciting racial, national or religious enmity or discord, humiliating national honor and dignity.*” It is also worth noting that the list is not symmetric in terms of groups comparing hate speech and humiliation of dignity. The hate motive as an aggravating circumstance is used in the Belarusian Criminal Code only in three articles, one of which deals with “hazing”: see Art. 443 “*Violation of the rules of the relationship between persons subject to the status of enlisted men, in the absence of subordinate relations.*”

The issues of hate crimes and hate speech are developed more thoroughly in the Administrative Code of Belarus than they are in the Administrative Code of the Russian Federation. First, the hate motive is an aggravating circumstance both in the Administrative Code and in the Criminal Code. Second, Art. 17.11 “Production, distribution and (or) storage of extremist materials” does not only penalize mass dissemination. Third, in contrast to Art. 20.3 of the Administrative Code of Russia, Art. 17.10 “Propaganda and (or) public demonstration, production and (or) distribution of Nazi symbols or paraphernalia” of the Belarusian law includes a reservation that the use of this symbolism in art, cinema or museums is not against the law.

I should add that both the Criminal Code and the

Administrative Code of Belarus contain provisions explicitly associated with this legislation, which separately describe receipt of “illegal” foreign financing as, respectively, a crime (Art. 369²) and an administrative offence (Art. 23.24).

§ 3. Moldova

The Moldovan law “On Combating Extremist Activity” adopted in 2003, was, of course, created in the wake of the first edition of the Russian law, but the approach to the definition of extremism is different in Moldova, where the Russian list-based definition is supplemented by a conceptual definition.

Extremism is defined as “[a] position [or] doctrine of some political movements that, based on extreme theories, ideas or opinions, seeks to impose [its] program by means of violence or radical measures.” This definition is quite difficult to recognize as successful. For example, it is unclear why it only makes reference to the “doctrine of political movements.” Furthermore, the definition also mentions incomprehensible “radical measures,” and does not refer to violent measures.

The extremist activity itself as well as methods to counter such activity are defined very similarly to the Russian law in its 2002 version. However, the most interesting items in the definition of extremist activity for the purposes of this study are formulated in a rather peculiar way. Here follow a few examples of the variety of sets of objects of hatred used in different clauses:

“*activity of a public or religious association, mass media establishment or other organization, or of a physical entity with the aim of planning, organizing, preparing, or implementing actions with the purpose of:*

- *incitement to racial, national, and religious hatred, as well as to social hatred, through violence or an appeal to violence;*
- *disgrace to national dignity;*
- *incitement to mass disorder, to acts of hooliganism or vandalism, on grounds of ideological, political, racial, national or religious hatred or hostility, as well as on grounds of hatred or hostility toward a social group;*
- *propaganda of exclusivity, superiority or inferiority of citizens according to their religious affiliation, or depending on their race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, property, or social origin.”*

The list of biases in the last paragraph is extremely broad and includes such characteristics as views and political affiliation, which are unusual in the context of a statement of exclusivity.

At the same time, the list of aggravating circumstances is fairly standard for extremist crimes, referring as it does to “*racial, national, and religious hatred.*” According to the definition of extremist activity, “social hatred” is generally

understood to refer to differences in wealth or social origin.

It is noteworthy that other group characteristics found in the definition, such as gender, views, and other characteristics were not reflected in the Moldovan Criminal Code: this suggests that any corresponding violation of the law “On Combating Extremist Activity” may involve penalties for organizations and the media, but not for individuals.

§ 4. Kazakhstan

Ukraine and the former Soviet states of the Caucasus have no special anti-extremist legislation. This is why our geographic focus now shifts to the Central Asian countries, for which the threat of radical political Islam provided the main motivation for the adoption and use of such legislation. Of course, this threat is on the minds of legislators in the Russian Federation as well, but, as already mentioned, the concept of “religious extremism” is not directly reflected in the legislation.

Turkmenistan is the only Central Asian country that does not belong to the Shanghai Cooperation Organization and that has no anti-extremist legislation. The word “extremism” is found in the laws, but only in sections of secondary importance.¹¹¹

In Kazakhstan, the law “On Countering Extremism” was adopted in 2005. In contrast to the Russian law, the Kazakh law contains no list: it classifies extremism directly in accordance with its ideological parameters. Extremism is defined in p. 5, Art. 1 of the Act as actions aimed at the following objectives:

“Forcible change of the constitutional system, violation of the sovereignty of the Republic of Kazakhstan, the integrity, inviolability and inalienability of its territory, undermining national security and national defense, forcible seizure of power or forcible retention of power, creation, management and participation in illegal paramilitary organization of armed rebellion and participation in it, inciting social, class strife (political extremism);

inciting racial, ethnic and tribal strife, including that associated with violence or calls for violence (national extremism);

¹¹¹ Art. 5 of the Law “On Freedom of Conscience and Religious Organizations” states that the government “does not permit manifestations of religious or other fanaticism and extremism,” while paragraph 2.4 of Art. 16 of the law “On Combating Terrorism” states that “the distribution of information... serving [as] propaganda or justification of terrorism and extremism is not allowed.” Turkmenistan’s criminal provisions concerning hate crimes are similar to those of Kazakhstan, though there is no characteristic of “blood feud,” and the article on hate speech is more like the old Russian one. However, there are no qualified hate-motivated acts of vandalism in the Criminal Code.

inciting religious enmity or discord, including associated with violence or calls for violence and the use of any religious practice that causes a threat to security, life, health, or morals or the rights and freedoms of citizens (religious extremism).”

Additionally, calls for terrorist activity are actually equated with calls for extremist activity, and the same applies to providing assistance: see Art. 233-3 “Financing of terrorist or extremist activity and other assistance to terrorism or extremism.” Furthermore, the Kazakh Criminal Code contains articles on organized extremist activities and on the continuation of the activities of a banned organization, to be described in greater detail in the next subsection. Kazakhstan, like Russia, maintains a list of prohibited information materials, although the Kazakh list is significantly shorter than the Russian one.

Several aspects of this definition are worthy of attention, especially when one compares it with the Kazakh Criminal Code.

First, the conflict-management terminology of this definition is unique: it refers to “inciting strife/discord,” not “inciting hatred,” and makes no reference to “public calls.” The law “On National Security” adopted in early 2012 specifically stated that not only are calls for extremism forbidden, but so are calls for “the use of existing confessional differences and different religious beliefs for political, extremist and terrorist purposes”: see p. 2.4 Art. 21. However, Art. 164 of the Kazakh Criminal Code “Incitement of social, national, tribal, racial or religious hatred,” refers to more specific issues, though they are not always well-defined. The corpus delicti of this article includes a broad range of criminalized statements, as follows:

“Deliberate acts aimed at inciting social, national, tribal, racial or religious enmity or discord, insulting national honor and dignity or religious feelings of citizens, as well as propaganda of exclusivity, superiority or inferiority of citizens based on their attitude to religion, class, nationality, tribal or racial origin, if these acts are committed publicly or with the use of mass media, as well as through the dissemination of literature and other media that promote social, ethnic, racial or religious enmity or discord.”

Second, there is a reference to tribal enmity, which is topical for Kazakhstan. This is partly reflected in the Kazakh Criminal Code, where it is to be distinguished from the motive of “blood feud.”

Third, in contrast to the wording of a similar article in the Russian Criminal Code, the object of protection under Art. 164 of the Kazakh Criminal Code is not only people, based on their attitude to one group or another, but also such objectified categories as “national honor and dignity” and “religious feelings.”

Fourth, Art. 164 of the Kazakh Criminal Code refers to “social discord,” but the propaganda of exclusivity is

explained through social class. One would assume that the words “social” and “social class” mean the same in the context of this article, but they do not, since in the definition of extremism they are separated by commas.

Fifth, the notion of religious extremism includes not only “inciting religious hatred or enmity,” but also any religious practice that is damaging to certain citizens. In comparison, in Russia such practices are also prohibited by the law “On Freedom of Conscience and Religious Associations”: on a rhetorical level, they are often classified as “religious extremism,” but they are not included in the official definition of extremist activity. However, in Kazakhstan, this item, which emerged historically as a tool for countering new religious movements, was included in the definition of extremism.

Sixth, the use of violence is mentioned in the definition of extremism as a possible, but not a necessary attribute of the latter. At the same time, p. 2, Art. 2 of the law states that international treaties take precedence over the text of the law. This applies, of course, to the Shanghai Convention as well. Its definition of extremism, which was provided above, includes violence as a necessary characteristic, but it does not seem that this narrower understanding has in any way affected legal practice in Kazakhstan.

Seventh, the wording of the definition is constructed in such a way that it is impossible to understand whether hate crimes are actually extremist acts if they are not intended to incite hatred. Apparently, the legislator believes that this intention is inherent in hate crimes.

§ 5. Uzbekistan

In Uzbekistan, there is no legal definition of extremism. One would assume that Uzbekistan abides by the definition given in the Shanghai Convention, but it seems that Uzbekistan, together with the Russian Federation, has a broader interpretation of extremism than that provided in that convention.

Because of the political situation in the country, the very term “religious extremism” is a topical one for the authorities. It is definitely present in the law, but is not defined. An understanding of its meaning is gained by an examination of the stringent wording of Art. 5 of the Law “On Freedom of Conscience and Religious Organizations”:

“The state assists in [the] establishment of mutual tolerance and respect between citizens either practicing different religions or not practicing any, [and] between religious organizations of different religions; the state does not permit religious and other fanaticism and extremism, as well as actions aimed at opposition and aggravation of relationship[s], [or of] incitement of enmity between different confessions.

The state supports peace and accord between religious confessions. Actions aimed at conversion of believers of one

confession into another confession (proselytism), as well as any other missionary activity, is banned. Persons violating this rule bear [the] responsibility established by the legislation.

... It is not permitted to use religion for the purpose of anti-state and anti-constitutional propaganda, incitement of enmity, hatred, international discord, breach of moral principles and civil accord, distribution of slanderous insinuation that would destabilize the situation, spreading panic among the population and taking other actions against the state, society and people. [Any] Activity of religious organizations, movements, sects and other organizations promoting terrorism, the narcotic business and organized crime, as well as [any] activity of organizations pursuing other selfish ends, is banned.

Any attempts to put pressure upon the agencies of State power and administration, officials, as well as illegal religious activity, are suppressed by law.”

Given this special attention to “religious extremism,” it is surprising that the motive of religious hatred is mentioned neither as a general aggravating circumstance nor as a specific aggravation¹¹² in the Uzbek Criminal Code, which only refers to the motives of racial and ethnic hatred.

However, Articles 216 and 2161 of the Uzbek Criminal Code on the illegal activities of organizations, including those banned as extremist organizations, clearly cover “religious extremism” This is especially true of Article 2161, which was introduced most recently and which refers to “public associations and religious organizations, movements, sects.” However, there is also a separate, more stringent Art. 244² “Establishment, Direction of or Participation in Religious Extremist, Separatist, Fundamentalist or Other Banned Organizations.”

The understanding of extremism contained in the above passage is also reflected in art. 244¹ “Production and Dissemination of Materials Containing Threat(s) to Public Security and Public Order,” which penalizes:

“Any form of dissemination of information and materials containing ideas of religious extremism, separatism, and fundamentalism, calls for pogroms or violent eviction of individuals, or aimed at creating a panic among the population, as well as the use of religion for purposes of breach of civil concord, dissemination of calumnious and destabilizing fabrications, and committing other acts aimed against the established rules of conduct in society and of public security.”

Production or possession with intent of dissemination of materials containing such ideas is punished slightly less severely, and only “after imposing [an] administrative

¹¹² There is also an aggravating motive described as “out of religious prejudice,” but it is unclear whether or not this can be considered to be a hate motive.

penalty for the same action.”¹¹³ The extreme lack of specificity in the wording of this article is noteworthy. For example, “the established rules of conduct in society” is an unclear concept. And the term “fundamentalism” is not defined by the law, though it is the subject of heated debate among scholars.

Incitement to hatred, hate speech and discrimination are covered by another article, Art. 156, which is in turn related to the statements recalled in the corresponding article of the Criminal Code of Kazakhstan described above. The basic formulation is as follows:

“Intentional acts, humiliating ethnic honor and dignity and insulting religious or atheistic feelings of individuals, carried out with the purpose of incitement to hatred, intolerance, or division on national, ethnic, racial, or religious grounds, as well as [the] explicit or implicit setting [of] limitation of rights or preferences on the basis of national, racial, or ethnic origin, or religious beliefs.”

Production and storage of materials that incite hatred yields a lighter sanction and only following the administrative penalty. The consecutive use of the words “national” and “ethnic” is noteworthy: such a combination is also seen in the legislation of Turkmenistan. Certainly the main feature, and one atypical of post-Soviet countries, is the equal protection of citizens’ feelings “on the basis of their religious or atheistic beliefs,” as opposed to the *corpora delicti* of incitement to hatred, which are usually formulated to suggest an option of disbelief, which may at times be clearly indicated.

Vandalism motivated by hatred is addressed neither by the Criminal Code of Uzbekistan, nor by that of Turkmenistan.

§ 6. Tajikistan

The law “On combating extremism” has been in force in Tajikistan since 2003. This means that it was adopted six years after the conclusion of a bloody civil war, following which a coalition government was formed that included the participation of the radical Islamists who had lost the war. This feature makes the political background of Tajikistan completely unique in the OSCE region. However, this unique background has not given rise to any special legislation regarding hate crimes, incitement to hatred or hate speech.

Tajik law features different definitions for “extremism” and “*extremist activity*.” *The activity is defined by a list, very similar to what is found in the former Russian and current Belarusian definition provided above. It should be noted that in Tajik law, there is no notion of extremist symbols. Tajik law*

does include the concept of extremist materials. However, extremism is defined only as “extreme forms of action calling for the destabilization of the constitutional order in the country and the seizure of power and appropriation of its authority, incitement of racial, national, social and religious hatred.” On the one hand, this can be seen as an attempt at a generic definition through the notion of “extremity” while on the other hand, this definition of extremism is more similar to one of the paragraphs of the definition of extremist activity, in that it refers to public calls for other types of the same activity.

The specificity of the Tajik situation is reflected in the presence of such rare motives of hatred as “religious fanaticism” and “local animosity” that is, enmity on a regional basis, which is found in para. “F” of Art. 62 of the Criminal Code of Tajikistan. Interestingly, “religious fanaticism” is not indicated as a specific aggravation, although “enmity on a regional basis” is. The addition of the specific aggravation of “blood feud” may have an indirect bearing on inter-regional hostility and the general consequences of the civil war, but it still remains a separate issue. Indeed, this specific aggravation is found in a number of articles.

Enmity on a regional basis is present in the definition of incitement to hatred and hate speech, which is found in Art. 189 of the Tajik Criminal Code. This article is also noteworthy for its specific aggravations, apart from those that bear a similarity to the contents of Art. 282 of the Russian Criminal Code. Particularly severe punishment is provided to instigators of hatred, if such action resulted in someone dying (cl. “b” p. 3 of the Article) or being evicted or banished (ibid, cl. “c”).

The definition of “extremist materials” in Tajik legislation is somewhat more functional than the same definition in Russian law. Extremist materials are: “*the official materials of the banned extremist organizations*” and “*materials written by the person convicted in accordance with international legal acts for crimes against peace and humanity and containing signs of extremism.*” Such a description is clearly more appropriate than the vague reference contained in Russian legislation to the leaders of the German Nazi and Italian Fascist parties. Of course, the uncertainty regarding such concepts as, for example, “promotion of supremacy ... on the basis of religion” and “incitement of national discord” remains, but at least with regard to “inciting social discord,” Tajikistan has retained the qualification of “*associated with violence or incitement to violence,*” which was removed from the Russian definition in 2007.

The prohibitions in the law regarding materials previously recognized as extremist or simply containing elements attributable to the definition of extremist activity are not stringent, but the law contains no criterion of mass distribution. The corpus of Art. 374 of the Code of

¹¹³ Such a clause is found in a number of articles of the Criminal Code of Uzbekistan.

the Republic of Tajikistan on Administrative Offences, entitled “Production, storage, import, transportation and distribution in the territory of the Republic of Tajikistan of banned media products, other banned of printed products,” is far from uniform. It reads as follows:

“Production, storage, import, transportation and distribution in the territory of the Republic of Tajikistan of media products containing information and materials aimed at propaganda or agitation of violent change of the constitutional order, violation of state integrity and state sovereignty, undermining state security, war, incitement of social, racial, ethnic or religious hatred, the cult of cruelty, violence and pornography, justification of terrorism and extremism, the spread of information constituting a state secret, as well as the demonstration of film and video production of pornographic and special sexual-erotic nature, as well as other banned printed materials in the absence of the signs of a crime.”

The Administrative Code of Tajikistan lists another quite similar offence regarding criminalized hate speech. In Part 2 of Art. 462 “Violation of silence,” the following corpus is unexpected:

“Playback of discs, cassettes and other technical means containing records of the religious extremist and (or) the insulting nature in the streets and avenues, squares, markets, shopping centers, parks and beaches, in vehicles and other public places.”

The definition of “religious extremist” is not given, but one understands that it means religion-related statements considered to be extremist in nature.

Finally, the Tajik Criminal Code, in addition to the articles on “extremist community” and on the continuation of the activities of banned extremist organizations which are similar to the articles contained in Russian legislation, also contains a specific article criminalizing “extremist” religious instruction. For more detailed information on this topic, please see the subsection on the prohibition of organizations below.

§ 7. Kyrgyzstan

The Kyrgyz law of 2005 “On Counteracting Extremist Activities” virtually copies the Russian law of that time, not only in name but also in the definition of extremist activity and throughout the body of the text. As such, its definition almost coincides with that contained in Belarusian law, as described above.

Kyrgyz criminal law was only partially affected by the anti-extremist legislation as compared to legislation from the Soviet era. It does not feature the motive of hatred as a general aggravating circumstance. Rather, the hatred motive is only considered a specific aggravation for the crime of murder, as in the statement “on the grounds of ethnic or racial or religious hatred or enmity.”

The article of the Kyrgyz Criminal Code on incitement to hatred and enmity adds “inter-regional” enmity to the list of types of enmity: such a feature is highly relevant in Kyrgyzstan. In general, the wording of the Kyrgyz article basically follows the wording of Russian Art. 282, but there is an additional aggravating circumstance: a crime committed by a person “previously convicted for crimes of an extremist nature (extremist activity).” No definition of “crimes of an extremist nature” is provided in the Criminal Code of Kyrgyzstan, unlike the Russian Code, but we can assume that these may include crimes, the corpus of which is similar to the elements of the definition of extremist activity, i.e. incitement to hatred itself, as well as dissemination of corresponding materials, murder motivated by hatred and participation in an extremist organization.

However, the concept of an extremist organization is unknown in the Criminal Code of Kyrgyzstan, which contains a more limited notion of “organized activity aimed at inciting national, racial, religious or interregional hatred.” Art. 299¹ of the Kyrgyz Criminal Code criminalizes the creation and administration of an organization which incites hatred (p. 1), as well as the administration of (p. 2) and partaking in (p. 3) an organization that has been banned for extremist activities. Indeed, a few Islamist organizations were in fact banned in Kyrgyzstan.

Art. 299² of the Criminal Code stipulates very harsh penalties for the distribution of extremist materials, which are defined in a manner similar to that found in the original version of the Russian law. It also contains harsh penalties for the public display of symbols of organizations banned for extremism: these penalties are up to five years’ imprisonment, and even up to ten years’ imprisonment subject to a number of specific aggravations, including “the use of financial or other material assistance received from foreign public associations and religious organizations, or other organizations, as well as foreign nationals.”

Unlike Russian legislation, Kyrgyz law includes the concept of “religious extremism,” although no definition is given. Art. 1 of the Law “On Freedom of Conscience and Religious Organizations” states that the authorities are pursuing a policy “to protect public order, spiritual security, territorial integrity and the constitutional order from religious extremism.”

Similarly, without providing any definitions, this law introduces other notions related to political science. Art. 5 indicates that the state “does not allow religious radicalism and extremism, actions aimed at the opposition and aggravation of relations, inciting religious hatred.” “Radicalism,” as opposed to “extremism,” is left altogether undefined; unfortunately, the difference between the two is not clear. Moreover, it is not clear how they relate to the concepts at the end of the phrase. The highly ambiguous term

“fundamentalism” is simply used in the phrase “*the ideas of religious extremism, separatism, and fundamentalism,*” found in paragraphs 8 and 9 of Article 22 of the Law, featuring the clauses on the prohibition of distribution, import, and production of related materials.

§ 8. Outside the former Soviet Union

In Slovakia, the Criminal Code uses the term “extremist crimes” as follows: Art. 129 of the Slovak Criminal Code on group crime defines an “extremist group” as a group of at least three people united for the commission of “extremist crimes.” Membership in such a group is a specific aggravation for crimes such as the support of groups involved in activities directed against fundamental rights and freedoms (Art. 421) and incitement to hatred (Art. 424). The production (Art. 422a), distribution (Art. 422b), and even storage (Art. 422c) of “extremist materials” is also criminalized. The concept of “extremism” is not defined in the law, but there is a detailed definition of “extremist materials” in para. 7, Art. 130 of the Criminal Code, which offers a clear idea of how to understand “extremism”: this notion includes the suppression of fundamental rights and freedoms, hate speech, incitement to violence and discrimination on several grounds, and denial and justification of crimes against humanity, as defined by the decisions of international tribunals. In fact, Art 140a defines “extremist activities” in a similar fashion, through references to the corresponding articles of the Slovak Criminal Code.¹¹⁴

Of course, the term “extremism” may be used as a record-keeping and analytical concept, but not a legal one, including its use in the organization of law enforcement. This approach should not be included in the category of anti-extremist legislation, as the use of various analytical categories, including political science, does not produce any specific legislation.

In Germany, there is a mechanism to protect the constitutional order, including the prohibition of organizations with activities clearly aimed at overthrowing this

order and the monitoring of other groups suspected of the same intentions. They are considered to be extremist. One could even say that in Germany, the political science term “extremism” in some way substitutes the concept of hate crimes, the latter being represented in the legislation in a substantially weakened form.¹¹⁵ For a more detailed discussion, please refer to the chapter on hate crimes.

In the Czech Republic, legislation on hate crimes is very well developed, and the concept of “extremism” is used only as an analytical notion in countering certain categories of criminal activity, although the Czech Ministry of Internal Affairs is well aware that not everything described by this political science concept is a crime. Extremism is understood as clearly ideological activities aimed against the constitutional foundations of the democratic system of the Czech Republic, including equality and the protection of minorities, and activities which clearly deviate from the principles of constitutionality and the rule of law.¹¹⁶ Since 2011, the Czech Republic monitoring mechanism has been more geared to groups that are inclined toward hate crimes and similar acts. However, there still remains the problem of correlating the monitoring of related but different categories of crimes, i.e. politically motivated and racially motivated crimes.¹¹⁷

114 Here is the full definition: “*Extremist crimes are such crimes as support or propaganda for a group of persons or movement which, using violence, the threat of violence or the threat of other serious harm, demonstrably aims at suppressing citizens’ fundamental rights and freedoms, under §421 and §422, Manufacturing of Extremist Materials, §422A Dissemination of Extremist Materials, under §422B Possession of Extremist Materials, under § 422C, Approval or Denial of the Holocaust and Crimes of Political Regimes, under §422D Defamation of Nation, Race and Belief, under §423, Any Incitement of National, Racial and Ethnic Hatred, under §424 Incitement, Defamation and Threatening Persons because of their Affiliation to Race, Nation, Nationality, Complexion, Ethnic Group or Family Origin, under §424A, and also crimes with special motivation under clauses (D) and (F) §140.*”

115 Alke Glet, “The German Hate Crime Concept: An Account of the Classification and Registration of Bias-Motivated Offences and the Implementation of the Hate Crime Model Into Germany’s Law Enforcement System,” *The Internet Journal of Criminology*, 2009 http://www.internetjournalofcriminology.com/Glet_German_Hate_Crime_Concept_Nov_09.pdf

116 The full definition is available in: *Extremism and its Development in the Czech Republic in 2001*, Resolution of the Government of the Czech Republic, Website of the Ministry of Interior of the Czech Republic, <http://www.mvcr.cz/mvcren/file/extremism-and-its-development-in-the-czech-republic-in-2001-pdf.aspx>, pp. 1–3.

117 Klara Kalibova, *Zpráva o násilí z nenávisťi v České republice pro rok 2011* (Prague: In IUSTITIA, 2012), pp. 26–27.

4. Laws against groups

The crimes described in the previous chapters may be committed in organized groups, meaning that it is the aim of the groups themselves, to varying extents, to commit these crimes. Sometimes these are not just groups, but rather large officially registered organizations: one recent large-scale example is the Greek parliamentary party “Golden Dawn.”

Of course, a significant threat arising from organized criminal activity warrants an appropriate response, including through legislation. In fact, this reaction is observed in all countries, although in different forms.

Any criminal legislation includes at least two norms, with some variations. The first norm is that committing a crime in a group is usually an aggravating circumstance. The second norm is that the creation of a community with the purpose of committing crimes and participation in such crimes constitutes a crime in and of itself. However, the second norm may apply only to the most dangerous categories of crimes rather than to all crimes. This also seems to include laws against terrorist groups. Since all of these rules are beyond the scope of my research, I am only interested in the provisions directly or apparently aimed at combating hate crimes, incitement to hatred and hate speech.

Many countries prohibit the creation of organizations advocating the violent overthrow of the government, the violent secession of territory, incitement to racial or other hatred. These prohibitions are of a civil nature, since they entail denial or withdrawal of registration. However, the question as to the prosecution of leaders and activists remains, and it is resolved in different countries in different ways. In many countries, such civil injunctions do not include any criminal sanctions.

This type of legislation was initially part of the category of “political crimes” and, accordingly, has undergone considerable transformation over the decades during which we have witnessed the establishment of the principles of liberal democracy and human rights.

In Turkey, laws adopted before the First World War criminalizing participation in banned organizations are still in force, and no relevant amendments have been introduced. Turkish legislation, as opposed to the laws on organized crime, was clearly initially focused on specific anti-government groups, hence, it can still be used against various ideological criminal organizations. However, the case of Turkey is clearly exceptional.

In general, there are two basic approaches. The first one formulates a certain political and legal framework, as it is done in particular in the national legislation on combating extremism discussed in the previous subsection: it is easy to formulate the *corpus delicti* relating to organized criminal activity within such a framework. The

same applies to the post-war anti-fascist laws. The second approach identifies some types of crime not by their gravity, but by their content – for example, hate crimes or discrimination. Under this approach, such crimes warrant special counteraction and so the relevant organized criminal activity is criminalized. I will review the national legislation below in precisely this order.

§ 1. Laws on ideology

Laws against the revival of the Nazi and fascist movements were an integral part of the process of de-Nazification. The anti-fascist and anti-monarchic law was passed in 1947 in Italy, but in 1993 the ideological legislation was replaced by a more modern version, as referred to below.

Anti-Nazi legislation was preserved in its purest form in Austria. The Act of May 8, 1945, prohibits any act aimed at the reconstruction of the NSDAP, which was the official acronym for the National Socialist German Workers Party or “Nazi” party. This legislation has been modified several times and expanded to avoid recreating organized National Socialism in any form. The wording used is very broad: among other things, it prohibits the justification of Nazi crimes and actions “*in the spirit of National Socialism.*” Lengthy prison sentences are provided for “*whoever founds an association that seeks to make its members act in the spirit of National Socialism with a view to ... disturbing public peace,*” or who in any way helps such a community, and conspires to commit murder, bombings or arson, acting “*in the spirit of National Socialism.*”¹¹⁸ Of course, the definition of “the spirit of National Socialism” remains at the discretion of the court. However, the more the events of 1945 recede into the past, the more likely it becomes that those groups focused on “undermining public order,” including ultra-right-wing groups, may correspondingly move further away from the original Nazi ideology. Therefore, anti-fascist legislation in this form is quite simply at risk of becoming outdated.

Anti-fascist laws also emerged in Portugal after the fall of the Salazar regime, though the term “fascism” had only been used as an analytical and evaluative term in relation to this regime, and not as a universally clear self-determinant, as was the case with Fascism in Italy, or with “National Socialism” in Germany and Austria. Therefore, the law required a definition. The Portuguese Law on Fascist Organizations of 1978 states:

“... to consider fascist those organizations that in their charters, manifestos, reports and statements of ruling and responsible leaders, and in their activities openly hold, protect,

¹¹⁸ Austrian National Socialism Prohibition Act of 1947, The Legal Information System of the Republic of Austria, https://www.ris.bka.gv.at/Dokumente/ErV/ERV_1945_13/ERV_1945_13.pdf

seek to spread and actually spread the principles, doctrines, attitudes and practices of the historically fascist regimes, namely: conduct [of] propaganda for war, violence as a form of political struggle, colonialism, racism, corporatism, and praise [of] prominent Nazi figures.”¹¹⁹

Thus, the organizations described in the law are banned by the Portuguese Supreme Court, and any people leading such entities will be sentenced to terms ranging from 2 to 8 years in prison. Any violent actions performed by fascist organizations are considered to be crimes. The same law criminalizes attempts to resume the activities of the organization in any way or simply not to abide by the decision of the Portuguese Supreme Court on the dissolution of the organization.

The Portuguese law is subject to the same claims as is the Austrian law.

One would expect that with the fall of the Communist regimes in the late 1980s and early 1990s, similar legislation would have emerged in Eastern Europe. However, the anti-communist norms only infiltrated the criminal law of some countries: this process occurred at a different pace and in different forms according to the specific country. There were many political declarations which essentially equated the dangers of Communism and Fascism.

Central European laws tend to criminalize public statements in favor of Fascist and Communist ideology, rather than the ideology itself. This is partly manifested in the laws on “historical revisionism” described above in the Czech Republic, Lithuania and Hungary, all of which mention the crimes committed by Communists. This is also true in the laws on hate speech in Hungary and Poland, as mentioned above. The Hungarian Criminal Code, which entered into force in 2013, contains in its Art. 335 a prohibition against the public use of symbols of those repressive regimes that are historically significant for Hungary, i.e. the Nazi, Communist and Horthy regime, but with some restrictions. In Poland, the corresponding article of the Polish Criminal Code is called “Promotion of Fascism or other totalitarian systems” and the corpus of the law is supplemented accordingly.

In Romania, on the other hand, the concept of “propaganda in favor of a totalitarian state” concerns only fascism and related phenomena. According to the Emergency Ordinance of March 13, 2002, organizations that advocate the ideas of fascism, racism and xenophobia may be banned, as well as those aimed at violently changing the constitutional order and democratic institutions, and those engaged in the distribution of symbols, unless such distribution is for educational or cultural purposes.

However, no further description of this motive was included in Romanian law. “Systematic dissemination via any means of the ideas, concepts or doctrines calling for the creation of a totalitarian state, including incitement to murder persons who are declared to belong to an inferior race” is considered to be a crime in Romania, as are any organizational activities of the kind, along with the “popularization of the beliefs of persons guilty of committing crimes against peace and humanity.”

A relatively new threat, or rather a long-forgotten old threat, of political radicalism associated with religion lends credence to the development of new legislation on ideology.

De facto, such legislation can currently only be directed against radical political Islam. However, modern concepts of non-discrimination do not allow for any direct formulation, meaning that other terms must be used. Despite this fact, such norms have appeared thus far only in the post-Soviet space, and with religiously neutral terms such as “religious extremism” and “fundamentalism.”

Most of these norms were adopted in countries which have anti-extremist legislation in place as well as in countries lacking such legislation, suggesting that there is no direct link between these two approaches.

It is important to note that Kazakhstan is the only country that provides a definition of “religious extremism” in its anti-extremism law. However, in this particular case, political extremes and all other kinds of extremes or of practices related to religion that can be considered to be undesirable for society are lumped together. As a result, Kazakhstan’s articles against organized activity related to “religious extremism” go far beyond the scope of this study.

Other countries simply do not include this type of definition in their law, even though they use the terms with no uniform meaning. In Uzbekistan, various laws refer to “religious and other fanaticism and extremism” and “ideas of religious extremism, separatism and fundamentalism”: it is worth noting that, since separatism may be non-religious, fundamentalism in this phrase could also be understood as not associated with religion. In Tajikistan, groups and materials can be “religious extremist,” while Kyrgyzstan envisages protection of “spiritual security... from religious extremism.”

The situation is different in Armenia and Azerbaijan. These countries do not have specific anti-extremist legislation, but they are also concerned about the threat of the radical politicization of religion. Therefore, one of the common motives that serves as an aggravation and qualification for hate crimes is the motive of religious fanaticism. However, the laws on incitement to hatred and hate

¹¹⁹ See *Legislating for Equality*, op. cit., p. 363.

speech feature no comparable legal novelty. They employ the standard wording of “religious hatred.” Tajikistan is the only country out of all those with anti-extremist legislation to feature the motive of “religious fanaticism” in norms on hate crimes.

§ 2. Anti-extremist laws

I will now provide a summary regarding criminal prosecution for participation in the extremist groups described in the preceding subsection.

Although definitions of extremism vary greatly in different countries, there is always a wide margin left for judicial discretion, and in many cases, too wide a margin. Two different approaches to criminalization of extremist groups are used, both of which are modeled on the Russian legislation, which was the first of its kind. Art. 282¹ of the Russian Criminal Code criminalizes participation in a group, the activities of which are aimed at committing crimes that meet the definition of extremism. This means that the same approach which is applicable to organized criminal groups, i.e. groups aimed at committing grave and especially grave crimes, is expanded to cover extremist crimes as well. Art. 282² is connected with the civil law provision on banning the organization for extremist activity. Such a ban does not entail any criminal prosecution, which would of course still be possible on a parallel track, but the continuation of the activities of a banned organization constitutes a crime. The law does not specify what should be considered a continuation of the organization’s activities, to be distinguished, for example, from the mere continuation of personal activity on the part of an individual who used to be a member of such an organization, and is unlikely to have changed his or her views. This creates significant problems for law enforcement, precisely the same problems that arise in the above-mentioned methods of banning organizations.¹²⁰

Other CIS countries that have learned from the Russian experience may establish their norms in different ways. Some have provisions analogous to those in of the Art. 282¹ and Art. 282² (Kazakhstan and Tajikistan, and in a certain sense Uzbekistan and Kyrgyzstan, see below), while others have no such norms (Belarus, Moldova).

In some countries, as in Russia, direct reference is made to the definition of extremism, while others simply describe in the corresponding articles of the criminal code exactly what kind of organized activity is considered to be criminal.

In Kazakhstan, the article on the continuation of the banned organization’s activity refers to the definition of extremism. However, organized extremist activity is not referred to as such and is added to the article featured in the legislation of most post-Soviet countries on the activities of the religious association being damaging to individuals or conducting some otherwise illegal activity. Furthermore, the list of activities in this article of the Kazakh Criminal Code does not fully coincide with the definition of extremism. Please refer to the previous subsection for further detail.

In Kyrgyzstan, the two norms are combined in a single article, but, in fact, in a much more restricted manner than the norm on extremist communities. The article in question only criminalizes participation in groups, the activities of which are aimed at inciting hatred and dissemination of hate speech. Of course, norms of this kind are found in a number of other countries, as indicated below.

In Tajikistan, there are two articles that are quite similar to those found in the Russian Criminal Code, but there is also a third article that is specific to this Central Asian country that has been the theatre of repeated armed confrontation with radical Islamists following the Civil War. Art. 307⁴ of the Criminal Code of Tajikistan is entitled “Organization of Religious-Extremist Training or Training Groups”: it prescribes very severe punishment, even though according to the definition of extremism the concept of a “study group” does not necessarily imply anything like commando or other violent training.¹²¹

Uzbek legislation does without the definition of extremism, and separately criminalizes participation in illegal organizations and even inducement to participate in such organizations. It also features separate and much stronger wording – “*participation in religious extremist, separatist, fundamentalist or other banned organizations.*” The wording of the articles seems to imply a judicial ban of the organization as a condition for the persecution of its members, but this is not required de facto, so these articles function in the same way as the two Russian articles mentioned above.

§ 3. Banning groups by types of activity

The anti-extremist, anti-fascist, and anti-communist

120 In 2014, the Criminal Code of the Russian Federation was amended with an added Article. 282³ “Financing of extremist activity,” but it did not introduce any important changes, since the prosecution of financing as a form of complicity was already a feature of the law.

121 In itself, combat training with a view to committing certain unlawful actions, in contrast to the activities of military sports clubs, can be prosecuted with no special norms as a form of preparation to commit crimes. Special articles in this sense can also be introduced in the criminal code; for instance, in 2014 the Russian Federation introduced Art. 205, 205³ “Undergoing training with the purpose of carrying out terrorist activities,” and Art. 212, para. 4 “Preparing for riots.”

formulations and approaches to the legislation in question are all attempts to describe the illegal activity as being in opposition to fundamental political values, as well as to the values of civil society. At the same time, all OSCE participating States at least theoretically believe that these values are directly related to human rights, equality and democracy, as enshrined in their national constitutions. Accordingly, one is tempted to suggest the formulation of a less politicized framework regarding organized illegal activity in prosecuting hate crimes, hate speech and incitement to hatred.

This is the path long taken by Germany, the legislation of which is designed to target anti-constitutional organizations rather than to target Nazism. The German Supreme Court may ban an organization for anti-constitutional activity, as has been the case for a number of organizations, from NSDAP to Blood & Honour: even the Communist Party was banned in Germany at one time. Continued activity on the part of a banned organization is a crime according to § 85 of the German Criminal Code. It is also a crime to promote the ideas of banned organizations (§ 86) and to use its symbols (§ 86a).

It should be noted that the promotion of the ideas of certain organizations is not a very clear concept: on the one hand, other organizations that have not been banned may have similar ideas, while on the other hand, even mere discussion of the prohibited ideas could be considered a form of their promotion. The German Criminal Code offers no solution to address these problems, nor indeed does the legislation of any other country, but German law does provide for two important reservations. First, it is prohibited to distribute not only materials of the banned organization, but also those of related organizations, which are found to be substituting the prohibited organization. Second, only propaganda that *“is directed against the free democratic constitutional order or the idea of the comity of nations”* is prohibited. In order to address the second problem, §86 contains a clause that stipulates prohibition of propaganda against the free democratic order or the idea of international mutual understanding, but not statements pursuing the goals of education or of developing art, science, research and teaching, or reporting on contemporary or historical events, or other similar goals.

A similar clause is contained in §86a. However, this clause does not mention using the same symbols for the purposes of counter-propaganda. This clause has led to the prosecution of anti-fascist groups for using images including a swastika, such as the famous pictogram depicting a man throwing a swastika into the garbage. However, in 2007 the Supreme Court ruled that §86a can not be applied in this manner.

Clearly, the German law was adopted in a country characterized by a liberal democratic regime. But, in principle, it is possible to apply in a similar manner even the old legislation on “political crimes” such as exists today in Turkey, if and when the country becomes a liberal democracy. It can thus be concluded that such legislation, while not formulated in political terms, is still critically dependent on the political regime in force, since it does not describe specifically what type of organized activity is prohibited.

The Czech Republic and Slovakia also formulate their legislation in this area as protecting constitutional values, although these exact words are not used. In fact, the wording is even stronger.

Art. 403 of the Czech Criminal Code criminalizes the creation and even propaganda of any organization *“aiming ascertainably at suppression of the rights and liberties of the individual or [which] promulgates racial, ethnic, religious or class hate or hate against another group of persons.”* The punishment is very severe – up to 10 years in prison. The public expression of sympathy for such a movement is also punishable, although only by up to three years in prison. In addition, membership in an association that *“proclaims discrimination, violence or racial, ethnic, class, religious or other hatred”* is a specific aggravation for incitement to hatred.

In Slovakia, it is a crime to support or to promote *“a group of persons or [a] movement which, using violence, the threat of violence or the threat of other serious harm, demonstrably aims at suppressing citizens’ fundamental rights and freedoms”* (Art. 421 of the Slovak Criminal Code). Specific aggravations for this article include acting as a member of an extremist community, which is described in greater detail in the subsection on anti-extremist legislation. Other specific aggravations would be acting as a member of an extremist community or in a crisis situation. It is also a criminal offence to publicly express sympathy for such groups, including the use of its or similar symbols (art. 422 of the Slovak Criminal Code). In my opinion, these provisions create unnecessary complexity in the correlation of those groups described in Art. 421 with extremist communities as described in Art. 129 of the Slovak Criminal Code. Generally speaking, the understanding of extremism provided through the definition of extremist materials (in Art. 130 of the Slovak Criminal Code) coincides with the definition from Art. 421 cited above, meaning that the resulting enforcement is most likely consistent.

The legislation of a number of countries identifies groups, participation in which is a criminal offence. These groups are identified through the value of equality, rather than through a set of constitutional values. Accordingly, the most obvious example of such criminalization of

participation in a group is to be found in the use of anti-discrimination legislation.

This is the approach taken in Greece, the legislation of which specifically criminalizes statements through the Anti-Discrimination Act. Accordingly, it is a crime to create organizations which promote “*propaganda [of] or any type of activity including racial discrimination,*” as well as to take part in the activities of such organizations.

The situation is similar in Liechtenstein, which criminalizes organizational activity aimed at the practice of discrimination and incitement to it, rather than activity aimed at hate crimes. This is achieved through the framework of an article in the Criminal Code entitled “Racial discrimination.”

In Cyprus, the anti-discrimination law criminalizes participation in any organization that “*promotes organized propaganda or activities of any form aiming at racial discrimination.*”

The wording of the Lithuanian Criminal Code is very similar, but the list of protected characteristics is borrowed from the definition of the corresponding general aggravation for hate crimes.

Clearly, these norms already include not only organized discrimination, but also organized public statements promoting discrimination. It is also possible to formulate the norms more broadly, as is the case in the Spanish Criminal Code, which prohibits organizations that “*promote discrimination, hate or violence against groups or associations*” for a number of protected characteristics, “*and also call[s] to such actions.*” Incitement to the creation of and conspiring to create such an organization are also punishable offences.

Luxembourg only criminalizes participation in an organization that publicly advocates discrimination, hatred or violence according to the set of protected characteristics provided in the article on such statements.

Interestingly, none of the above countries with legislation against groups based on countering discrimination include violent crime itself in the definition of criminal organized activity.

However, this is precisely the approach taken by Bulgaria, where organizing a group aimed at promoting hatred and discrimination or seeking to commit acts of violence motivated by hatred is punishable by one to six years in prison: membership in such a group is punishable by up to three years’ imprisonment.

Only Georgia has a norm that focuses exclusively on violence. Under Georgian law, it is a crime to create a political, religious or other organization, the activities of which involve violence: participation in such an organization is also a crime, according to Art. 252 of the Georgian Criminal Code. It should be noted that participation in such a group is also likely to be considered criminal in

other countries, but only if such participation is covered by rules on criminal associations, and that such rules, as already mentioned, may not generally apply to all crimes, nor specifically to all violent crimes.

Chapter V. Comparative analysis and recommendations

1. Common features based on characteristics

§ 1. Statement of purpose

Now that we have reviewed all of the laws regarding hate crime, incitement to hatred and hate speech in all 57 OSCE participating States, it is possible to attempt to identify patterns in the distribution of these laws in order to analyze how different standards are combined. Of course, these laws have not been adopted randomly, so simply considering the combinations of the various parameters as proof of any kind of correlation between or among the laws would be a controversial approach. Yet, I believe that when such a “correlation,” which I express in inverted commas given the question I have just raised, has either a significant positive or negative value, this could be of interest. I refer to those cases in which certain groups of norms or approaches coincide much more frequently than on average, or vice versa.

The legislation of one country is noticeably dependent on that of another, since lawmakers take into account the relevant experience of other countries. The legal tradition of a given country is a very important factor: this becomes especially evident when comparing the many post-Soviet and post-Yugoslav laws to the laws of other countries. One might assume not only that the violent upheavals of the 20th century greatly influenced the laws examined here, but also that the impact of such turbulence may have been quite variable. However, it becomes obvious from the review of the legislation that recent historic events do not establish any preconditions for the language used in these laws. For example, while the impact of the civil wars of the 1990s is often quite noticeable, there is no uniformity in the laws of the countries affected by such wars. Often, the relevant articles of the codes have changed radically over the past 10-15 years, which is clearly illustrated by the transition from politically-formulated laws to laws based primarily on the idea of the protection of equal rights, including within the framework of the adoption of comprehensive anti-discrimination legislation: a clear example here is the case of Belgium. However, there have been changes of another kind as well, such as when legislators noticed that the criminal laws on statements which were based on anti-discrimination legislation were too broad, and consequently limited them to a certain degree, as we have seen in Croatia.

All of these considerations show that laws on hate crimes, incitement to hatred and hate speech are a dynamic system, and that describing such a system in terms of static correlations should be considered a purely provisional effort.

I shall now proceed to these provisional considerations.

First of all, the laws on hate crimes do not seem as pertinent in the search for correlations among the legislation of different countries, since their various options, I believe, were sufficiently discussed in the relevant chapter. For the purposes of seeking a significant correlation, I would prefer to begin by examining the laws on statements, the laws on “extremist” or other similarly described groups and other “special” laws.

Toward this end, I have compiled a summary table (see the following center spread), which reflects the presence or absence of particular elements in the legislation. All of these elements have been discussed above in the previous two chapters, so I will limit myself to indicating them here according to their column numbers in the table for the purposes of further discussion. Brief notations that will facilitate this analysis are provided in brackets.

Ways of criminalizing statements

1. Norms that visibly focus on conflict prevention, including the use of terminology such as “inciting hatred” (conflictological norms)
2. Norms that explicitly or implicitly mention calls for violence (incitement to violence)
3. Norms that refer to calls for discrimination (incitement to discrimination)
4. Norms that either use only strong definitions of criminal statements are considered to be incitement to hatred (strong norms), or use only weak forms that are considered to be hate speech (weak norms) or norms that feature both terms (mixed norms)
5. Norms that specifically focus on protection of the groups (group norms) or norms built only upon the designation of protected characteristics (characteristics-based norms), or norms that either mention both groups and their “members,” or that mention both groups and the protected characteristics (complex norms)

Protected characteristics by statement

We can omit here the characteristics associated with race/ethnicity/nationality or religion, as they are found almost everywhere. I also decided to exclude from this review both very rare characteristics and cases with open lists of characteristics, as neither of these provides us with information about the aim of the relevant laws.

The following characteristics will be reviewed:

6. Political views, participation in political or trade union structures (policy)
7. Worldview and ideology, usually understood as an

- extension of a religious characteristic (worldview)
- 8. Social and class-specific characteristics in all their formulations (social status)
- 9. Sexual orientation or gender identity (sexual orientation)
- 10. Sex or gender (sex)
- 11. Other characteristics associated with health status (disability)

Basis for criminalizing affiliation with the group

Here we consider the various legal frameworks used to formulate laws that criminalize participation in groups, the activities of which include, either as a fact or as an intention, hate crimes, incitement to hatred, and/or hate speech.

- 12. Laws generated by anti-extremist legislation (anti-extremist framework)
- 13. Laws that directly appeal for the protection of constitutional values, such as democracy, equality and/or the protection of minorities and others (constitutional framework)
- 14. Laws that explicitly mention certain ideologies that are being counteracted – Fascism, fundamentalism or Communism (ideological framework)
- 15. Laws that clearly form part of an anti-discriminatory legal framework (anti-discrimination framework)
- 16. Laws directly aimed at countering the use of violence in politics (anti-violence framework)

Special laws

- 17. Norms that explicitly criminalize certain forms of “historical revisionism” (anti-revisionist provisions)
- 18. Norms that criminalize statements concerning religion, ranging from blasphemy to insult to religious or atheistic feelings, and which go a step further than the usual norms on incitement to hatred and hate speech or norms on the protection of religious associations from undue interference (religious provisions)

Availability of legislation on hate crimes

- 19. This is a simple note regarding the very existence of such rules in any form: incidentally, such rules are found in almost all countries. However, if the only form of hate crime specified in the law is vandalism, the country is marked with a zero.

Finally, we should point out that the United States and the Holy See are missing from the table, as they do not have any rules relating to statements and groups in this area.

Of course, I will not be listing all correlations: most of them are too weak for the drawing of any general conclusions. Sometimes the relationship is tautological:

for example, conflictological standards closely correlate with the anti-extremist framework, but this is not surprising, given the prevalence of the concept of “discord” in post-Soviet legislation. It is also possible that there may be a correlation that does not necessarily imply any substantial connection. For example, the same conflictological norms have a strong negative correlation with religious norms, but I find it difficult to draw any meaningful conclusions on this basis. In those cases in which I judge the correlation to be insignificant, I have not highlighted it: those readers who may be interested in doing so may analyze the table themselves. However, the following interpretation should only be regarded as provisional, and as providing a basis for further discussion.

Here follows a concise list, with brief comments on the significant positive and negative correlations, as well as my conclusions regarding these results.

§ 2. Correlations observed

Conflictological norms overlap with norms on incitement to violence in 11 countries, while the absence of conflictological norms overlaps with norms on incitement to violence in 25 countries: eleven countries have neither type of norms. Thus, these elements of the law can be seen as a soft alternative in approaches taken to counter the risk of clashes, riots, and similar actions, which seem to be the most politically significant component of the legislation on statements.

It is noteworthy that there is no clear correlation between the conflictological norms and the availability of laws on hate crimes, suggesting that legislators probably do not see the latter through such a political prism.

A comparison between conflictological norms and “strong” and “weak” forms of criminal sentences yields no significant correlation. A similar picture emerges when comparing conflictological norms with the focus of the laws that cover speech, i.e. whether they refer to social groups, to “abstract” protected characteristics, or to groups and their “members.”

However, it is striking that the conflictological norms have a strong negative correlation with anti-revisionist norms. In principle, there is a connection between these two approaches. Anti-revisionism has historically been based primarily on the protection of feelings of certain groups and a desire to weaken the ideological basis for radical movements with a specific historical background, although more recent legislation has evolved in the direction of a more universalistic approach. This attitude in the formulation of legislation may coincide with the intention of preventing riots or uprisings in the first place: however, these two attitudes appear to diverge quite often in practice. In this regard, it becomes immediately apparent that conflictological norms have a clearly negative correlation

Worksheet on criminalization of statements and participation in a group

COUNTRY	TYPES OF CRIMINALIZATION OF STATEMENTS					PROTECTED CHARACTERISTICS FOR STATEMENTS					BASIS FOR CRIMINALIZATION OF PARTICIPATION IN A GROUP					SPECIAL LAWS			
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19
	Conflict prevention	Calls to violence: explicitly – 1, implicitly or as specific aggravation – 2, both – 3	Calls to discrimination	Only “strong” types of statements – 1, only “weak” types of statements – 0	Social groups – 0, protected characteristics – 1, both – 2	Political views	Worldview	Social status	Sexual orientation	Sex / Gender	Disability / illness	Anti-extremism	Protection of constitutional values	Laws on ideology	Combating discrimination	Combating violence	Revisionism	Insult to religion	Hate crimes
Andorra	1			0	0	1	1											1	1
Albania	1			1	1				1										1
Armenia		2			1								1				1		1
Austria	1	1		0	2				1	1	1		1				1	1	1
Azerbaijan		2			1								1						1
Belarus	1				1							1							1
Belgium		1	1		1		1	1	1	1	1						1		1
Bosnia and Herzegovina	1	2			2														1
Bulgaria			1	1	1										1		1		1
Canada	1			1	0				1									1	1
Croatia		1		1	2				1	1							1		1
Cyprus	1	1	1		2			1							1		1	1	1
Czech Republic		2	1		2	1						1					1		1
Denmark				0	2				1									1	1
England	1	2			1				1										1
Estonia	1	1	1	1	1	1		1	1	1									0
Finland	1	2			1		1		1										1
France		1	1		2				1	1	1						1		1

with anti-discrimination laws on groups, which, in turn, have a clearly positive correlation with anti-revisionism.

Finally, a positive correlation is to be expected between conflictological norms and the availability of social and class-specific protected characteristics.

Incitement to violence is addressed in direct or indirect form, mainly as a specific aggravation, in the legislation of 35 out of 55 countries. Incitement to discrimination, on the other hand, is mentioned much less frequently, and is found in the legislation of 20 countries. Of these twenty countries, only five are among those that do not explicitly mention violence in their laws. Interestingly, neither incitement to violence nor incitement to discrimination correlate with the existence of laws on hate crimes.

Incitement to violence references have a positive correlation with all of the legal frameworks relating to groups, except for the anti-extremist framework. Georgia, which is the only country that criminalizes ideological groups specifically on the basis of their advocacy of violence, does not mention incitement to violence in the article on inciting hatred. Thus, it is fair to say that laws that criminalize participation in groups generally have a significant positive correlation with incitement to violence, and that in Georgia, advocacy of violence is criminalized by other means. The anti-extremism laws take a fundamentally different approach: as shown in the respective subsection, they do not focus on violence as the most dangerous type of activity.

A strong correlation between incitement to violence and anti-revisionism is also apparent. Anti-revisionist legislation also strongly correlates with the existence of laws on hate crimes. An examination of the correlation between anti-revisionism and legal frameworks that criminalize participation in a group yields the following picture: a positive correlation was observed for the three frameworks, with complete coincidence for all three of the countries with a constitutional framework in their legislation. Anti-revisionism is present in six of the seven countries the legislation of which features anti-discriminatory provisions, and in six out of the 11 countries with anti-ideological legislation. There is a clearly negative correlation with the anti-extremist framework for 2 of 8 countries. Apparently, the anti-extremist framework, which was designed to be universal, does not fit with such laws, although Russia, where the framework first emerged, adopted an anti-revisionist law in 2014. Thus, a fairly close relationship is observed among the three characteristics, though this link is not as clear in the case of countries with an anti-ideological framework, where calls to violence and anti-revisionism do not correlate.

If we look at laws mentioning incitement to discrimination, it is striking that this approach does not correlate

with social groups as an object of criminal statements, i.e. group norms, in any country. It is possible that the law of the country in question may either feature only protected characteristics, or that it may contain references both to groups and to individuals. However, the anti-discrimination approach to groups is almost exclusively compatible with mixed norms. Unfortunately, I cannot tell for how long such a correlation has been in existence. In other words, it is difficult to understand how accurately this reflects current trends in the development of legislation. The correlation itself is to be expected: after all, the modern anti-discriminatory approach, despite its greater focus on defending individual rather than group equality, still pays attention to both groups and individuals.¹²²

The coincidence of modern trends, including targeting the protection of minorities, provides an explanation for the significant positive correlation between anti-revisionism and incitement to discrimination. However, modernity is not as homogeneous as it might seem based on specially selected examples. Incitement to discrimination provisions more or less positively correlate with the protected characteristics of social class, gender and health status, and for some reason they especially correlate with political views, but there is a negative correlation with sexual orientation. Obviously, the sexual orientation characteristic is introduced into the laws in a geographically uneven manner. For further details, please see the corresponding chapter.

Incitement to discrimination provisions, as expected, closely correlate with the anti-discrimination framework for groups. There is also a positive correlation between incitement to discrimination provisions and the constitutional framework, but not between these provisions and the anti-extremist framework. However, in countries with an anti-ideological framework, no references to incitement to discrimination are found. I believe that based on the sample of the 11 countries, it is fair to assume that resistance to a particular ideology and a focus on the protection of equality are competing approaches in the legislation.

There is also a certain correlation if we differentiate between norms based on the object of protection such as protected groups or characteristics, and norms based on groups and their members.

As already mentioned, norms relating to discrimination positively correlate with characteristics and with complex norms. The same is true of anti-revisionism. We also observe that, while religious norms are compatible with all

¹²² However, there are complex dynamics in this conflict. See (in Russian): Alexander Ossipov, *Ethnicity and Equality in Russia*, pp. 8–61.

options, including with the absence of other laws on statements, as in San Marino, they correlate most often with groups, and least often with characteristics. This would seem to be logical, since both the origin and wording of religious norms are focused on the protection either of certain social groups defined by religion, or of all such groups.

The anti-extremism framework is often observed in combination with protected characteristics, and in a few cases with complex norms, but never with groups. There is an obvious practical explanation for this situation, since such is the design of the “parent” Russian law; however, the reason that such an arrangement has remained in almost all other countries requires some explanation. One hypothesis is that, although the legal framework of anti-extremism exists in those countries in which the value of the individual is considered as secondary to that of large groups, as is apparent from the dominant discourse on “ethnic conflict,” the anti-extremism framework is the product of authoritarian regimes primarily focused on the elimination of threats to political stability rather than on the actual protection of groups. At the same time, this legal framework has been formed under the influence of certain modern trends in the liberal legal philosophy and does not admit wording directly protecting the authorities per se. As a result, the framework has developed with a primary focus on protected characteristics.

Since the main protected characteristics are to be found in the legislation of almost all countries, the links among them can be meaningfully analyzed only through an examination of characteristics that are less common, yet not rare.

Political and ideological characteristics are found together in about half the cases, which is not surprising in itself. However, there are many correlations, both positive and negative, that are difficult or even impossible to interpret without studying the history of the development of relevant laws. For example, half of the countries examined feature political and social class characteristics in their legislation, but the latter are generally more numerous, meaning that most of them are to be found in countries in which legislation also features political characteristics. The same is true of the correlation between worldview and sexual orientation, gender or disability. There is a clearly positive correlation between political and social-class characteristics and the characteristic of gender, but the same correlation is clearly negative with the characteristics of sexual orientation and disability.

There are almost no cases in which political characteristics overlap with anti-extremist and anti-ideological frameworks. Apparently, here we are dealing with alternative ways of limiting political strife, however one chooses to define this term.

However, the situation is not quite as simple as it

may seem upon first glance. There is almost no overlap between political characteristics and the anti-discrimination framework. At this point, we can assume that these examples highlight the conditional and merely partial division of legislation into the categories of “political” and “anti-discriminatory.” This hypothesis is indirectly confirmed by the fact that the political and ideological characteristics, unlike all other characteristics, have a clear negative correlation with the fact of existence of hate crime legislation.

It is no surprise then that almost all of the few countries with legislation in which the characteristic of religion is extended to cover worldview also have special laws concerning religion. However, none of these countries uses anti-ideological, anti-extremist or constitutional frameworks. Obviously, this is the same alternative approach as is observed in the case of the characteristic of political hostility, only in relation to the area which can be roughly described as “worldview-related criminal legislation” (“criminalizing one’s worldview”).

The social and class-specific characteristics are firmly at odds with the constitutional framework, but yield a clear positive correlation with the anti-discrimination framework; they do not correlate with any other frameworks. This strongly suggests a political motivation for these correlating norms, meaning a division between right and left, though this would appear to be a premature conclusion.

Generally speaking, I believe that such simple political hypotheses should be treated with caution. For example, the same social and class characteristic shows a minor negative correlation with the laws on the protection of religion, which might imply similar conclusions about the right-left division. However, the sexual orientation characteristic has a small but clearly positive correlation with religious provisions.

This correlation between the characteristic of sexual orientation and the presence of religious provisions suggests that the existence of special laws relating to religion is not a sign of extreme conservatism of the country. Rather, this positive correlation can be interpreted as the growing willingness of states to restrict freedom of expression in order to protect certain groups, or at least the largest groups with the greatest representation in the political arena, but which are still perceived to be a minority. It is worth noting that, even when it comes to “the religion of the majority,” the active core of believers is quite small in most OSCE participating States. An indirect confirmation of this is provided by the strong correlation between sexual orientation and the existence of laws on revisionism. Although laws on revisionism cannot be considered as entirely similar to laws on religion, there is still an apparent similarity.

Finally, the characteristic of sexual orientation is not exactly compatible with the anti-ideological framework and does not overlap at all with the constitutional and anti-extremist frameworks, while it shows a slight positive correlation with the anti-discrimination framework. This positive correlation is to be expected, as is the complete mismatch with the anti-extremist framework, since such a framework exists only in extremely morally conservative countries. However, the mismatch with the constitutional framework is surprisingly strong, especially so in the case of countries like the Czech Republic and Germany, which are generally quite progressive and characterized by liberal values.

We can assume that the reason for this is not to be explained by liberalism and perhaps not even by the pace of adoption of new legislative ideas. For example, the characteristic of disability does overlap with the anti-extremist and constitutional frameworks. This characteristic has no noticeable correlation with the anti-ideological framework, but shows a clearly positive correlation with the anti-discrimination framework. The result is somewhat similar to that of the characteristic of sexual orientation.

The impression is that we are dealing with a certain alternative approach to legislation in this area, at least in some cases. One might provisionally assume that this alternative approach is related to more detailed norms or to a greater tendency towards formulating such norms in more basic and generalized categories, such as the protection of human rights in general under the constitutional framework, rather than mere protection of the rights of sexual minorities or of people with disabilities. The very strong correlation of the characteristic of disability with the presence of laws on revisionism lends credence to such a hypothesis. It should be noted both that laws on revisionism are lacking in only in two of the nine countries concerned, and that these laws are a typical case of a detailed norm.

Turning to the different legal frameworks that criminalize participation in groups, it should be noted that the activities of such groups may be aimed at the commission either of all types or of only a part of the crimes reviewed in this book. In any event, such a framework is observed in only 25 countries in the region. All of these countries have laws on statements and almost all of them also feature laws on hate crimes. The latter laws are absent for some reason in only two countries that have anti-discrimination laws.

Much has been said regarding the possible correlations among these legal frameworks. In general, the presence of the framework appears to correlate positively with the presence of special provisions on religion or on

revisionism. Perhaps this is the result of the inherent tendency of all of these norms to introduce some extralegal concept in the segment of the criminal law regarding hate crimes, incitement to hatred and hate speech. It is my contention that this phenomenon itself is not to be evaluated wither positively or negatively; rather, the evaluation should depend on the quality of the implementation.

Finally, almost all of the frameworks show a positive correlation with laws on religion, and a negative correlation with the anti-ideological framework, rather than with the anti-extremist framework. The reason for this is unclear. Incidentally, laws on religion show only a weak negative correlation with laws on revisionism.

§ 3. Provisional analysis

At the beginning of this chapter, I emphasized how cautiously one should approach the establishment of correlations between legal norms in different countries; I believe that one should be even more careful in attempting to generalize about the links that are observed among such norms. As a result, I will limit myself here to the expression of only a few hypotheses which I have developed during the course of this analysis.

The laws reviewed in this book share several commonly accepted goals which may be evaluated in different degrees in different societies. The first such goal is ensuring the political security of the existing authorities, including their protection from the threat of aggressive ethnic, religious or other factors forming grounds for group mobilization and/or large-scale clashes of all kinds. The second of these goals is the protection of public security, i.e. the security of both citizens and of existing institutions, from the same threats. The third goal is the protection of the physical and emotional security of certain social groups, such as those under the greatest threat, or the protection of any group on certain grounds, including protection from public statements seriously affecting such a group. The fourth goal is the protection of such fundamental values as equality, and, accordingly, the countering of discrimination and of discriminatory crimes and statements. While all or some of these goals may be perceived by certain people, including legislators, as being adjacent or overlapping, in the process of adopting legislation, some of the above goals are translated into norms more clearly than are others.

The norms that we previously referred to as “conflictological” norms explicitly achieve the second goal, that of protecting public security, and partially achieve the first goal of protecting the political security of the authorities in office. Norms directly based on the concept of discrimination obviously primarily help to achieve the fourth goal, that of the protection of fundamental values and the corresponding countering of discrimination. One might

question the goals of the anti-ideological framework, for example, but one can definitely say that such a framework achieves its goals through a certain politicization of the law. Such an approach always seems to lead to a certain degree of suspicion that the objective of ensuring the political security of the ruling authorities or that of protecting public security plays a special role. However, it is the anti-extremist framework more clearly promotes these two goals. Of course, all such observations are approximate and their relevance is highly dependent on the actual political climate of the country. Still, the significant interconnected correlation described above is worth noting. I would summarize it as follows:

Conflictological norms and various norms related to politics and ideology provide notable alternatives to the anti-discriminatory approach expressed in any form; in turn, the anti-discriminatory approach is an alternative to either the first and second or to the third and fourth goals listed above. Indeed, it becomes clear that the goals in question go hand in hand.

In the texts of laws in the OSCE region, it is virtually impossible to distinguish between the first goal, that of protecting the political security of the authorities, and the second goal, that of protecting public security in general. Different policy objectives can be achieved in different ways. One may note the obvious, but not rigid, difference in these two legislative approaches to the prevention of riots and similar events, either through conflictological norms or through direct references to incitement to violence. Also noteworthy is the juxtaposition of the three approaches, i.e. the anti-extremist and anti-ideological framework and the criminalization of incitement of political and similar hostility.

Interestingly, the fourth goal, that of protecting fundamental values and countering discrimination, is de facto close to the third goal of the protection of the security of social groups, although it would seem these approaches are focused on two different types of victims, individuals in the first case and social groups in the second case. In the practice of lawmaking, the anti-discriminatory approach is usually simultaneously focused both on individuals and on groups. At the same time, the anti-discriminatory approach is paired with anti-revisionism, which retains a certain political or ideological component; in fact, this link is directly established in the EU Framework Decision. Thus, the anti-discriminatory approach does not rule out political content, although it certainly provides an alternative to the abovementioned options of achieving political goals.

Thus, it is possible to say as the first approximation that the legislation in different countries gravitates towards two clear poles, which can be arbitrarily designated as political in one case and anti-discriminatory in the other.

In the case of the political pole, it is difficult to determine the core group of countries due to the above-mentioned alternative methods of implementation; the various “politicized” norms listed above almost never match in more than two categories. Three matching categories were found only in legislation of Moldova and Turkey, and even those were found in different sets.

In case of the anti-discriminatory pole, the overlap between the anti-discrimination framework and incitement to discrimination provisions can be seen in Cyprus, Luxembourg, Liechtenstein, Lithuania, Greece and Bulgaria. If we add the countries with the constitutional framework approach, then the Czech Republic and Slovakia can be added to this list. In all countries with the exception of Bulgaria, incitement to discrimination is implied as being directed against both groups and individuals. However, we cannot identify this particular set of countries as constituting the core of the anti-discriminatory approach, because it does not include a number of countries in which there are simply no laws criminalizing membership in groups. In such cases, there is no corresponding legal framework and the legislation is clearly based on the idea of combating discrimination. This is primarily true of Belgium and Slovenia, but also worth mentioning in this category are Estonia, Georgia, France and the Netherlands. However, with the exception of France and the Netherlands, all of these countries use protected characteristics rather than complex norms.

It should be noted that the countries in the “anti-discrimination group,” including those mentioned above, which use the constitutional framework, show differing relationships to the various subgroups of the “political” group. With respect to the positive correlation with incitement to violence and with anti-revisionism, which is characteristic of all but three of these countries, the “anti-discrimination group” is closest to the countries featuring anti-ideological “political” norms. However, there is no similarity based on this characteristic between those states with an anti-extremist framework and those in which the legislation features the characteristic of political strife.

Though I would also like to try and rank the countries according to the degree of limitation of freedom of expression allowed for the sake of achieving the four goals listed at the beginning of this section, unfortunately, an analysis of the legislation does not provide enough data for such a ranking. While the laws may be formulated in a more or less accurate manner, the breadth of the limitations does not appear any more clearly.

It is worth noting that there are several countries which have specifically included significant reservations on the protection of freedom of expression in their laws.

Since these countries are England, Ireland and Canada, it would seem that it is the specificity of Anglo-Saxon legal approaches, rather than a special legislative commitment to freedom of expression, that explains such a feature. Of course, as noted earlier, the topic of enforcement is beyond the scope of the present study.

On the other hand, one may point to a fairly good correlation between the following four parameters: anti-revisionism and the existence of the protected characteristics of sexual orientation, gender and disability. It would seem that those countries that can be linked with each other on these grounds do not share any other common features in their legislation. Thus, all that unites them is their greater than average propensity to more detailed restrictions of the freedom of expression, which is explained in part for the sake of the protection of certain population groups. The countries that feature all four characteristics in their legislation are: Spain, Luxembourg, Austria, Hungary, Belgium and France. However, if we choose only three of the four characteristics, the circle expands to include the Netherlands, Slovenia, Romania, Lithuania and Croatia.

The above analysis does not allow me to draw any general conclusions regarding the development of legislation across the OSCE region, except for the fact that such legislation has not developed in any one direction, however one might define such a direction. Undoubtedly, lawmakers in OSCE participating States are affected by the changing public mood, by political considerations and by the geographically diverse development in public perception of the law itself. These changes, of course, do not and cannot elicit any uniform reaction from the societies of these countries, or from the public in the region as a whole.

The development of laws on hate crimes faces no substantial criticism, except from those circles that are politically affiliated with potential offenders. However, there are still a number of countries that do not have such laws, including some countries which one would have a difficult time accusing of negligence of this issue. Consequently, the arguments in favor of a special legal category described in the beginning of the corresponding chapters are not commonly accepted.

Laws on incitement to hatred and hate speech are more widespread, but they are much more varied, especially when one considers specific laws protecting religion, which have completely different origins. Of course, with the development of the framework of combating discrimination through law in recent decades, the anti-discriminatory approach has gained a significantly greater foothold, but, as has been shown, it is by no means dominant in the OSCE countries. At the same time, it is the approach taken by approximately half of the EU member states.

On the other hand, the growing complexity of these laws, together with the growing number of protected characteristics and of anti-revisionist laws, all lead to significant criticism from the standpoint of the protection of freedom of expression. This concern is directly related to the anti-discriminatory approach in relation to hate speech, which aims to protect the emotional sphere of various minorities. Without repeating previously mentioned considerations here, and recognizing that the debate on the boundaries of freedom of expression is a constant, I will only refer to the comments of the honorable Miklos Haraszti, OSCE Representative on Freedom of the Media from 2004-2010. In his notes, which carry the revealing title "Hate Speech and the Coming Death of the International Standard before It Was Born (Complaints of a Watchdog)," Haraszti writes that heightened attention to the cultural and political contexts increasingly blurs the very idea of a universal approach to freedom of expression, and further that the idea that restrictions of this freedom should be exceptional is gradually losing force almost everywhere.¹²³

Finally, laws that specifically criminalize participation in groups with activities including hate crimes, hate speech and related crimes, are found in only 26 out of 57 participating States. As we have seen, the legislation of these countries is also very diverse. So it is impossible to say that any one of the common approaches has the possibility of becoming the dominant approach. There is not even any way to predict whether or not the list of these 26 countries will grow in length with the passage of time.

123 I refer here to the introduction to the book, which I have already cited:

Miklos Haraszti, "Hate Speech and the Coming Death of the International Standard before It Was Born (Complaints of a Watchdog)," *The content and context of hate speech*, op. cit., pp. xii-xviii.

2. Recommendations

In the closing subsection I will indulge myself by expressing my position on a number of alternatives discussed in the previous chapters, thus formulating my own personal recommendations. I have already outlined the arguments in support of these conclusions above, so for the sake of brevity I will not repeat them here.

Legislation on hate crimes is certainly needed. Experience shows that these specific and at the same time quite numerous crimes require special legal norms.

When choosing between specifying the type of crime and introducing the corresponding motive as an aggravating circumstance, the latter approach remains preferable.

For the sake of harmonized legislation, it would obviously be more appropriate to use the general aggravating circumstance rather than specific aggravations to individual crimes, since the list of the latter will always be disputed. On the other hand, specific aggravations are easier to apply in enforcement practice. An effective compromise, especially for the countries where such enforcement issue is topical, might be a combination of the general aggravation and specific aggravations for a wide range of articles, and first and foremost for violent crimes.

The basis of the concept of hate crimes is formed by the intent and motive of the criminal. The views and perceptions of the criminal are not defined by any “objective” classification of people by groups, regardless of whether or not the lawmakers (and most people) consider such an “objective” classification to be possible on the grounds of ethnicity, religion or gender identity. Accordingly, the law should be formulated through lists of protected characteristics rather than through the notion of groups of one kind or another.

The concept of prejudice, meaning the discriminatory selection of the victim, more accurately describes the subjective side of the crime than does the concept of hatred, so the law should be formulated within the framework of an anti-discriminatory approach. However, there are two major difficulties that must be overcome here. The first difficulty consists of explaining this subtle concept to all enforcement stakeholders and to the society at large. The second difficulty is the need to bear in mind that the discriminatory choice implies a negative attitude toward the group with which the offender associates the victim; without such a negative attitude, the selection of the victim from a particular group can be a purely pragmatic choice which does not qualify the crime as a hate crime.

The common issue of mixed motives is a related problem. Perhaps the best option would be to have the law stipulate that a discriminatory motive must be the dominant one, but not necessarily the only one. This is

particularly important in the investigation of such crimes. The motive of the perpetrator can almost never be known at the time of the initial registration of a crime, i.e. at the crime scene or at the time the police are contacted, but if a discriminatory motive is suspected, this suspicion should be registered at the earliest possible opportunity, and later if necessary. This does not mean to suggest that investigators should seek to identify the motive of hatred in any offence, but simply that such a hypothesis, if it is at least somewhat grounded, should be promptly and effectively investigated.

It is important to establish in the law the choice of victim by association. This situation is not uncommon and requires a response no less in this case than in other routine cases.

When defining the prejudices that underpin hate crimes, it is better to avoid definitions that refer to different ideologies, such as Nazism; since contemporary ideologies are volatile, such references only limit the practical applicability of the law, and their political message risks rapidly becoming obsolete.

There are three reasons that it is impossible to create a model sample list of protected characteristics. First of all, different characteristics have different levels of importance in different societies. Second, the characteristics should not generate too great a difficulty of proof, otherwise there is a risk of creating a stillborn norm, which is always harmful. For the same reason, one shouldn't include any protected characteristics that the society in question is not ready to protect. Creating an open list of characteristics should be acknowledged as an extremely infelicitous solution, since it undermines the principle of legal certainty.

A number of recommendations have already been published regarding how to find a balance between the need to counter incitement to hatred and other socially dangerous statements on the one hand, and the protection of freedom of expression on the other. It seems to me that the Rabat Plan of Action referred to in the present study is by far the most authoritative comprehensive recommendation. However, naturally, the Rabat Plan of Action also leaves much to the discretion of national legislators, so there is still room for my own personal conclusions regarding the other considerations that could usefully guide lawmakers.

The importance of the protection of freedom of expression encourages the formulation of criminal provisions restricting this freedom with the necessary caveats and reservations. One such reservation is linking the criminality of statements with their actual and/or potential impact on “real events,” i.e. on the commission of other crimes. However, such a linkage violates one of the basic

principles of criminal law, according to which the accused are liable only for their actions and the consequences that they had in mind, consequences which they pursued, accepted or the occurrence of which they were aware. After all, the consequences of statements, such as riots, are dependent on a multitude of factors. If the wording of the law implies the need to assess the likelihood of such consequences in order to address the issue of criminalization, then the courts face an almost impossible task. It is still more appropriate to judge the statement specifically, as is done for any other action.

Of course, all circumstances must be taken into account. This was emphasized in the recommendations of the Rabat Plan of Action, which I will repeat here only briefly. The court must assess not only the content of the statements, that is, their formal content and style, but also the context and spread of the statements and the status and the intentions of the accused; only after having done so should it consider the likelihood of adverse effects. It is unlikely that all of this can be reflected directly in the law, at least in the continental tradition, but these ideas can be implemented in law enforcement through authoritative interpretation by the supreme court, for example.

Penalties for these or other statements must vary depending on the above parameters, and ultimately depending on the social danger of the statements themselves. However, it is hardly correct to impose the task of the ranking of penalties solely on the court. It would be appropriate for the legislator to introduce some provisional ranking. In fact, many countries see this as a register of aggravating circumstances. The countries divide various types of statements among various articles of the criminal code.

In my view, such an approach is insufficient. It is not clear to me why criminal law alone should be used as a tool for the legal response in such cases. After all, there is also civil law, and many states apply administrative law.

The most serious enforcement problems arise in relation to hate speech, i.e. public displays of intolerance that do not constitute incitement to hatred in a fairly narrow sense and in a clearly dangerous form. This does not mean that hate speech cannot have serious consequences; these consequences can indeed be very serious depending on the circumstances. At the same time, the danger of such statements depends on these circumstances much more than it does on the actual content of the speech, and this is a factor which is difficult for law enforcement to take into account; in such cases, criminal repression is used in too indiscriminate a manner.

In many ways, the problem is the mass nature of public manifestations of intolerance, especially as aggravated by the spread of the Internet and of social networks. The logic of the prosecution of hate speech in the past was to

target certain unacceptable views that were expressed in the form of speeches at meetings, on the radio or in printed media. New information and communication technologies have created new problems of attribution and determination of jurisdiction, including on a global scale. The number of potential suspect authors has also increased many times over. Of course, these problems are not intractable. However, given the technical ease of committing the act, the “costs” of enforcement create a separate issue of resource efficiency for law enforcement. This problem also exists for traditional forms of hate speech, and it exists more generally in dealing with minor common offences such as beatings. At the same time, against the backdrop of the new communication technologies, the issue becomes increasingly topical and multifaceted, to the extent that it appears to make the broadly-worded norms unfit for consistent application. Widespread and obvious selective enforcement also discredits the law and only attracts more attention to the statements themselves.

I believe that the way out of this apparent dead-end can be found through the transfer of hate speech, as opposed to incitement to hatred, from the sphere of criminal law to the sphere of civil law. Hate speech always has a certain group as an object; so, my contention is that the informal representatives of the group can take the claim to the court themselves without relying on the state. Of course, it is true that civil procedural law in many countries does not provide or may restrict such an opportunity. In the end, I think these problems can be solved, and that all matters pertaining to such categories as humiliation, defamation, and insult will be moved into the scope of defamation cases, which is where such legal disputes rightly belong in my view. The problem of limiting freedom of expression on the part of the state will be resolved, especially given that the consequences of losing a civil trial may be even more serious than a sentence for such a minor offence. Let us recall that, in practice, hate speech is considered a minor offence in almost all countries. At the same time, this will resolve the issue of the “truth” of statements that comprise hate speech; fact-finding occurs more naturally in civil litigation than in the criminal process, because the court is not bound by the presumption of innocence.

I also believe that special criminal norms on “historical revisionism” are excessive, though such a view goes against the current official policy of the European Union, including the majority of democratic countries of the OSCE. The political reason for the emergence of such laws is understandable, but politically motivated laws may only be appropriate in extraordinary circumstances, and these laws have emerged and spread under circumstances that are far from extreme. These norms, in fact, could easily be replaced by an explanation of the supreme court or

of another authoritative court on the typical methods of incitement to hatred: such is already the case in the Netherlands, for example. The denial or glorification of historical crimes themselves may or may not constitute such methods. In fact, some anti-revisionist laws already make this reservation. If a revisionist statement is aimed at incitement to hatred, then it constitutes an offence under the general rules on incitement to hatred. A politically acceptable way of removing unnecessary norms could be through their inclusion in the general norms on inciting hatred, using such wording as “including through denial, justification or glorification of certain crimes,” as has been done in some countries. In such a case, the aim of inciting hatred will be an integral element of the crime.

In fact, the same reasoning can be applied to specific legislation on the protection of religion. Basic laws on incitement to hatred have as their object the protection of people. Blasphemy or harsh criticism of religious beliefs and symbols are hurtful to these people, but they are as much a part of public debate as is strong criticism of political parties and their symbols, or strong criticism of popular music styles and artists, and other kinds of criticism. Special protection of religion is a relic of the past and a partial reaction to overly militant secularism; in modern societies this special protection could well be abandoned. Of course, in some countries, there are social conflicts associated with religion that remain particularly acute; it is also true that the complete rejection of norms long rooted in the legal system may cause certain difficulties. However, these rules can and should be phased out, starting with the most archaic ones on blasphemy against God and religious organizations. Other special rules can then be included in the general corpus, using the previously mentioned wording “including through...”

Statements still recognized as criminal may vary according to the degree of public danger. Of course, the structure of the law generally does not allow for any detailed classification, and it is unlikely that this would be possible, but at the same time it would be expedient to divide statements into at least two categories according to their degree of danger. The less dangerous statements should be categorized as entailing minor punishment not involving imprisonment. In countries that have a code of administrative offences or similar legislation, these acts can be transferred there from the criminal code.

The criterion for such a division is difficult to formulate. In fact, it is not so easy to distinguish in practice between incitement to hatred and hate speech. I suggest that we assume that statements and similar expressions that degrade certain categories of citizens constitute hate speech, and that we then automatically consider everything else to be “incitement to hatred.” Of course, there are a number of other possible formulations.

However, in any case, it is impossible to describe the second category as constituting “hate speech” since the term itself has not yet acquired a clear and unambiguous meaning, as mentioned above.

Such a clear and unambiguous meaning is definitely present for any form of statement which is “a public call for” certain types of actions towards people according to a certain set of characteristics as stipulated by the law. I believe that this is precisely the formulation that should provide the basis for a criminal offence, and that everything else that does not match should remain an administrative or criminal offence entailing penalties that do not involve imprisonment. Of course, this does not mean that the alleged statement should literally be a “call”: the court may determine that some other form of statement was perceived by the target audience (or was meant to be received) as an appeal.

All that remains is to determine calls to precisely what action should be considered as criminal. Of course, we are referring to any incitement to violence or to the commission of other serious crimes. One might be tempted to include calls for discrimination in the list as well, but this wording must be approached with caution, as in some cases the illegality of unequal treatment, which is the essence of discrimination, is controversial in a particular society. In such cases, criminalization of the debate on this subject is not always the best means of solving problems in the spirit of equality. However, the legislator can also include calls to other socially dangerous acts.

As in the case of hate crimes, the question still remains as to how to define the object of the crime. For the same reasons as those indicated above, I am inclined to think that the object should be only people, and not groups. Although the statements are formulated specifically against groups, the court’s decision cannot and should not depend on the discussion of the definition and understanding of the boundaries of a particular social group. Accordingly, the wording of these laws should be based on the protected characteristics.

This leads us to the same question about selection. The considerations here are substantially the same as for hate crimes, but with two significant exceptions. First, the proof is based on the content of the statements more than it is on the motive of the accused. Second, the criminalization of statements is limited by the guarantees of freedom of expression as the foundation of a democratic political system, in contrast to the criminalization of hate crimes. So, the lists of protected characteristics may be different for these two cases. For example, for hate crimes such a protected characteristic as political views would be possible, but this would clearly be undesirable for the law on statements, as it would inevitably unduly restrict the political debate.

In fact, political and ideological considerations are best excluded from the text of the criminal law. This applies first and foremost to the prevention of conflicts, as well as to the mention of specific ideologies of hatred and to political goal-setting. All of these considerations may be very important for a particular society at a particular period, and there are numerous ways of emphasizing the importance of this, but their presence directly in the corpus delicti restricts and distorts the essence of the restriction imposed by this criminal provisions on freedom of expression.

Finally, the concept of the public nature of statements is another important aspect of the law on statements. It is essential for proper enforcement that the courts do not perceive the public nature of a statement as a binary category and that they are able to take into account the extent of the actual public nature of the statements, i.e. the real and potential scale and characteristics of the audience. This is particularly important when it comes to statements on the Internet. Just as is the case with the other elements of the Rabat recommendations, this can hardly be reflected directly in the text of the criminal law. However, it can be reflected in official comments, and the law should avoid any language that distorts the understanding of the criterion of the public nature of statements.

At the junction of hate crimes and incitement to hatred or hate speech we find cases of ideologically-motivated vandalism. On its face, such an act would be a hate crime, but this is not the case in reality. There have been many cases in which ideological vandalism yielded sentences for vandalizing the objects, though this act in itself, regardless of its meaning, did not cause any real damage that would be sufficient to consider the crime as such without considering the motive. We have already cited the obvious example of graffiti. It is difficult to say how graffiti is different from any other kind of statement in terms of its formal characteristics.

Thus, the norms on ideologically motivated vandalism require some conceptual clarification. It seems to me that understanding and applying such norms would be less difficult if such actions were seen not as a single offence but as two separate offences, i.e. damage to a particular object and the actual statement, the content of which takes into account, of course, the essence of the affected object. The first offence is assessed, as is any attack on property, based on the material and moral damage to the owner or the society as a whole, as in the case of a monument; of course, this topic is beyond the scope of the present study. The second offence would thus become a potentially criminal statement, rather than a hate crime. When assessing the statements, one should first evaluate

the content and other parameters of the statement rather than the moral damage to various social groups or even to the society as a whole. It seems to me that this approach could serve to preclude many misunderstandings in enforcement.

The embodiment of this approach in legislation implies the removal of the separate crime of ideological vandalism from the criminal code. For example, the crime of an attack on burial places and headstones should be reformulated without mentioning hatred or hostility as motives and goals, as is done in many countries. Furthermore, the norms on incitement to hatred could be broadened through the formulation of "including by..." This would allow for the inclusion of methods such as damage to objects significant to groups and the like. Just as in the case of "historical revisionism," this would require proof that the act was committed with the purpose of initiating or manifesting hatred towards a social group, rather than out of hooliganism, for example.

However, the proposed approach cannot be applied in those few countries that do not criminalize statements. For such countries, the best choice is apparently to retain the existing approach.

Criminalization of participation in groups, the goal of which is the commission of hate crimes, is an entirely justified measure, since hate crimes as such present increased danger to the public. The question of whether the definition of these groups should also include incitement to hatred is a more controversial one. I am inclined to think that it should. First, as a rule, this constitutes an important part of the activities of the groups with the goal of committing hate crimes. Second, the most significant actions that can be qualified as incitement to hatred are rarely committed by lone offenders. However, this approach involves the use of a narrow definition of the corpus of the incitement to hatred, which I have proposed above. This approach is necessary because the use of broader wording, particularly a formulation including hate speech, would lead to the characterization of a large number of informal communities as particularly dangerous groups. This, in turn, would obscure the meaning of the norms on groups and would inevitably have negative consequences.

The above criminalization itself does not require any other conceptual framework, either for the purpose of formulation, or for its comprehension. However, this does not mean that such a framework is unnecessary or harmful. In addition to the criminal code, it would be possible, though not absolutely necessary, to have legal norms and perhaps even a special law which acts in connection with the criminal norms, and which would complement them in two important respects. First, such a

law, or separate norms in other laws, could establish the very conceptual framework, that is, it could formulate the values, in defense of which the criminal law is applied in this case. This, in particular, would allow for the grouping of criminal provisions relating to somewhat similar acts, such as preparation of rebellion, acts of terrorism and hate crimes. It would also be a way to preclude the *corpora delicti* from serving other political goals, such as, for example, the criminalization of criticism of dominant views. Secondly, such a framework law allows for the bringing together of various mechanisms, other than criminal law, to counter the threats, the most radical embodiment of which is included in the criminal norms. Of course, of paramount importance for such frameworks are the public values they seek to protect. A general reference to “constitutional values” would be inappropriate, since this would not actually create any norms. I believe that the most obvious protected value in this case would be equality, but human rights and democracy could also be mentioned. However, reference in the law to specific ideological or political threats would hardly be appropriate for the reasons discussed above.

In concluding this book which has been entirely devoted to criminal law, I must reiterate that criminal legislation is not and should not be the primary means of countering hate speech, incitement to hatred and the dissemination of ideas that contribute to the commission of hate crimes. There is a whole corpus of literature covering the various non-legislative approaches to this issue.¹²⁴ I believe that a comparative analysis of such approaches and practices in different countries would be of great interest.

¹²⁴ As an example, I would cite the short list of highly varied initiatives in the different countries of the Council of Europe: Anne Weber, *Manual on Hate Speech* (Strasbourg: Council of Europe, 2009), pp. 80–87.

Annexes

Annex 1. Summary table on legislation

These tables represent the specificity of national legislation in OSCE participating States as accurately as possible considering the format.

The numbers 1 and 0 indicated in the table stand for “yes” and “no”. Footnotes to these values are references to the original norms, or to translated or paraphrased versions of the original norm. All footnotes are to be found below the table.

	HATE CRIME WITH BIAS AS A MOTIVE		STATEMENTS		PROTECTED CHARACTERISTICS (HATE CRIME / STATEMENTS)		SPECIAL NORMS		
	Distinct offence	0	1 ¹	0	1 ²	0	1 ³	0	0
	General aggravation	0	1 ⁷	0	1 ⁸	0	0	0 ⁶	0
	Specific aggravation to certain crimes	0	1 ¹³	1	1 ¹⁴	1	1 ¹⁹	0/0	0/0
	Criminalization of statements	0	1 ¹⁷	1	1 ¹⁸	1	1 ¹⁹	0/0	0/0
	Insulting statements towards groups	0	1 ²⁵	1	1 ²⁷	1	0	0/0	0/0
	Bias as a specific aggravation for vandalism	0	1 ²⁹	1	1 ³¹	1	0	0/0	0/0
		0	1 ³⁴	0	1 ³⁵	0	1 ³⁶	0/0	0/0
		0	1 ⁴³	0	1 ⁴⁴	0	1	0/0	0/0
Albania		1 ⁴⁵	0	1 ⁴⁷	0	1	1 ⁴⁹	0/0	0/0
Andorra		0	1 ⁵³	0	1 ⁵⁴	0	1 ⁵⁵	0/0	0/0
Armenia		0	1 ⁵⁹	0	1 ⁶⁰	0	0	0/0	0/0
Austria		0	1 ⁶⁴	1	1 ⁶⁵	1	1 ⁶⁶	0/0	0/0
Azerbaijan		0	1 ⁷⁴	1	1 ⁷⁶	1	0	0/0	0/0
Belarus		0	1 ⁸³	0	1 ⁸⁴	0	0	0/0	0/0
Belgium		0	1 ⁸⁸	0	1 ⁸⁹	0	1 ⁹¹	0/0	0/0
Bosnia and Herzegovina		0	1 ⁹⁵	0	1 ⁹³	0	0	0/0	0/0
Bulgaria		0	1 ¹⁰³	1	1 ¹⁰⁵	1	1 ¹⁰⁷	0/0	0/0
Canada		0	1 ¹¹¹	1	1 ¹¹²	1	1	0/0	0/0
Croatia		0	1 ¹¹⁶	1	1 ¹¹⁷	1	1 ¹¹⁸	0/0	0/0
Cyprus		0	1 ¹²⁴	0	1 ¹²⁵	1	0	0/0	0/0
Czech Republic		1 ¹²⁸	0	1 ¹²⁹	0	1 ¹³⁰	0	0/0	0/0
Denmark		0	0	0	0	0	0	0/0	0/0
England ¹²⁸		0	0	0	0	0	0	0/0	0/0
Estonia		0	0	0	0	0	0	0/0	0/0
Finland		0	0	0	0	0	0	0/0	0/0
France		0	0	0	0	0	0	0/0	0/0
Georgia		0	0	0	0	0	0	0/0	0/0
Germany		0	0	0	0	0	0	0/0	0/0
Greece		0	0	0	0	0	0	0/0	0/0
Hungary		0	0	0	0	0	0	0/0	0/0
Iceland		0	0	0	0	0	0	0/0	0/0
Ireland		0	0	0	0	0	0	0/0	0/0
Italy		1 ¹³⁹	0	1 ¹⁴¹	0	1 ¹⁴³	1 ¹⁴⁴	0/0	0/0
Kazakhstan		0	1 ¹⁴⁶	1	1 ¹⁴⁸	1	1 ¹⁴⁹	0/0	0/0
Kyrgyzstan		0	0	1 ¹⁵⁴	1	0	0	0/0	0/0
	Defamation of religion ¹²⁷	0	0	0	0	0	0	0	0
	Denial of other similar crimes	0	0	0	0	0	0	0	0
	Holocaust denial	0	0	0	0	0	0	0	0
	Participation in a group	0	0	0	0	0	0	0	0
	Direct criminalization of distribution of materials	0	0	0	0	0	0	0	0
	Open lists	0	0	0	0	0	0	0	0
	Exotic	0	0	0	0	0	0	0	0
	Political or ideological views	0	0	0	0	0	0	0	0
	Affiliation with political associations	0	0	0	0	0	0	0	0
	Disability / illness	0	0	0	0	0	0	0	0
	Sex / gender	0	0	0	0	0	0	0	0
	Sexual orientation	0	0	0	0	0	0	0	0
	Religion ¹²⁶	0	0	0	0	0	0	0	0
	Language	0	0	0	0	0	0	0	0
	Nationality as citizenship	0	0	0	0	0	0	0	0
	National origin	0	0	0	0	0	0	0	0
	Ethnicity/ethnic origin ¹²⁵	0	0	0	0	0	0	0	0
	Race/skin color	0	0	0	0	0	0	0	0

Annex 2. Laws on Hate Crimes in the US States: Protected Characteristics

	STATE	RACE, RELIGION, ETHNICITY (INCLUDING COUNTRY OF ORIGIN AND ORIGIN IN GENERAL)	SEXUAL ORIENTATION	SEX / GENDER	ILLNESS/ DISABILITY	POLITICAL VIEWS OR PARTICIPATION IN AN ORGANIZATION	AGE	(TRANS-) GENDER IDENTITY	OTHER
AL	Alabama	√			√				
AK	Alaska	√		√	√				
AZ	Arizona	√	√	√	√				
AR	Arkansas								
CA	California	√	√	√	√	√	√	√	
CO	Colorado	√	√		√			√	
CT	Connecticut	√	√	√	√			√	
DC	District of Columbia (is not a state)	√	√	√	√	√	√	√	Homelessness, marital status admission to college, family responsibility (DC Code, para 22-3701)
DE	Delaware	√	√		√				
FL	Florida	√	√		√		√		Homelessness
GA	Georgia								
HI	Hawaii	√	√	√	√		√	√	
ID	Idaho	√							
IL	Illinois	√	√	√	√				
IN	Indiana								
IA	Iowa	√	√	√	√	√	√		
KS	Kansas	√	√		√		√		
KY	Kentucky	√	√						
LA	Louisiana	√	√	√	√	√	√		
ME	Maine	√	√	√	√		√		Homelessness
MD	Maryland	√	√					√	Homelessness
MA	Massachusetts	√	√		√				
MI	Michigan	√		√					
MN	Minnesota	√	√	√	√		√	√	
MS	Mississippi	√		√					
MO	Missouri	√	√	√	√			√	
MT	Montana	√							
NE	Nebraska	√	√	√	√		√		
NV	Nevada	√	√		√				
NH	New Hampshire	√	√	√	√				
NJ	New Jersey	√	√	√	√			√	
NM	New Mexico	√	√	√	√		√	√	
NY	New York	√	√	√	√		√		

	STATE	RACE, RELIGION, ETHNICITY (INCLUDING COUNTRY OF ORIGIN AND ORIGIN IN GENERAL)	SEXUAL ORIENTATION	SEX / GENDER	ILLNESS/ DISABILITY	POLITICAL VIEWS OR PARTICIPATION IN AN ORGANIZATION	AGE	(TRANS-) GENDER IDENTITY	OTHER
NC	North Carolina	√		√					
ND	North Dakota	√		√					
OH	Ohio	√							
OK	Oklahoma	√			√				
OR	Oregon	√	√					√	Sexual orientation of a family member
PA	Pennsylvania	√							
RI	Rhode Island	√	√	√	√				
SC	South Carolina								
SD	South Dakota	√							
TN	Tennessee	√	√	√	√				
TX	Texas	√	√	√	√				
UT	Utah								
VT	Vermont	√	√	√	√		√	√	Status of an enlisted man
VA	Virginia	√							
WA	Washington	√	√	√	√			√	
WV	West Virginia	√		√		√			
WI	Wisconsin	√	√		√				
WY	Wyoming								

¹ In 2013 a new aggravation was added to Art. 50 of the Albanian Criminal Code:

“para. J: the commission of the offence due to motives related to gender, race, [skin] color, ethnicity, language, gender identity, sexual orientation, political, religious, or philosophical convictions, health status, genetic predispositions or disability.”

² Article 265. Inciting hate or disputes.

“Inciting hate or disputes on the grounds of race, ethnicity, religion or sexual orientation, as well as intentional preparation, dissemination or preservation for purposes of distributing writing with such content, by any means or form, shall be punishable by two to ten years of imprisonment.”

Art. 119A separately criminalizes dissemination of “racist and xenophobic material,” Art. 119B – insults to persons on grounds of race, ethnicity, nationality or religion, and Art. 84A – threats towards a person on the same grounds, but all this refers only to actions taken through computer systems.

³ Art. 132. Destruction of or damage to religious sites.

“The destruction of or damage to objects of worship, leading to a partial or total loss of their value, is punishable by a fine or up to three years of imprisonment.”

⁴ The specific reference in Albanian law is to health status, genetic predisposition or disability.

⁵ As per the discussion in these pages, this refers specifically to production, promotion, distribution, dissemination, or possession with intent to promote.

⁶ In 2013, Art. 74a was added, which criminalizes the distribution of materials that deny, significantly understate, justify or approve of acts of genocide and crimes against humanity, but for some reason – only through computer systems. Therefore, this new article of the Albanian Criminal Code is not included in the main text.

⁷ Article 30.6 of the Criminal Code of Andorra establishes aggravating circumstances for crimes committed based on racist and xenophobic motives or on reasons related to ideology, religion, nationality, ethnic origin, sexual orientation, illness or physical or psychological disability of the victim.

⁸ The Criminal Code of Andorra does not deal explicitly with incitement to hatred or violence, although its article 339 punishes anyone who, for injurious purposes and publicly, commits acts or utters significant offensive expressions about members of religious, national, ethnic, trade labor or political groups, or about persons who express different beliefs or ideologies.

⁹ Trade labor groups.

¹⁰ “Racist and xenophobic motives” are mentioned alongside the traditional protected characteristics.

¹¹ Article 301. “Anyone who insults religious beliefs in public or impedes or disrupts a religious act or ceremony shall be subject to a maximum prison sentence of six months.”

¹² General and specific aggravation: “commission of a crime based on ethnic, racial or religious motives, or on religious fanaticism.”

¹³ Applicable to the following articles of the Armenian Criminal Code: Art. 104 (Murder), article 112 (Deliberate infliction of grievous bodily harm), article 113 (Deliberate infliction of moderate bodily harm), article 119 (Torture), and article 185 (Willful destruction of property), as well as article 265 (Desecration of cemeteries).

¹⁴ Article 226. Inciting national, racial or religious hatred:

“1. Actions aimed at the incitement of national, racial or religious hatred, at racial superiority or humiliation of national dignity, are punished with a fine in the amount of 200 to 500 minimal salaries, or with correctional labor for up to 2 years, or with imprisonment for a term of 2-4 years.

2. The actions envisaged in part 1 of this Article which are committed:

- 1) publicly or through the mass media, which include violence or the threat of violence;
 - 2) by abuse of official position;
 - 3) by an organized group,
- are punished with imprisonment for a term of 3 to 6 years.”

¹⁵ “Religious fanaticism” is listed as a motive.

¹⁶ Art. 397¹: Denial or derogation of genocide and other crimes against peace and human security, their approval or justification.

“Denial, derogation, approval or justification of genocide or other crimes against peace and human security, which are envisaged under other articles of this chapter, through dissemination among the public of materials via a computer system or any other available form, if they are perpetrated based on ethnicity, skin color, national or ethnic background or religious affiliation for the purpose of rousing hatred towards a person or group of persons, their discrimination or violence, are punished by a fine in the amount of from 100- to 300 times the amount of minimum salary or by imprisonment of up to four years.”

¹⁷ Currently, § 283 of the Criminal Code of Austria reads as follows: “Whoever publicly or in a form threatening the public order commits acts of a violent nature in relation to the church, religious community or other organization because of race, color, language, religion or belief, nationality, descent or national or ethnic origin, gender, disability, age or sexual orientation, as well as whoever incites conflicts and crimes against a particular group of people or an individual representative of such a group, precisely because of his membership in the group, or who incites violence, shall be punished by imprisonment of up to two years. 2. The same penalty shall apply to a person or group found guilty of public insult or violation of human dignity of the representatives of groups listed in para.1.”

¹⁸ Para. 2 § 283 above.

¹⁹ This is defined by the same article as blasphemous, since it relates to the insult of sacred objects.

²⁰ Age.

²¹ Article 33(5) of the Austrian Criminal Code deals with cases in which the offender acted out of racist, xenophobic or other particularly reprehensible motives.

²² The Act of 1945, updated prior to 1992, apart from membership in NSDAP and related organizations, expands the prohibition as follows:

“§ 3. ...-

2. whoever founds an association that seeks to make its members act in the spirit of National Socialism with a view to undermining the self-determination and independence of the Republic of Austria or to disturbing public peace and the reconstruction of Austria or whoever plays a leading role in an association of this kind;

3. whoever promotes the further development of any of the organizations and associations mentioned in subpara. 1 and subpara. 2 by soliciting members, providing financial resources or similar, supplies the members of such an organization or association with weapons, means of transportation or telecommunications systems or facilitates or supports the activity of such an organization in a similar way;

4. whoever produces, obtains or makes available weapons, means of transportation or telecommunications systems for such an organization or association.

§ 3b. Whoever participates in an organization or association of the type described in § 3a or supports such an organization through financial contributions or in any other way will, unless the act is punishable under § 3a, be punished for committing a crime with a prison sentence of between five and ten years, or, if the perpetrator or the activity should pose a particularly grave danger, with a prison sentence of up to twenty years.

§ 3c. Criminal liability for the acts described in §§ 3a and 3b ceases when the guilty party discloses to the authority of his/her own accord and before the authority becomes aware of his/her guilt everything that he/she knows about the organization or association and its plans at a point in time when this was still secret and when damage could be avoided.

§3d. Whoever requests, instigates or seeks to induce others through publications, documents distributed or illustrations in public or in the presence of several persons to perform forbidden acts in accordance with §1 or §3, and who, to this end, in particular glorifies or extols the objectives of the NSDAP, its institutions or actions, shall, unless this is an offence subject to a more severe punishment, be punished with a prison sentence of between five and ten years, or, if the perpetrator or the activity should pose a particularly grave danger, with a prison sentence of up to twenty years..

§ 3e. (1) Whoever conspires with another person to commit murder, robbery, arson or a crime in accordance with §§ 85, 87 or 89 of the Penal Code or a crime in accordance with § 4 of the Explosives Act as a means of performing an activity inspired by the National Socialist ideology will be punished with a prison sentence of between ten and twenty years, or, if the perpetrator or the activity should pose a particularly grave danger, with a life sentence.

²³ § 3 of the same Act was expanded in 1992 with the following provision: “anyone who denies, grossly minimizes, approves or seeks to justify the National Socialist genocide or any other National Socialist crimes against humanity in a publication, a broadcasting medium or any other medium publicly and in any other manner accessible to a large number of people will also be punished.”

²⁴ § 188 (“Denigration of religious doctrines”) states: “Whoever publicly disparages or mocks a person or a thing, respectively, being an object of worship or a dogma, a legally permitted rite, or a legally permitted institution of a church or religious society located in Austria, in a manner capable of giving rise to justified annoyance, is liable to imprisonment for a term not exceeding six months, or to a fine.”

²⁵ Art. 61, p. 1.6 of the Azerbaijani Criminal Code: “Commission of a crime on grounds of national, racial, religious hatred or fanaticism, revenge against the lawful actions of other persons, with mercenary purpose or another base motive, and also with the purpose of hiding another crime or of mitigating its commission.”

²⁶ This is only applicable to murder, as per Art. 120.2.12.

²⁷ Art. 283. Inciting national, racial or religious hatred: “283.1. Actions directed at the incitement of national, racial or religious hostility, humiliation of national advantage, as

well as actions directed at the restriction of citizen's rights, or the establishment of the superiority of citizens on the basis of their national or racial affiliation, acts committed publicly or with use of mass media –are punished by a fine at a rate from one to two thousand nominal financial units, or by restriction of freedom for a term of up to three years, or imprisonment for a term of from two to four years.

283.2. The same acts committed:

283.2.1. with the use of violence or with the threat of its use;

283.2.2. by persons abusing their authority;

283.2.3. by an organized group –
are punished by imprisonment for a term of three to five years.”

²⁸ Religious fanaticism.

²⁹ The list of the relevant aggravating circumstances in paragraph 9 Article 64 of the Criminal Code of Belarus complies with the law “On Countering Extremism”:

“Committing a crime motivated by racial, national or religious enmity or discord, political or ideological hatred, as well as based on hatred or enmity towards any social group”

This general aggravating motive is also found in the Azerbaijani Administrative Code: according to Art. 7.3 “committing an administrative offense based on racial, national or religious hatred” is recognized as an aggravating circumstance with respect to the administrative liability.

³⁰ This is applicable to murder, infliction of grievous bodily harm and “hazing.”

³¹ Art. 130: Incitement to racial, national or religious hatred or discord

1. Willful actions aimed at inciting racial, national or religious hatred or discord, degradation of national honor and dignity, shall be punishable by a fine or by arrest for up to six months, or by restriction of freedom for a period of up to five years, or by imprisonment for the same period of time.

2. If these actions are carried out, with the use of violence, or by a person who has made use of his/her official position, they shall be punishable by imprisonment of the guilty person for a period of from three to ten years.

3. Actions, specified in parts 1 and 2 of this article, if committed by a group of persons or which entailed death or other grave consequences, shall be punishable by imprisonment of the guilty person for a period of from five to twelve years.

³² Social group.

³³ This is an administrative penalty, and lacks the reservation on “mass” distribution.

³⁴ Introduced by the Belgian Antidiscrimination Act of 2003. The formulation of the relevant article, Art. 377bis, is excessively broad: “hatred, contempt or hostility toward a person because of his alleged race, color, ancestry, national origin or ethnic origin, his nationality, sex, sexual orientation, marital status, birth, his age, his fortune, his religion or belief or his current state of health or future state of disability, his language, political conviction, a physical or genetic characteristic or social origin.”

This provision is applicable to murder, mutilation, rape, ambush, failure to give assistance to a person in danger, attempt on personal liberty or property, arson, libel, slander and harassment.

³⁵ The law criminalizes incitement to hatred in two different ways. On the one hand, it criminalizes incitement to discrimination, hatred, violence, and public announcement of the intention to discriminate: this is the wording introduced by Section 6 of the Anti-Discrimination Act of 2003, with a punishment of up to one year's imprisonment. On the other hand, the hate motive under this quite broad list of characteristics is an aggravating circumstance for offences such as libel and defamation, as well as for the desecration of graves, etc. (Chapter 5 of the Criminal Code of Belgium).

³⁶ The Belgian Criminal Code does not only refer to property damage: it also mentions graffiti separately.

³⁷ The list of prejudices in the definition reads: “imputed or alleged race, skin color.”

³⁸ The law uses the term “origin.” This can mean all the characteristics of the parents and other ancestors, including their ethnicity, but not limited to it, including, for example, their criminal record. Moreover, there is also a criterion of “birth,” including any characteristics of birth, for example, whether the parents are married at the time of the birth. Obviously, in the final analysis these are characteristics regarding the family.

³⁹ Beliefs or philosophy of life.

⁴⁰ The law refers to the current and future state of health, a disability or a physical characteristic.

⁴¹ Age, wealth, marital status, as well as birth and origin (See above).

⁴² The language used refers not only to the Holocaust, but also to the “genocide, committed by Nazi Germany” (Art. 444 of the Belgian Criminal Code).

⁴³ The Bosnia and Herzegovina Criminal Code also provides for the possibility of more severe penalties in case of murder (P. 2, Art. 166), grievous bodily harm (Art. 172) and rape (Art. 203), if the offence is committed on racial, national or religious grounds.

⁴⁴ Article 150: “1. Whoever publicly incites or fans national, racial or religious hatred or discord or hostility between constitutional nations and others living in Bosnia and Herzegovina or the Federation, shall be punished by a sentence of imprisonment for a term between one year and five years.

2. If an act referred to in paragraph 1 of this article has been committed by coercion, molestation, jeopardizing safety, exposing to derision of national, ethnic or religious symbols, damaging belongings of another, or desecrating monuments or graves, the perpetrator shall be punished by a sentence of imprisonment for a term between one and eight years.

3. Whoever commits an act referred to in paragraphs 1 and 2 of this article abusing his/her position or authority, or if disorder, violence or other grave consequences for the coexistence of constitutional nations and others living in Bosnia and Herzegovina or the Federation resulted from these acts, shall be punished for the act referred to in paragraph 1 by imprisonment for a term of between one and eight years and for the act referred to in paragraph 2 by imprisonment for a term of between one and ten years.”

⁴⁵ In the Bulgarian Criminal Code, Article 162, para.2 punishes those “who apply violence against another or damage his property because of his nationality, race, ethnicity, religion, or political conviction” by imprisonment of up to four years and a fine of five thousand to ten thousand lev and a public reprobation.

Article 163, para.1 punishes “those persons who participate in a crowd to attack groups of the population, individual citizens or their property in connection with their national or racial affiliation” in which case the instigators and leaders face a punishment of imprisonment of up to five years, while other participants face punishment of up to one year’s imprisonment or probation. Para. 2 extends to cases in which “the crowd or some of the participants are armed,” in which case the instigators and leaders face a punishment of imprisonment of one to six years, while the other participants face punishment of up to three years. Para. 3 extends to cases in which “an attack is carried out as a result of which serious bodily harm or death has followed,” in which case the instigators and leaders face a punishment of imprisonment of three to fifteen years, while other participants face a punishment of imprisonment of up to five years.

⁴⁶ “Racist or xenophobic motive” is included in the list of aggravating circumstances for murder and grievous bodily harm, cl. 11 para. 1, Art. 116 and c. 12 para. 1, Art. 13, respectively.

⁴⁷ Article 162, para. 1. “Whosoever by word, print or other media through electronic information systems or otherwise preaches or incites to discrimination, violence or hatred based on race, nationality or ethnicity, shall be punished with imprisonment from one to four years and a fine of five thousand to ten thousand lev, as well as public reprobation.”

⁴⁸ Article 165, para. 3 states: “For acts under Article 163 committed against groups of the population, individual citizens or their property in connection with their religious affiliation, the punishments stipulated by that article shall apply.”

⁴⁹ Article 164, para. 1 punishes those “who propagate hatred on a religious basis through speech, through the press or other mass media devices, through electronic information systems or by the use of other means.”

⁵⁰ “Racist and xenophobic motive”

⁵¹ Article 162, paras. 3 and 4 state, “Whoever forms or heads an organization or a group whose goal is the perpetration of an act under the preceding paragraphs [see para. 1 and 2 above] shall be punished by imprisonment of one to six years and a fine of ten thousand to thirty thousand lev and by public reprobation. A member of such an organization or a group shall be punished by imprisonment of up to three years and by public reprobation.”

⁵² Art. 419a: “1. Anyone who in any way denies, justifies or substantially understates the crime against peace and humanity, so that it poses a threat of violence or hatred against persons or groups defined on the basis of race, color, religion, ancestry, or national or ethnic origin, shall be punishable by imprisonment for a term of 1 year to 5 years.

2. Anyone who incites others to commit an offence described in Part 1, shall be punished by imprisonment for up to 1 year.”

⁵³ Section 718.2(a)(i) of the Criminal Code of Canada provides for a court to increase a sentence in the light of an aggravating factor, to include “evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, color, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor.”

⁵⁴ Article 319. (1) Everyone who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

Marginal note: Willful promotion of hatred

(2) Everyone who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

Marginal note: Defenses

(3) No person shall be convicted of an offence under subsection (2)

(a) if he establishes that the statements communicated were true;

(b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;

(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or

(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

Marginal note: Forfeiture

(4) Where a person is convicted of an offence under section 318 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, on such conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.

Marginal note: Exemption from seizure of communication facilities

(5) Subsections 199(6) and (7) apply with such modifications as the circumstances require to section 318 or subsection (1) or (2) of this section.

Marginal note: Consent

(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

Marginal note: Definitions

(7) In this section,

“communicating” includes communicating by telephone, broadcasting or other audible or visible means;

“identifiable group” has the same meaning as in section 318;

“public place” includes any place to which the public have access as of right or by invitation, express or implied;

“statements” includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations.

Article 318 defines “identifiable group” as: “any section of the public distinguished by color, race, religion, ethnic origin or sexual orientation.”

⁵⁵ Under section 430(4.1), the Canadian Criminal Code provides enhanced penalties for the specific crime of “mischief” when committed “in relation to property that is a building used for religious worship, including a church, mosque, synagogue or temple, or an object associated with religious worship located in or on the grounds of such a building or structure, or a cemetery, if the commission of the mischief is motivated by bias, prejudice or hate based on religion race, color or national or ethnic origin.”

⁵⁶ For hate crimes, but not for hate speech: age.

⁵⁷ For hate crimes, but not for hate speech: any other similar factor.

⁵⁸ Marginal note: Offence

296. (1) Everyone who publishes blasphemous libel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Marginal note: Question of fact

(2) It is a question of fact whether or not any matter that is published is a blasphemous libel.

Marginal note: Saving

(3) No person shall be convicted of an offence under this section for expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion on a religious subject.”

⁵⁹ Cl. 20 Art. 87 of the Croatian Criminal Code, which entered into force in January 2013, defines hate crimes as “any criminal act committed because of race, color, religion, national or ethnic origin, disability, gender, sexual orientation or gender identity of another person.” This action is a common aggravating factor.

⁶⁰ Art. 325 of the Croatian Criminal Code: Public incitement of violence and hatred.

“ (1) Whoever in print, through radio, television, computer system or network, at a public rally or in some other way publicly incites to or makes available to the public tracts, pictures or other material instigating violence or hatred directed against a group of persons or a member of such a group on account of their race, religion, national or ethnic origin, descent, color, gender, sexual orientation, gender identity, disability or any other characteristics shall be sentenced to imprisonment for a term of up to three years.

(2) The sentence referred to in paragraph 1 of this Article shall be imposed on whoever publicly approves of, denies or grossly trivializes the crimes of genocide, crimes of aggression, crimes against humanity or war crimes, directed against a group of persons or a member of such a group on account of their race, religion, national or ethnic origin, descent or

color in a manner likely to incite to violence or hatred against such a group or a member of such a group.

(3) The perpetrator who attempts to commit the criminal offence referred to in paragraph 1 or 2 of this Article shall be punished.”

⁶¹ Origin.

⁶² Any other characteristics.

⁶³ Para. 2 Art. 235 above.

⁶⁴ On 21.10.2011 a law came into effect in Cyprus (Law N. 134(I)/2011) transposing Council Framework Decision 2008/913/JHA. It states that “the racist motive is an aggravating circumstance for any offense.”

⁶⁵ Law 134 (I) / 2011 states that a criminal offence is:

“a) public incitement to hatred and violence against a group of persons or a member of such a group defined by reference to race, color, religion, ancestors, or national or ethnic origin,

b) actions specified in cl. “a” committed through public dissemination of texts, images and other materials.”

The Criminal Code of Cyprus has two similar Sections: Section 47.2, cap. 154

“Whoever enters into an act publicly with the intention to promote feelings of ill will and hostility between different communities or religious groups by reason of his racial or ethnic origin or his religion is guilty of an offence and may on conviction be liable to imprisonment for up to five years.”

Section 51A, cap. 154

“Whoever publicly in any manner and in any way procures inhabitants to acts of violence against each other; or promotes feelings of ill will and enmity between different classes or communities or persons in the Republic, is guilty of misdemeanor and is liable to imprisonment for twelve months or to a fine of 1 000 pounds or both, and in case of a legal entity a fine of 3 000 pounds may be imposed.”

There is also a more traditionally-worded norm:

Section 2 Law no, 11 (III)/92

Any person who establishes or participates in any organization which promotes organized propaganda or activities of any form aiming at racial discrimination;

Any person who in public, either orally or in the press or in any documents or pictures or by any other means, expresses ideas which insult any person or group of persons by reason of their racial or ethnic origin or their religion, is guilty of an offence.

⁶⁶ Section 138

“Any person who destroys, damages or defiles any place of worship or any object which is held sacred by any class of persons or with the knowledge that any class of persons is

likely to consider such destruction, damage or defilement as an insult to their religion, is guilty of a misdemeanor.”

⁶⁷ “communities,” “classes”.

⁶⁸ Racist motives.

⁶⁹ See the abovementioned Law 134(I)/2011.

⁷⁰ See above Art. 2 of Law No. 11 (III)/92.

⁷¹ Law 134(I)/2011 stipulates the following corpus delicti:

“Public acceptance, denial or substantial trivialization of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, color, religion, ancestors, or national or ethnic origin, if these actions are such that they may incite hatred to call for violence against a group or a member of such a group.”

The law refers to Article 6 of the Nuremberg Tribunal in the same way.

⁷² Section 141

“Any person who with the deliberate intention of wounding the religious feelings of any person utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, is guilty of a misdemeanor and is liable to imprisonment for one year.”

Section 142

“1) Any person who publishes a book or pamphlet or any article or letter in a newspaper or periodical which any class of persons consider as a public insult to their religion, with intent to vilify such religion or to shock or insult believers in such religion, is guilty of a misdemeanor.

2) A prosecution for an offence under the provisions of this section shall not be commenced except by, or with the consent of, the Attorney-General of the Republic.”

⁷³ Criminal Code of the Czech Republic, Art.. 352, para.2:

“Any person who uses violence against a group of people or against individuals or who threatens them with death, bodily harm with extensive damage to their property, based on their real or perceived race, ethnicity, nationality, political opinion, religion or on their actual or alleged lack of religious beliefs shall be punished by imprisonment of from six months to three years.”

⁷⁴ Art.. 42, para/b. includes characteristics such as race, ethnicity, nationality, religion, class, and “other.”

⁷⁵ In this case, as in § 352, para. 2, the following

characteristics are taken into account: race, ethnicity, nationality, political opinions and religion.

This is applicable to the following offences: abuse of power (§ 329 paras.1, 2 b), damage to property (§ 228 paras.1 and 3 b), unlawful use of classified or private documents (§ 183 paras.1 and 3 b), extortion (§ 175 paras. 1 and 2 f), concealment abroad (§ 172 paras.1, 2 and 3 b), restriction of freedom (§ 171 paras.1 and 2 b) or deprivation of freedom (§ 170 paras.1 and 2 b), torture (§ 149 paras.1 and 2 c), inflicting bodily harm (§ 146 paras.1, and 2 e), grievous bodily harm (§ 145 paras.1 and 2 f), murder (§140 paras. 1, a 2 and 3. g).

⁷⁶ Article 355. Defamation of a Nation, Race, Ethnic or Other Group of Persons

(1) Whoever publicly defames

a) a nation, its language, some race or ethnic group, or
b) a group of persons for their true or supposed race, allegiance to an ethnic group, nationality, political conviction (opinion), confession or for an actual or supposed lack of confession (religious faith),

shall be punished by imprisonment for a term of up to two years.

(2) The offender shall be punished for a term of imprisonment of up to three years, if he commits an act under paragraph (1)

a) with at least two persons, or
b) through the written press, film, radio broadcasting, television broadcasting, a publicly accessible computer network or other similarly effective manner.

Article 356. Incitement to Hatred against a Group of Persons or to the Limitation of their Rights and Freedoms

(1) Whoever publicly incites hatred towards a group of persons based on their nation, race, ethnic group, religion, class or other or who promotes the restriction of the rights and freedoms of the members of such a group shall be punished by a term of imprisonment of up to two years.

(2) The same sentence shall apply to any person who associates or assembles to commit an act under paragraph (1).

(3) The offender shall be punished by a term of imprisonment of from six months to three years,

a) if he commits an act under paragraph (1) through the written press, film, radio broadcasting, television broadcasting, a publicly accessible computer network or through another similarly effective manner, or

b) if he actively participates through such an act in the activities of a group, organization or association that proclaims discrimination, violence or racial, ethnic, class, religious or other hatred.

⁷⁷ § 352, para. 2.

⁷⁸ Political views are mentioned in § 355 ("Defamation"), but not in § 356 ("Incitement to hatred").

⁷⁹ Class in § 42, para. b.

⁸⁰ Another group of people.

⁸¹ Article 403. Establishment, Support and Propagation of Movements Aimed at Suppressing Human Rights and Freedoms

(1) Whoever establishes, supports or propagates a movement which demonstrably aims at suppressing human rights and freedoms, or which proclaims racial, ethnic, national, religious or class hatred or hatred against another group of persons shall be punished by a term of imprisonment of from one to five years.

(2) The offender shall be punished by a term of imprisonment of from three to ten years

a) if he commits an act under paragraph (1) through the written press, film, radio or television broadcasting, or through another similarly effective manner, or

b) if he commits such an act as a member of an organized group, or

c) if he commits such an act as a soldier, or

d) if he commits such an act during a state of peril or a state of war.

(3) Preparation for such an act is also punishable.

Article 404. Expression of Sympathies to Movements Aimed at Suppressing Human Rights and Freedoms

Whoever publicly expresses sympathies (positive feelings) to movements under Section 403(1), shall be punished by a term of imprisonment of from six months to three years.

⁸² Article 405. Denial, Casting of Doubt upon, Approval or Justification of Genocide

Whoever publicly denies, puts in doubt, approves or attempts to justify Nazi or Communist or other genocide or other crimes of Nazis or Communists against humanity, shall be punished by a term of imprisonment of from six months to three years.

⁸³ "aggravating circumstance ... that the offense is based on the ethnic origin, faith or sexual orientation of others, or the like."

⁸⁴ Article 266.b of the Danish Criminal Code:

"1. Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, scorned or degraded on account of their race, color, national or ethnic origin, religion, or sexual orientation shall be liable to a fine or to imprisonment for a term not exceeding two years. It shall be considered an aggravating circumstance if the conduct can be characterized as propaganda."

⁸⁵ "or the like".

⁸⁶ Article 140

“Any person who, in public, mocks or scorns the religious doctrines or acts of worship of any lawfully existing religious community in this country shall be liable to imprisonment for a term not exceeding four months.”

⁸⁷ The Crime and Disorder Act of 1998 (see below) is formulated in such a way as to render attacks, not criminal in themselves, as criminal due to the aggravation. For example, see below Article 29, para. 1c.

⁸⁸ The Crime and Disorder Act of 1998 with the amendments introduced by the Anti-terrorism Crime and Security Act of 2001, defines a hate crime as a specific offence:

“Section 28. Meaning of “racially or religiously aggravated.”

“(1) An offence is racially or religiously aggravated for the purposes of sections 29 to 32 below if –

(a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim’s membership (or presumed membership) of a racial or religious group; or

(b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

(2) In subsection (1)(a) above –

“membership,” in relation to a racial or religious group, includes association with members of that group; “presumed” means presumed by the offender.

(3) It is immaterial for the purposes of paragraph (a) or (b) of subsection (1) above whether or not the offender’s hostility is also based, to any extent, on any other factor not mentioned in that paragraph.

(4) In this section “racial group” means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.

5) In this section “religious group” means a group of persons defined by reference to religious belief or lack of religious belief.

Section. 29. Racially or religiously aggravated assaults.

(1) A person is guilty of an offence under this section if he commits –

(a) an offence under section 20 of the Offences Against the Person Act 1861 (malicious wounding or grievous bodily harm);

(b) an offence under section 47 of that Act (actual bodily harm); or

(c) common assault, which is racially or religiously aggravated for the purposes of this section.

(2) A person guilty of an offence falling within subsection (1)(a) or (b) above shall be liable –

(a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding seven years or to a fine, or to both.

(3) A person guilty of an offence falling within subsection (1)(c) above shall be liable –

(a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.

Section. 30 Racially or religiously aggravated criminal damage.

(1) A person is guilty of an offence under this section if he commits an offence under section 1(1) of the Criminal Damage Act of 1971 (destroying or damaging property belonging to another) which is racially or religiously aggravated for the purposes of this section.

(2) A person guilty of an offence under this section shall be liable –

(a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding fourteen years or to a fine, or to both.

(3) For the purposes of this section, section 28(1)(a) above shall have effect as if the person to whom the property belongs or is treated as belonging for the purposes of that Act were the victim of the offence.”

The Criminal Justice Act of 2003 repeats in its section 145 the wording of section 28 of the Crime and Disorder Act of 1998 for racial and religious hate crimes. Further, in section 146, it reproduces them precisely for those crimes committed based on a hate motive related to the actual or perceived sexual orientation or disability of the victim.

⁸⁹ Two types of actions are considered incitement to hatred and hate speech.

The first are those actions committed under the conditions described above in Section 28 of the Crime and Disorder Act of 1998, and, according to Section 31 of this Act, which are related to the following sections of the Public Order Act of 1986, supplemented by the Racial and Religious Hatred Act of 2006 and by the Criminal Justice and Immigration Act of 2008.

Sections 4, 4a and 5, respectively, describe actions of the first type:

“Fear or provocation of violence – A person is guilty of an offence if he uses towards another person threatening, abusive or insulting words or behavior, or distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting,

with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.”

“Intentional harassment, alarm or distress” – the same actions “causing that or another person harassment, alarm or distress.”

“Harassment, alarm or distress” – the same actions, committed “within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.”

The second type of actions are described in Parts III and IIIA of the Public Order Act, as amended. Part III is entitled “Racial Hatred,” with the word “racial” used in the same meaning as in section 28 of the Crime and Disorder Act of 1998. Section 18 contains the key provisions: “Use of words or behaviour or display of written material.

“(1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if –

(a) he intends thereby to stir up racial hatred, or

(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.

(3) A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.

(4) In proceedings for an offence under this section it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behavior used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling.

(5) A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.

(6) This section does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme ([meaning a TV or radio programme. – A.V.])”

Part IIIA is identical to Part. III, provided that the “person who uses threatening words or behavior or demonstrates any threatening written material, is guilty of an offence if intending to incite religious hatred” or “hatred against a group of persons defined by reference to their sexual orientation (in relation to persons of the same sex, opposite sex or

both)”

Part IIIA, in contrast to Part III, contains articles on the protection of freedom of speech:

Section 29J: “Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practicing their religion or belief system.”

Section 29JA: “for the avoidance of doubt, the discussion or criticism of sexual conduct or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening.”

⁹⁰ In 2013, the word “insulting” was dropped from Section 5 of the Public Order Act of 1986, so only the word “abusive” remains. Although the two words are synonyms, the first term suggests an intention to offend, while the second suggests an intention to inflict damage.

⁹¹ See above section 30 of the Crime and Disorder Act 1998.

⁹² Provisions regarding materials containing racial hate speech are extensively covered by Part III of the Public Order Act of 1986:

“Section 19. Publishing or distributing written material;

Section 20. Public performance of play (contains a series of practical reservations);

Section 21. Distributing, showing or playing a recording;

Section 22. Broadcasting or including programmes in cable programme service;

Section 23. Possession of racially inflammatory material (with the purpose of distribution).”

Part IIIA includes a similar group of sections on religious hate speech and on hate speech targeting sexual orientation.

⁹³ Article 151 of the Estonian Criminal Code:

“1. Activities which publicly incite to hatred, violence or discrimination on the basis of nationality, race, color, sex, language, origin, religion, sexual orientation, political opinion, or financial or social status are punishable by a fine of up to 300 units or by detention if such activities result in danger to the life, health, or property of a person

2. The same act, if

1) it causes the death of a person or results in damage to health or in other serious consequences, or

2) it was committed by a person who has previously been punished for such an act, or

3) it was committed by a criminal organization, – is punishable by a fine or by up to 3 years’ imprisonment.”

⁹⁴ Origin, financial or social status.

⁹⁵ Chapter. 6, Section. 5, para. 4 of the Finnish Criminal Code: “commission of the offence for a motive based on race, skin color, birth status, national or ethnic origin, religion or belief, sexual orientation or disability or on other corresponding grounds.”

⁹⁶ Specific aggravations are not provided for in the Criminal Code of Finland. But it does contain the concept of the criminal liability of a registered organization, if the offence was committed within the framework of its activities. This is applicable to a number of acts committed based upon the above motivation: trafficking in human beings (Chapter 25, section 10), defamation and threats (Chapter 17, section 24, cl. 2) and incitement to hatred (see below).

⁹⁷ Chapter 11. Section 10. Ethnic agitation.

“A person who makes available to the public or otherwise spreads among the public or keeps available for the public information, an expression of opinion or another message where a certain group is threatened, defamed or insulted on the basis of its race, skin color, birth status, national or ethnic origin, religion or belief, sexual orientation or disability or a comparable basis, shall be sentenced for ethnic agitation to a fine or to imprisonment for at most two years.

Section 10(A). Aggravated ethnic agitation.

If the ethnic agitation involves incitement or enticement (1) to genocide or the preparation of genocide, a crime against humanity, an aggravated crime against humanity, a war crime, an aggravated war crime, murder, or manslaughter committed for terrorist intent, or

(2) to serious violence other than what is referred to in paragraph 1 so that the act clearly endangers public order and safety,

and the ethnic agitation also when assessed as a whole is aggravated, the offender shall be sentenced for aggravated ethnic agitation to imprisonment for at least four months and at most four years.

The crimes described in Sections 10 and 10 (a) may be charged to a registered organization, if the offense was committed as part of its activities, as well as aggravating defamation or threat, if they were made on the grounds listed in Chapter 6, section 5, para. 4 (Chapter 17, section 24, para. 1).”

⁹⁸ Status at birth.

⁹⁹ Same.

¹⁰⁰ Other similar grounds.

¹⁰¹ Same.

¹⁰² Chapter 17. Section 10. Breach of the sanctity of religion.

“A person who

(1) publicly blasphemes against God or, for the purpose of offending, publicly defames or desecrates what is otherwise held to be sacred by a

church or religious community, as referred to in the Act on the Freedom of Religion (267/1922), or

(2) by making noise, acting threateningly or otherwise, disturbs worship, ecclesiastical proceedings, other similar religious proceedings or a funeral,

shall be sentenced for a breach of the sanctity of religion to a fine or to imprisonment for at most six months.”

¹⁰³ Articles 132-76 of the Criminal Code of France (Inserted by Act no. 2003-88 of 3 February 2003 Art. 1 Official Journal of 4 February 2003)

(Act no. 2004-204 of 9 March 2004 article 12 I, article 38 Official Journal of 10 March 2004)

“Where provided for by law, the penalties incurred for a felony or a misdemeanor are increased when the offence is committed because of the victim’s actual or supposed membership or non-membership of a given ethnic group, nation, race or religion.

The aggravating circumstances defined in the first paragraph are established when the offence is preceded, accompanied or followed by written or spoken words, images, objects or actions of whatever nature which damage the honor or the reputation of the victim, or a group of persons to which the victim belongs, on account of their actual or supposed membership or non-membership of a given ethnic group, nation, race or religion.”

Articles 132-77

(Inserted by Act no. 2003-239 of 18 March 2003 Art. 47 Official Journal of 19 March 2003)

“In the cases provided for by law, the penalties incurred for a felony or a misdemeanor are increased where the offence is committed because of the victim’s sexual orientation.

The aggravating circumstances defined in the first paragraph are established when the offence is preceded, accompanied or followed by written or spoken words, images, objects or actions of whatever nature which damage the honor or the reputation of the victim, or a group of persons to which the victim belongs, on account of their actual or supposed sexual identity.”

¹⁰⁴ This applies to the following crimes: murder, torture and barbaric treatment, violence, resulting in the death of the victim, causing moderate damage to health (from eight days of incapacity), infliction of bodily harm (eight days or less), threats, the desecration of graves and corpses, theft, extortion, destruction of property, the publication of guidelines for the manufacture of destructive devices.

¹⁰⁵ According to Art. 24 of the Law on the Freedom of the Press, actions leading to discrimination, hatred or violence against a person or group because of their origin or of their belonging or not belonging to an ethnic group, nation, race or religion, shall be punished by imprisonment of up to one year and / or a fine of up to 45 thousand euros. Also punished are actions leading to hatred, violence as well as certain (with reference to the articles of the Criminal Code) forms of discrimination against individuals and groups based on gender, orientation, gender identity or disability.

¹⁰⁶ Defamation of a person or group on the same grounds entails the same penalty.

¹⁰⁷ As listed above – desecration of graves and corpses and destruction of property.

¹⁰⁸ Orientation and gender identity are mentioned separately.

¹⁰⁹ According to Art. 24 bis of the Act on Freedom of the Press, the denial of crimes against humanity as defined by the Nuremberg Tribunal (as defined by Article 6 of the Statute of the International Military Tribunal annexed to the London Agreement of August 8, 1945) committed by members of the organizations referred to in the judgment of the Tribunal, and also by citizens who have been convicted by the French or international courts, shall be equal to providing excuses for war crimes.

¹¹⁰ According to Art. 24 of the Act on Freedom of the Press, providing excuses for war crimes, crimes against humanity, crimes of collaboration with the enemy and terrorism is punishable by imprisonment of up to five years and a fine up to 45 thousand euros.

¹¹¹ “due to racial, religious, national or ethnic intolerance.” This applies to the following crimes: murder, grievous and moderate bodily harm, torture and the desecration of graves or corpses.

¹¹² Among the amendments to the Criminal Code of Georgia adopted in 2003 was a provision on incitement. A new article 142(1) was added to the code and “provides that racial discrimination, i.e. an act committed for the purpose of inciting to national or racial hatred or conflict, humiliating national dignity or directly or indirectly restricting human rights or granting advantages on grounds of race, color, social status or national or ethnic origin, is punishable by imprisonment for a term not exceeding three years.”

¹¹³ The articles on hate crimes use the word “national” as an adjective, while the article on hate speech refers to

“national origin.” In the aggregate, it can be assumed that this is not a reference to the characteristic of nationality.

¹¹⁴ Social status.

¹¹⁵ Art. 252. Creation or Leading or Participation in an Illegal Union.

“1. Creation of a religious, political or public union, the activities of which involve violence against people, or the leading of such a union, shall be punishable by a fine or by imprisonment of up to three years in length.

2. Participation in a union referred to in Paragraph 1 of this article shall be punishable by a fine or by imprisonment for up to two years in length.”

¹¹⁶ The German Criminal Code does not feature the concept of the hate motive.. However, in the case of murder there is a “motive based on prejudice,” which the Supreme Court in a1993 decision qualified as a racist motive.

¹¹⁷ The articles regarding incitement read as follows: § 130. Incitement to hatred.

“(1) Whosoever, in a manner capable of disturbing the public peace

1. incites hatred against a national, racial, religious group or a group defined by their ethnic origins, against segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population or calls for violent or arbitrary measures against them; or

2. assaults the human dignity of others by insulting, maliciously maligning an aforementioned group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population, or defaming segments of the population, shall be liable to imprisonment from three months to five years. (2) Whosoever

1. with respect to written materials (section 11(3)) which incite hatred against an aforementioned group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population which call for violent or arbitrary measures against them, or which assault their human dignity by insulting, maliciously maligning or defaming them,

(a) disseminates such written materials;

(b) publicly displays, posts, presents, or otherwise makes them accessible;

(c) offers, supplies or makes them accessible to a person under eighteen years; or

(d) produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of No's (a) to (c) or facilitate such use by another; or

2. disseminates a presentation of the content indicated in No 1 above by radio, media services, or telecommunication

services

shall be liable to imprisonment not exceeding three years or a fine.

(3) Whosoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in section 6 (1) of the Code of International Criminal Law, in a manner capable of disturbing the public peace shall be liable to imprisonment not exceeding five years or a fine.

(4) Whosoever publicly or in a meeting disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying National Socialist rule of arbitrary force shall be liable to imprisonment not exceeding three years or a fine.

(5) Subsection (2) above shall also apply to written materials (section 11(3)) of a content such as is indicated in subsections (3) and (4) above.

(6) In cases under subsection (2) above, also in conjunction with subsection (5) above, and in cases of subsections (3) and (4) above, section 86(3) shall apply *mutatis mutandis*."

(§ 11, para. 3 reads as follows: "Audiovisual media, data storage media, illustrations and other depictions shall be equivalent to written material in the provisions which refer to this subsection.")

§ 130a. Attempting to cause the commission of offences by means of publication.

"(1) Whosoever disseminates, publicly displays, posts, presents, or otherwise makes accessible written material (section 11(3)) capable of serving as an instruction for an unlawful act named in section 126(1) and intended by its content to encourage or cause others to commit such an act, shall be liable to imprisonment not exceeding three years or a fine.

(2) Whosoever

1. disseminates, publicly displays, posts, presents, or otherwise makes accessible written material (section 11(3)) capable of serving as an instruction for an unlawful act named in section 126(1); or

2. gives instructions for an unlawful act named in section 126(1) publicly or in a meeting, in order to encourage or cause others to commit such an act, shall incur the same penalty.

(3) Section 86(3) shall apply *mutatis mutandis*."

Also worthy of note is § 126. Breach of the public peace by threatening to commit offences.

"(1) Whosoever, in a manner capable of disturbing the public peace, threatens to commit

1. an offence of rioting indicated in section 125a 2nd sentence ## 1 to 4;

2. murder under specific aggravating circumstances (section 211), murder (section 212) or genocide (section 6 of the Code of International Criminal Law) or a crime against humanity (section 7 of the Code of International Criminal Law) or a war crime (section 8, section 9, section 10, section 11 or section 12 of the Code of International Criminal Law);

3. grievous bodily harm (section 226);

4. an offence against personal freedom under section 232(3), (4), or (5), section 233(3), each to the extent it involves a felony, section 234, section 234a, section 239a or section 239b;

5. robbery or blackmail with force or threats to life and limb (Sections 249 to 251 or section 255);

6. a felony endangering the public under sections 306 to 306c or section 307(1) to (3), section 308(1) to (3), section 309(1) to (4), section 313, section 314 or section 315(3), section 315b(3), section 316a(1) or (3), section 316c(1) or (3) or section 318(3) or (4); or

7. a misdemeanor endangering the public under section 309(6), section 311(1), section 316b(1), section 317(1) or section 318(1),

shall be liable to imprisonment not exceeding three years or a fine.

(2) Whosoever intentionally and knowingly and in a manner capable of disturbing the public peace pretends that the commission of one of the unlawful acts named in subsection (1) above is imminent, shall incur the same penalty."

¹¹⁸ Although hate crimes are not included in the law, setting fire to a church or other place of worship is considered "grave arson" (§ 306a) and is punished more severely than usual.

¹¹⁹ Considering that in § 130 reference is made to groups that have some characteristics of nationality, perhaps, the language is still included in the list of these characteristics.

¹²⁰ The same paragraph refers to "parts of the population": although the text refers to national, ethnic and religious groups, § 130 can cover any of these groups.

¹²¹ § 85: "Whosoever, as a ringleader or hinterman, maintains the organisational existence of an organisation, which has been banned by final decision, shall be liable to imprisonment not exceeding five years; Whosoever is an active member in a party or organisation indicated in subsection (1) above or whosoever supports its organisational existence shall be liable to imprisonment not exceeding three years."

§ 86: "Dissemination of propaganda material of unconstitutional organisations.

Whosoever within Germany disseminates or produces, stocks, imports or exports or makes publicly accessible through data storage media for dissemination within Germany or abroad, propaganda material shall be liable to imprisonment not exceeding three years. Propaganda materials within the meaning of subsection (1) above shall only be written materials (section 11(3)) the content of which is directed against the free, democratic constitutional order or the idea of the comity of nations. Subsection (1) above shall

not apply if the propaganda materials or the act is meant to serve civil education, to avert unconstitutional movements, to promote art or science, research or teaching, the reporting about current or historical events or similar purposes.”

§ 86a: “Using symbols of unconstitutional organisations.

Whosoever domestically distributes or publicly uses, in a meeting or in written materials, produces, stocks, imports or exports objects, which depict or contain such symbols for distribution or use in Germany or abroad shall be liable to imprisonment not exceeding three years or a fine. Symbols within the meaning of subsection (1) above shall be in particular flags, insignia, uniforms and their parts, slogans and forms of greeting. Symbols which are so similar as to be mistaken for those named in the 1st sentence shall be equivalent to them. ... Subsection (1) above shall not apply if the propaganda materials or the act is meant to serve civil education, to avert unconstitutional movements, to promote art or science, research or teaching, the reporting about current or historical events or similar purposes.”

¹²² § 130, para. 3.

¹²³ § 166. Defamation of religions, religious and ideological associations.

“Whosoever publicly or through dissemination of written materials (section 11(3)) defames the religion or ideology of others in a manner that is capable of disturbing the public peace, shall be liable to imprisonment not exceeding three years or a fine.

(2) Whosoever publicly or through dissemination of written materials (section 11(3)) defames a church or other religious or ideological association within Germany, or their institutions or customs in a manner that is capable of disturbing the public peace, shall incur the same penalty.”

¹²⁴ Art. 79 of the Greek Criminal Code states that “committing a crime on the basis of national, racial or religious hatred or hatred based on sexual orientation, constitutes an aggravating circumstance.”

¹²⁵ Act No. 927 adopted in 1979 and subsequently updated a number of times also includes such provisions.

Art. 1.1 criminalizes the following actions: “to willfully and publicly, either orally or by the press or by written texts or through pictures or any other means, incite to acts or activities which may result in discrimination, hatred or violence against individuals or groups of individuals on the sole grounds of the latter’s racial or national origin or [by virtue of article 24 of Law 1419/1984] religion;

to express publicly, either orally or by the press or by written texts or through pictures or any other means offensive ideas against any individual or group of individuals on the grounds of the latter’s racial or national origin or

religion.”

The penalty is up to two years in prison.

Section 2 covers the expression in speech, via the press, in writings, by pictures or by any other means of any ideas offensive to an individual or a group of individuals by virtue of their racial or ethnic origin or their religious affiliations. The penalty is a maximum of one year imprisonment and/or a fine.

¹²⁶ Law 927. Section 1.2

“Constitution of or membership in an organization, the aim of which is to organize propaganda or activities of any nature involving racial discrimination, is punishable by a maximum of two years’ imprisonment and/or a fine.”

¹²⁷ Article 198 – Malicious blasphemy

“1. Anyone who insults God in public and with malicious intent, in any way whatsoever, shall incur a prison sentence of up to two years.

2. Anyone who blasphemes in public in circumstances other than those specified in paragraph 1, thereby showing a lack of respect towards God, shall incur a prison sentence of up to three months.”

Article 199 – Insulting a religion

“Anyone who insults the Eastern Orthodox Church or any other religion recognized in Greece, in public and with injurious intent, in any way whatsoever, shall incur a prison sentence of up to two years.”

¹²⁸ Art. 216 of the Hungarian Criminal Code, Violence against members of a community.

“(1) Any person who displays an apparently anti-social behavior against others for being part, whether in fact or under presumption, of a national, ethnic, racial or religious group, or of a certain societal group, in particular on the grounds of disability, gender identity or sexual orientation, of aiming to cause panic or to frighten others, is guilty of a felony punishable by imprisonment not exceeding three years.

(2) Any person who assaults another person for being part, whether in fact or under presumption, of a national, ethnic, racial or religious group, or of a certain societal group, in particular on the grounds of disability, gender identity or sexual orientation, or compels him by force or by threat of force to do, not to do, or to endure something, is punishable by between one to five years’ imprisonment.

(3) The penalty shall be between two to eight years’ imprisonment if violence against a member of the community is committed:

- a) by displaying a deadly weapon;
- b) by carrying a deadly weapon;
- c) by causing a significant injury of interest;
- d) by tormenting the aggrieved party;
- e) in a gang; or

f) in criminal association with accomplices.

(4) Any person who engages in the preparation for the use of force against any member of the community is guilty of a misdemeanor punishable by imprisonment not exceeding two years.”

¹²⁹ Art. 332. Incitement against a Community.

“Any person who before the public at large incites hatred against:

a) the Hungarian nation;
b) any national, ethnic, racial or religious group; or
c) certain societal groups, in particular on the grounds of disability, gender identity or sexual orientation;
is guilty of a felony punishable by imprisonment not exceeding three years.”

Art. 335. Use of Symbols of Totalitarianism.

“Any person who:

a) distributes,
b) uses before the public at large, or
c) publicly exhibits,
the swastika, the insignia of the SS, the arrow cross [symbol of the pre-war “Hungarist” party – A.V.], the sickle and hammer, the five-pointed red star or any symbol depicting the above so as to breach public peace – specifically in a way to offend the dignity of victims of totalitarian regimes and their right to sanctity – is guilty of a misdemeanor punishable by custodial arrest, insofar as the act did not result in a more serious criminal offense.

¹³⁰ Art. 371 (“Vandalism”) in para. 3bb contains a specific aggravation related to the vandalized object: “religious objects or consecrated buildings or objects used for religious rights.” However, this is not a reference to the motive of the crime.

¹³¹ Certain social groups.

¹³² Same.

¹³³ In 2010, a law was passed to ultimately criminalize the crimes by Nazi and Communist regimes: Holocaust denial is mentioned separately. Previously, the law on Holocaust denial had been annulled by the Constitutional Court. The new norm was introduced into the new Criminal Code, which entered into force by a special act on July 1, 2013. Art. 333. Open Denial of Nazi Crimes and Communist Crimes.

“Any person who denies before the public at large the crime of genocide and other crimes committed against humanity by Nazi and communist regimes, or who expresses any doubt or implies that it is insignificant, or attempts to justify such crimes, is guilty of a felony punishable by imprisonment not exceeding three years.”

¹³⁴ Incitement is addressed in Section 233(a) of the

Criminal Code of Iceland, which provides a punishment of up to two years’ imprisonment for “any person who, by mockery, slander, insult, threat or other means, publicly attacks a person or a group of persons on the grounds of their nationality, color, race, religion or sexual orientation....”

¹³⁵ Article 124

“If anyone disturbs the sanctity of cemeteries or is guilty of indecorous treatment of a corpse will be subject to fines ... 1) or to up to 6 months’ imprisonment. The same penalty shall be applied to the indecorous treatment of objects belonging to churches and of objects which are used in ecclesiastical ceremonies.”

Art. 125: “Anyone officially ridiculing or insulting the dogmas or worship of a lawfully existing religious community in this Country shall be subject to fines or imprisonment for up to 3 months. Lawsuits shall not be brought except upon the instructions of the Public Prosecutor.”

¹³⁶ Irish Prohibition of Incitement to Hatred Act of 1989.

“An act to prohibit incitement to hatred on account of race, religion, nationality or sexual orientation.

Section 2

It shall be an offence for a person –

- to publish or distribute written material,
- to use words, behave or display written material – in any place other than inside a private residence, or
iii. inside a private residence so that the words, behavior or material are heard or seen by persons outside the residence, or to distribute, show or play a recording of visual images or sounds, if the written material, words, behavior, visual images or sounds, as the case may be, are threatening, abusive or insulting and are intended or, having regard to all circumstances, are likely to stir up hatred.

In proceedings for an offence under subsection 1), if the accused person is not shown to have intended to stir up hatred, it shall be a defence for him to prove that he was not aware of the content of the material or recording concerned and did not suspect, and had to reason to suspect, that the material or recording was threatening, abusive, or insulting.

In proceedings for an offence under subsection 1)b), it shall be a defence for the accused person- to prove that he was inside a private residence at the relevant time and had no reason to believe that the words, behavior, or material concerned would be heard or seen by a person outside the residence, or if he is not shown to have intended to stir up hatred, to prove that he did not intend the words, behavior, or material concerned to be, and was not aware that they might be, threatening, abusive or insulting.

Section 3(1) if an item involving threatening, abusive or insulting visual images or sounds if broadcast, each of the persons mentioned in subsection 20 is guilty of an offence if he intends thereby to stir up hatred or, having regard to all

the circumstances, hatred is likely to be stirred up thereby.

Section 4

It shall be an offence for a person – a) to prepare or be in possession of any written material with a view to its being distributed, displayed, broadcast or otherwise published, in the State or elsewhere, whether by himself or another or b) to make or be in the possession of a recording of sounds or visual images with a view to its being distributed, shown, played, broadcast or otherwise published in the State or elsewhere, whether by himself or another, if the material or recording is threatening, abusive, or insulting and is intended to stir up hatred.

Envisaged penalty – up to two years in prison and/or fine of up to 10 thousand pounds.”

¹³⁷ Art. 4, Prohibition of Incitement to Hatred Act.

¹³⁸ Defamation Act of 1961, No. 40

“Penalty for printing or publishing blasphemous or obscene libel.

13.1 Every person who composes, prints or publishes any blasphemous or obscene libel shall, on conviction thereof on indictment, be liable to a fine not exceeding 500 pounds or imprisonment for a term not exceeding two years or to both fine and imprisonment or to penal servitude for a term not exceeding seven years.

a. In every case in which a person is convicted of composing, printing or publishing a blasphemous libel, the court may make an order for the seizure and carrying away and detaining in safe custody, in such manner as shall be directed in the order, of all copies of the libel in the possession of such person or of any other person named in the order for his use, evidence upon oath having been previously given to the satisfaction of the court that copies of the said libel are in the possession of such other person for the use of the person convicted.

b. Upon the making of an order under paragraph (a) of this subsection, any member of the Garda Síochána acting under such order may enter, if necessary by the use of force, and search for any copies of the said libel any building, house or other place belonging to the person convicted or to such other person named in the order and may seize and carry away and detain in the manner directed in such order all copies of the libel found therein.

c. If, in any such case, the conviction is quashed on appeal, any copies of the libel seized under an order under paragraph (a) of this subsection shall be returned free of charge to the person or persons from whom they were seized.

d. Where, in any such case, an appeal is not lodged or the conviction is confirmed on appeal, any copies of the libel seized under an order under paragraph (a) of this subsection shall, on the application of a member of the Garda Síochána to the court which made such order, be disposed of in such

manner as such court may direct.”

The Act of 1997 abolished forced labor, and conventional imprisonment should apply.

¹³⁹ Combined with calls to violence, if not a grave offence, Italian law provides that “anyone who, by any means whatsoever, commits or incites others to commit acts of violence or acts designed to provoke violence on racist, ethnic, national or religious grounds shall be subject to a prison sentence of six months to four years.”

¹⁴⁰ Act No. 205 of 25 June 1993 on urgent measures in respect of racial, ethnic and religious discrimination.

“Section 3 – Aggravating circumstances

“Where offences carrying a sentence other than life imprisonment are committed for reasons of ethnic, national, racial or religious discrimination or hatred, or for the purpose of facilitating the activities of an organization, associations, movement or group pursuing these goals, the sentence shall be increased by half.”

¹⁴¹ From Art. 3.1, para. 1 of the same Act No. 205:

“Section 3.1. Except where the acts in question constitute a more serious offence, the following penalties shall apply for the purposes of implementing Article 4 of the Convention [International Convention on the Elimination of All Forms of Racial Discrimination – A.V.]: a) anyone who, by any means whatsoever, disseminates ideas based on racial or ethnic superiority or hatred, or commits or incites others to commit discriminatory acts on racial, ethnic, national or religious grounds, shall be subject to a maximum prison sentence of three years; b) anyone who, by any means whatsoever, commits or incites others to commit acts of violence or acts designed to provoke violence on racist, ethnic, national or religious grounds shall be subject to a prison sentence of six months to four years.”

¹⁴² The term “the idea of supremacy” suggests the promotion of some ideology rather than a simple assertion of inequality.

¹⁴³ See Art. 404 of the Italian Criminal Code below.

¹⁴⁴ Act 645 of 1952 on the prohibition of reconstitution of the Fascist party.

“‘Fascist party’ means an association, movement, or group of at least 5 persons, which pursues anti-democratic aims and uses, among other things, racist propaganda; it is punishable by prison, the dissolution of the association, or confiscation of its property.

Act 645, Section 4 – Defense of Fascism

“The penalty for publicly glorifying fascism is aggravated when racist ideas or methods have been particularly extolled.

The penalty is up to 3 years' imprisonment and a fine."

There are also more recent laws:

See Art. 3 of Act 205, as well as Art. 1 of the same law:

"3. Any organization, association, movement or group whose aims include inciting discrimination or violence on racial, ethnic, national or religious grounds shall be prohibited. Anyone who participates in such an organization, association, movement or group, or helps it with its activities, shall be subject – solely on account of such participation or the provision of such assistance – to a prison sentence of six months to four years. Anyone who promotes or runs such an organization, association, movement or group shall be subject – on this account alone – to a prison sentence of one to six years."

Art. 2 of Act 205 criminalizes demonstration of the symbols of banned organizations with punishment of up to three years in prison; it also features a separate provision on the display of such symbols during sporting events.

¹⁴⁵ Article 403. – Offenses to a religious denomination by means of vilification of people.

"Anyone who publicly offends a religious denomination, by means of vilification of those who profess it, is punished with a fine ranging from EUR 1,000 to EUR 5,000."

A fine ranging from € 2,000 to € 6,000 is applied to those who offend one religious denomination, by means of vilification of a minister.

Article 404. – Offenses to a religious denomination by means of vilification or damage to property.

"Anyone who, in a place of worship, or in a public place or place open to the public, offends a religious denomination, vilifies with expressions insulting things that are the subject of worship, or are consecrated to the cult, or are intended necessarily to the exercise of worship, or commits the act in connection with religious services, conducted in a private place by a minister of religion, shall be punished with a fine ranging from EUR 1,000 to EUR 5,000."

¹⁴⁶ Art. 54, para. F of the Criminal Code of Kazakhstan: "The commission of a crime under a motivation of national, racial, or religious hatred or enmity, out of revenge for lawful actions of other persons, as well as for the purpose of concealing another crime, or to facilitate its commission."

¹⁴⁷ The specific aggravation is similar to the general aggravating circumstance, but is supplemented by social hatred or hostility and the phrase "motivated by blood feud." It is found in Articles 96 ("Murder"), 103 ("Intentional causing of grievous bodily harm"), 104 ("Intentional causing of moderate bodily harm") and 107 ("Torture").

¹⁴⁸ The corpus delicti of Art. 164 of the Criminal Code ("Incitement of Social, National, Tribal, Racial, or Religious

Enmity") is as follows: "Deliberate actions aimed at the incitement of social, national, tribal, racial, or religious enmity or antagonism, or at offense to the national honor and dignity, or religious feelings of citizens, as well as propaganda of exclusiveness, superiority, or inferiority of citizens based on their attitude towards religion, or their genetic or racial belonging, if these acts are committed publicly or with the use of the mass information media, as well as through the dissemination of literature and other media that promote social, ethnic, racial or religious enmity or discord."

¹⁴⁹ Art. 187 ("Deliberate Destruction or Causation of Damage to Someone Else's Property"); Art. 275 ("Outrage upon Bodies of the Deceased or Places of Their Burial").

¹⁵⁰ Social enmity is featured. It is difficult to say whether a blood feud can be attributed to motives of hatred. This does not seem to be the case. "Blood feud" appears only in the article "Murder."

¹⁵¹ Social strife and assertion of class-specific superiority are featured. The reference is not only to nationality, but also to origin.

¹⁵² Article 337. Creation or Participation in the Activity of Illegal Public Associations.

"1. Creation or guidance of a religious or public association, the activity of which is associated with violence against citizens or other causation of damage to their health, or with inducing citizens to refuse to perform their civil obligations or to commit other illegal actions, as well as the creation or guidance of a party on a religious basis or a political party or a trade union which are financed by foreign states, or foreign citizens or by foreign or international organisations, –

shall be punished by a fine in an amount from two hundred up to five hundred monthly calculation bases, or in an amount of wages or other income of a given convict for a period from two to five months, or by correctional labor for a period up to two years, or by detention under arrest for a period up to four months, or by imprisonment for a period up to three years with deprivation of the right to hold certain positions or to engage in certain types of activity for a period up to three years.

2. Creation of a public association which proclaims or carries out in practice racial, national, tribal, social, class, or religious intolerance or exclusiveness, or which calls for the subversion of the constitutional order, disruption of safety of the state, or infringements upon the territorial integrity of the Republic of Kazakhstan, as well as the guidance of such an association, –

shall be punished by correctional labor for a period up to two years, or by restriction of freedom for a period up to five years, or by detention under arrest for a period up to six

months, or by imprisonment for a period up to three years with deprivation of the right to hold certain positions or to engage in certain types of activity for a period up to three years.

3. Active participation in the activity of public associations indicated in the first or second part of this Article, –

shall be punished by a fine in an amount from one hundred up to three hundred monthly assessment indices, or in an amount of wages or other income of a given convict for a period from one to two months, or by correctional labour for a period up to one year, or by detention under arrest for a period up to four months or imprisonment for a period up to one year.” Article 337-1. Organization of the activities of a public or religious association or another organization following a court decision to prohibit its activities or to dissolve such an organization on account of its incitement of extremism.

“1. Organization of the activity of a public or a religious association or another organization, in respect of which there is a court decision which took legal effect about the prohibition of their activity or the liquidation on account of the implementation of extremism by them, – shall be punished by a fine in the amount up to three hundred monthly calculation indices or with the deprivation of right to hold specific posts or to practice a specific activity for a period from one year to five years, or with the restraint of liberty for a period up to six years, or with the deprivation of liberty for the same period.

2. Participation in the activity of a public or a religious association or another organization, in respect of which there is a court decision which took legal effect about the prohibition of their activity or the liquidation on account of the implementation of extremism by them, – shall be punished by a fine in the amount up to two hundred monthly calculation indices or with the deprivation of right to hold specific posts or to practice a specific activity for a period from one year to five years, or with the restraint of liberty for a period up to six years, or with the deprivation of liberty for the same period.

Note. A person, that willingly stopped participating in the activity of a public or a religious association or other organization, in respect of which there is a court decision which took legal effect about the prohibition of its activity or that was liquidated on account of the implementation of extremism by such an organization, shall be acquitted of criminal liability, unless his offences have another corpus delicti.”

¹⁵³ Religious feelings are mentioned in Art. 164 of the Kazakh Criminal Code (see above).

¹⁵⁴ In Kyrgyz law, this is formulated as “on the basis of ethnic or racial or religious hatred or enmity,” and is applicable to murder.

¹⁵⁵ Article 299, Criminal Code of Kyrgyzstan. Incitement to national, racial, religious or interregional hatred

“(1) Actions aimed at inciting national, racial, religious or inter-regional hatred, humiliation of national dignity, as well as propaganda of exclusivity, superiority or inferiority of citizens on the ground of their religion, nationality or race, if these acts were committed in public or using media, shall be punishable by a fine of five hundred to one thousand calculated indices, or with imprisonment of three to five years.

(2) The same acts if committed:

1) with the use of violence or threat of violence;

2) by a person using his official position;

3) by a group of persons or criminal community (criminal organization);

4) by a person who has previously been convicted for crimes of an extremist nature (extremist activities)

shall be punished by a fine of one thousand to five thousand calculated indices or by imprisonment of five to seven years with deprivation of the right to occupy certain positions or engage in certain activities.”

¹⁵⁶ Interregional enmity is referred to in Art. 299 of the Kyrgyz Criminal Code.

¹⁵⁷ Art. 299². Acquisition, storage, transport or shipment of extremist materials with a view to their dissemination, or preparation and dissemination of such materials, or the intentional use of symbols or attributes of extremist organizations.

“1. Acquisition, storage, transportation and shipment of extremist materials for distribution or their production and distribution, as well as the intentional use of symbols or attributes of extremist organizations –

shall be punished by a fine of one thousand to five thousand notional units or imprisonment from three to five years, with forfeiture of the right to hold certain posts or to exercise certain activities.

2. The same acts committed:

1) by a group of persons;

2) using an official position;

3) with the use of financial or other material assistance received from foreign, public associations and religious organizations, or other organizations, as well as foreign citizens;

4) during public events;

5) by a person previously convicted for crimes of extremist nature (extremist activity), –

are punishable by to a fine of between 3,000 and 7,000 notional units or deprivation of liberty for between 7 and 10 years with forfeiture of the right to hold certain posts or to exercise certain activities.”

¹⁵⁸ Art 299¹ of the Kyrgyz Criminal Code. Organization of activities intended to incite ethnic, racial, religious or interreligious hatred.

“1. The establishment and leadership of voluntary associations, religious organizations or any other organizations

whose activities are linked to inciting ethnic, racial, religious or interregional hatred, denigrating national pride or promoting exclusivity, superiority or inferiority of citizens on the grounds of their religion, are punishable by a fine of between 1,000 and 5,000 notional units or deprivation of liberty for between 5 and 7 years, with forfeiture of the right to hold certain posts or to engage in certain activities for up to 3 years

2. The organization of the activities of voluntary associations, religious organizations or other organizations in respect of which there has been a court decision to dissolve them or to ban their activities for reasons of extremist activities, and the involvement of citizens in their activities are punishable by a fine of between 2,000 and 6,000 notional units or deprivation of liberty for between 6 and 8 years, with forfeiture of the right to hold certain posts or to engage in certain activities

3. Involvement in the activities of voluntary associations, religious organizations or other organizations whose dissolution has been ordered or activities have been proscribed by a court on the grounds that they are carrying on extremist activities is punishable by a fine of between 1,000 and 3,000 notional units or deprivation of liberty for between 3 and 5 years, with forfeiture of the right to hold certain posts or to engage in certain activities

4. Acts provided for in paragraphs 1, 2 and 3 of the Act, committed with abuse of an official position or by a person with a previous conviction for extremist offences (extremist activities) are liable to a fine of between 3,000 and 7,000 notional units or deprivation of liberty for between 7 and 10 years with forfeiture of the right to hold certain posts or to exercise certain activities.

Note. A person, who willingly stopped participating in the activity of a public or a religious association or other organization, in respect of which there is a court decision which took legal effect about the prohibition of their activity or liquidated on account of the implementation of extremism by them, or if the person cooperated with the law enforcement in holding the organizers and members of such association or organization accountable, shall be acquitted of criminal liability, if his offences do not have another *corpus delicti*."

¹⁵⁹ Latvian Criminal Code, Art. 48, para. 1, cl. 14: "if the crime is committed based on a racist motive."

¹⁶⁰ Section 78. National, Ethnic and Racial Hatred

"(1) An operation which deliberately focuses on national, ethnic or racial hatred is

punishable by imprisonment for a term not exceeding three years or a short custodial sentence or community service, or a fine.

(2) The same acts, if they are associated with violence or threats, or if they are committed by a group of persons or

a public official, or a responsible officer of an organisation (company), or if committed by means of an automated data processing system are

punishable by imprisonment for a term not exceeding ten years, with or without probation supervision for a period of up to three years.

¹⁶¹ Insult to feelings is represented in two different forms in Latvian legislation. Ethnic feelings are covered by a separate article 158 of the Criminal Code, which was however removed from the Criminal Code in 2009: religious feelings are still included in the more general article. 150 (See below).

¹⁶² Section 79. Cultural and national heritage destruction
"The intentional destruction of cultural and national heritage is punishable by imprisonment for a term not exceeding twelve years."

¹⁶³ Art. 150 of the Latvian Criminal Code is quite comprehensive:

"For a person who directly or indirectly restricts the rights of persons or who creates any preferences whatsoever for persons, on the basis of the attitudes of such persons towards religion, excepting activities in the institutions of a religious denomination, or who violates the religious sensibilities of persons or who commits incitement to hatred in connection with the attitudes of such persons towards religion or atheism, the applicable sentence is deprivation of liberty for a term not exceeding two years, or community service, or a fine not exceeding 40 times the minimum monthly wage."

¹⁶⁴ "Racist motive."

¹⁶⁵ Art. 741. Acquittal of Genocide, Crime against Humanity.

"For a person who commits public glorification of genocide, a crime against humanity, a crime against peace or a war crime or public denial or acquittal of the crime of genocide, crimes against humanity, crimes against peace or war crimes,

the applicable punishment is deprivation of liberty for a term of not exceeding five years or temporary deprivation of liberty, or community service."

¹⁶⁶ Insult to religious feelings; see above in Art. 150.

¹⁶⁷ Sec. 33, para. 5, of the Liechtenstein Criminal Code lists racist, xenophobic or other particularly reprehensible motives as aggravating circumstances.

¹⁶⁸ Section 283 – Racial discrimination

I. "A person shall be punished with imprisonment of up to two years if he or she:

1. publicly incites hatred or discrimination against a person or a group of persons on the basis of race, ethnicity or religion;

2. publicly disseminates ideologies aimed at the systematic disparagement or defamation of members of a race, ethnicity or religion;

3. organizes, promotes, or participates in propaganda actions with the same objective;

4. publicly disparages or discriminates against a person or a group of persons on the basis of race, ethnicity or religion in a manner violating human dignity, by means of spoken words, writing, images, electronically transmitted symbols, gestures, physical violence or any other means;

5. publicly denies, grossly plays down the harm or attempts to justify genocide or other crimes against humanity, by means of spoken words, writing, images, electronically transmitted symbols, gestures, physical violence or any other means;

6. denies a service he or she provides that is meant for the general public to a person or a group of persons on the basis of race, ethnicity or religion;

7. participates as a member in an association whose activities consist of promoting and inciting racial discrimination.”

II. “A person shall be punished in the same manner, if the person

1. manufactures, imports, stores or distributes, for the purposes of further dissemination, documents, sound or image recordings, electronically transmitted symbols, depictions or other objects of this sort whose content is racial discrimination within the meaning of paragraph I;

2. publicly recommends, exhibits, offers or presents them.”

III. “Paragraphs I and II do not apply if the propaganda material or the act serves the purpose of art or science, research or education, appropriate reporting on current events or history, or similar purposes.”

¹⁶⁹ Insult is mentioned in Sec. 283 (see above), and Sec. 189 (see below), specifically in relation to religious feelings.

¹⁷⁰ Section 126 – Aggravated criminal damage

1. “A person is liable to a term of imprisonment not exceeding two years or to a fine of up to 360 days’ pay, if he or she has committed aggravated criminal damage against:

1. an object, which is used for a service or worship in a church or by a religious society located on the territory;

2. a grave, any other burial place, a tombstone or a memorial to the dead, which is in a cemetery or in a place of worship”

¹⁷¹ The term “xenophobic” in Russia is usually understood in terms of ethnic differences, but in Liechtenstein it can be connected with country of origin.

¹⁷² “xenophobic or other particularly reprehensible motives.”

¹⁷³ P. 2 Sec. 283 of the Criminal Code (see above) with important note in part 3.

¹⁷⁴ Cl. 7 p. 1 cl. 283 of the Criminal Code.

¹⁷⁵ Cl. 5 p. 1 Sec. 283 of the Criminal Code.

¹⁷⁶ Section 188 – Disparaging of religious precepts

“Whoever publicly disparages or mocks a person or a thing, respectively, being an object of worship or a dogma, a legally permitted rite, or a legally permitted institution of a church or religious society located on the territory in a manner capable of giving rise to justified annoyance, is liable to imprisonment for a term not exceeding six months or to a fine of up to 360 days’ pay.”

¹⁷⁷ Art. 60, p. 1, cl. 12 of the Lithuanian Criminal Code reads: “the act has been committed in order to express hatred towards a group of persons or a person belonging thereto on grounds of age, sex, sexual orientation, disability, race, nationality, language, descent, social status, religion, convictions or views.”

¹⁷⁸ The specific aggravation is formulated as: “to express hatred towards a group ...” followed by the list of characteristics from Art. 60 (see above). This applies to Murder (Art. 129), Grave Injury (Art. 135) and Non-Grave Injury (Art. 138).

¹⁷⁹ Article 170. Incitement against Any National, Racial, Ethnic, Religious or Other Group of Persons

“1. A person who, for the purposes of distribution, produces, acquires, sends, transports or stores items ridiculing, expressing contempt for, urging hatred of or inciting discrimination against a group of persons or a person belonging thereto on grounds of sex, sexual orientation, race, nationality, language, descent, social status, religion, convictions or views or who incites violence, physical violent treatment of such a group of persons or the person belonging thereto or distributes such items

shall be punished by a fine or by restriction of liberty or by arrest or by imprisonment for a term of up to one year.

2. A person who publicly ridicules, expresses contempt for, urges hatred of or incites discrimination against a group of persons or a person belonging thereto on grounds of sex, sexual orientation, race, nationality, language, descent, social status, religion, convictions or views

shall be punished by a fine or by restriction of liberty or by arrest or by imprisonment for a term of up to two years.

3. A person who publicly incites violence or physical violent treatment of a group of persons or a person belonging

thereto on grounds of sex, sexual orientation, race, nationality, language, descent, social status, religion, convictions or views or finances or otherwise supports such activities

shall be punished by a fine or by restriction of liberty or by arrest or by imprisonment for a term of up to three years.

4. A legal entity shall also be held liable for the acts provided for in this Article.”

¹⁸⁰ Insult is specifically mentioned in Art. 170 of the Lithuanian Criminal Code.

¹⁸¹ Art. 312² criminalises vandalism of graveyards that is motivated by hatred.

¹⁸² This may be what is meant by “origin” in Lithuanian legislation.

¹⁸³ Age, origin, social status.

¹⁸⁴ Social status.

¹⁸⁵ Other group of persons.

¹⁸⁶ Distribution of materials is specifically mentioned in Art. 170 of the Criminal Code.

¹⁸⁷ Art. 170¹. Creation and Activities of Groups and Organisations Aiming at Discriminating against a Group of Persons or Inciting Discrimination against such a Group

“1. A person who creates a group of accomplices or an organized group or organization aiming at discriminating against a group of persons on grounds of sex, sexual orientation, race, nationality, language, descent, social status, religion, convictions or views or inciting discrimination against it or who participates in the activities of such a group or organization or finances or otherwise supports such a group or organization

shall be punished by a fine or by restriction of liberty or by arrest or by imprisonment for a term of up to one year.

2. A legal entity shall also be held liable for the acts provided for in this Article.”

¹⁸⁸ Art. 170². Public approval of international crimes, public approval of the crimes committed by the USSR or by Nazi Germany against the Republic of Lithuania or its residents, denial or gross understatement of such crimes.

“1. Whoever publicly approves the crime of genocide and other crimes against humanity or war crimes, established by the legislation of the Republic of Lithuania, acts of the European Union, the final (res judicata) decisions of the Lithuanian courts or decisions of international courts, denies or grossly understates such crimes, if the acts are committed in a threatening, abusive or insulting manner or caused the

breach of public order; also if he or she publicly approves the aggression of the USSR or Nazi Germany against Lithuania, as well as the crime of genocide or other crimes against humanity and war crimes committed by the Soviet Union or Nazi Germany in the territory of the Republic of Lithuania with respect to residents of the Republic of Lithuania, or approves serious or grave crimes committed in the years 1990-1991, or who denies or grossly understates them, if this was committed in a threatening, abusive or insulting manner or caused public disorder, –

shall be penalized by a fine, restriction of freedom or arrest, or imprisonment of up to two years.

2. A legal entity shall also be held liable for the acts provided for in this Article.”

¹⁸⁹ Art. 457¹ of the Criminal Code of Luxembourg criminalizes calls to discrimination, hatred and violence, on the grounds listed in Art. 454 of the Criminal Code, which defines discrimination as: “Any distinction between individuals on account of their origin, skin color, gender, sexual orientation, civil status, age, state of health, disability, morals, political or philosophical opinions or trade union activities, or their actual or supposed membership or non-membership of a particular ethnic group, nation, race or religion, shall constitute discrimination.

Any distinction between legal entities or groups or communities of people on account of their origin, skin color, gender, sexual orientation, civil status, age, state of health, disability, morals, political or philosophical opinions or trade union activities of some or all of their members, or their actual or supposed membership or non-membership of a particular ethnic group, nation, race or religion, shall also constitute discrimination.”

Methods of discrimination themselves are listed in Art. 455.

According to Art. 457¹ the following shall be punished with imprisonment from eight days to two years and a fine of 251 euros to 25,000 euros or one of these penalties

“1) a person, whether through speeches, shouting or threats uttered in public places or meetings, or by written or printed matter, drawings, engravings, paintings, emblems, images or other media writing, speech or image sold or distributed, offered for sale or displayed in public places or public meetings, or by posters or posters displayed in public, or by any means of audiovisual communication, encourages the acts specified in Article 455, of hatred or violence against a person or entity, group or community, based on one of the elements referred to in Article 454 ;

2) a person who belongs to an organization, the objectives or activities of which are to commit any of the acts referred to in paragraph 1) of this section;

3) anyone who prints or has printed, manufactures, holds, transports, imports, exports, to be made, import, export or

transport, circulates in Luxembourg, sent from Luxembourg territory, presents the post office or other professional responsible for the distribution of mail in Luxembourg, transits through the territory of Luxembourg, writings, prints, drawings, engravings, paintings, posters, photographs, motion pictures, emblems, images or any other form of writing, speech or image, such as to encourage the acts specified Article 455, of hatred or violence against a person or entity, group or a community based on one of the elements referred to in Article 454.

The confiscation of the items listed above will be issued in all cases.”

¹⁹⁰ Vandalism of graves and of corpses (Art. 453 of the Criminal Code) is punished more severely, according to Art. 457² of the Criminal Code, if committed “in connection with real or supposed affiliation or non affiliation of the dead body with an ethnic group, nation, race or religion.”

¹⁹¹ The list begins with the term “origin,” which may indicate a national or other origin. The list also includes age, civil (i.e. marital) status, health status, disability, moral qualities, philosophical views and participation in union activities.

¹⁹² P. 3 Art. 457¹ above.

¹⁹³ P. 2 Art. 457¹ above.

¹⁹⁴ Art. 457³. (1) Any person who, either by speeches, shouting or threats uttered in public places or meetings or by written or printed words, drawings, engravings, paintings, emblems, images or any other form of writing, speech or image sold or distributed, offered for sale or displayed in public places or meetings, or by posters displayed in public, or by any means of audiovisual communication, challenges, minimizes, justifies or denies the existence of one or more crimes against humanity and war crimes as defined by Article 6 of the Statute of the international military court annexed to the London Agreement of 8 August 1945 and which have been committed either by members of an organization declared to be a criminal organization under Article 9 of the statute, or by a person convicted of such crimes by a Luxembourg court, foreign or international, shall be punished with imprisonment of from eight days to two years and a fine of 251 euros to 25,000 euros or only to one of these penalties.

(2) Any person who by the means set forth in the preceding paragraph, challenged, minimized, justified or denied the existence of one or several acts of genocide as defined by Article 136a of the Criminal Code, as well as crimes against humanity and war crimes, as defined in Articles 136ter and 136 quinquies of the Penal Code in a Luxembourg or international jurisdiction, shall be subject to the same penalties or to one of these penalties.”

¹⁹⁵ “Art. 144. Any person who, by facts, words, gestures, threats, writings or drawings, will insult objects of worship, or in areas normally used or intended for the exercise of, or in public ceremonies of the cult, shall be punished by imprisonment of fifteen days to six months and a fine of 251 euros to 5,000 euros.

Art. 145. Any person who, by facts, words, gestures, threats, writing or drawings, has insulted the minister of religion, in the exercise of his ministry shall be liable to the same penalties. Any person having committed such an act will be punished with imprisonment of from two months to two years and a fine of 500 euros to 5,000 euros.”

¹⁹⁶ Use of force is mentioned in Art. 319 quoted below.

¹⁹⁷ Article 319 of the Criminal Code of the Former Yugoslav Republic of Macedonia – Causing national, racial or religious hatred, discord and intolerance.

“1. A person who by force, mistreatment, endangering security, ridicule of national, ethnic or religious symbols, by damaging other people’s objects, by desecration of monuments, graves, or in some other manner causes or excites national, racial or religious hatred, discord or intolerance, shall be punished with imprisonment of one to five years.

2. A person who commits a crime from paragraph 1 by misusing his position or authority, or if because of these crimes, riots and violence were caused among people, or caused large damage to property, shall be punished with imprisonment of one to ten years.”

Article 417. Racial or other discrimination

“1. A person who, based on the difference in race, color of skin, nationality or ethnic affiliation, violates the basic human rights and freedoms acknowledged by the international community, shall be punished with imprisonment of six months to five years.

3. A person who spreads ideas about the superiority of one race above some other, or who advocates racial hatred, or instigates to racial discrimination, shall be punished with imprisonment of six months to three years.”

¹⁹⁸ See above: “A person who spreads ideas about the superiority of one race above some other.”

¹⁹⁹ Vandalism is included in the list of methods of incitement to hatred in Art. 319 of the Criminal Code.

²⁰⁰ Apparently, the wording of Art. 319 of the Criminal Code (see above) signifies that the word “national” relates to nationality of origin.

²⁰¹ Article 83B of the Criminal Code of Malta.

General Provision applicable to offences which are racially aggravated or motivated by xenophobia: “The punishment

established for any offence shall be increased by one to two degrees when the offence is racially or religiously aggravated within the meaning of sub-articles (3) to (6), both inclusive, of article 222A or is motivated, wholly or partly, by xenophobia.

Article 222A

Increase in punishment in certain cases: (2) "The punishments established in the foregoing provisions of this sub-title shall also be increased by one to two degrees when the offence is racially or religiously aggravated or motivated, wholly or partly, by xenophobia within the meaning of the following sub-articles. (3) An offence is racially or religiously aggravated or motivated by xenophobia if: (a) at the time of committing the offence, or immediately before or after the commission of the offence, the offender demonstrates towards the victim of the offence hostility, aversion or contempt based on the victim's membership (or presumed membership) of a racial or religious group; or (b) the offence is motivated, wholly or partly, by hostility, aversion or contempt towards members of a racial group based on their membership of that group (4) In sub-article (3) (a): "membership," in relation to a racial or religious group, includes association with members of that group; "presumed" means presumed by the offender. (5) It is immaterial for the purposes of sub-article (3) (a) or (b) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in those paragraphs. (6) In this article: "racial group" means a group of persons defined by reference to race, descent, color, nationality (including citizenship) or ethnic or national origins; "religious group" means a group of persons defined by reference to religious belief or lack of religious belief."

²⁰² Art. 82A in its p. 1 defines unacceptable statements as follows:

"whoever uses any threatening, abusive or insulting words or behavior, or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up racial hatred or whereby racial hatred is likely, having regard to all the circumstances, to be stirred up shall, on conviction, be liable to imprisonment for a term from six to eighteen months."

P. 2 specifies the notion of racial enmity as enmity against "a group of persons in Malta defined by reference to color, race, nationality (including citizenship) or ethnic or national origins."

²⁰³ The definition provided in Art. 222A of the Criminal Code includes a reference to ancestors.

²⁰⁴ A "xenophobic motive," could be formulated as a common aggravating circumstance, without specifying the specific type of xenophobia.

²⁰⁵ Art. 82B of the Criminal Code states: "Whoever publicly condones, denies or grossly trivializes genocide, crimes against humanity and war crimes directed against a group of persons or a member of such a group defined by reference to race, color, religion, descent or national or ethnic origin, when the conduct is carried out in a manner –

(a) likely to incite to violence or hatred against such a group or a member of such a group;

(b) likely to disturb public order or which is threatening, abusive or insulting, shall, on conviction, be liable to imprisonment for a term of from eight months to two years:

provided that for the purposes of this article, "genocide," "crimes against humanity" and "war crimes" shall have the same meaning assigned to them in article 54A."

Art. 82C is worded similarly to article. 82B, but refers to "crimes against peace." This category of crime is defined in p.2 as any complicity in the preparation of aggressive war or war in violation of international obligations.

Unlike in Art. 82C, the list of characteristics is supplemented by gender, gender identity, sexual orientation, language, beliefs, political or other views, but "descent or national or ethnic origin" is reduced to "ethnic origin."

²⁰⁶ Art. 77, cl. D of the Criminal Code of Moldova refers to "the commission of a crime due to social, national, racial, or religious hatred."

²⁰⁷ These are murder, intentional infliction of grievous bodily harm or other grievous health damage, intentional infliction of bodily harm of medium gravity or other moderate health damage, deliberate destruction or damage of property and profanation of graves.

²⁰⁸ Article 346. Deliberate Actions Aimed at Inciting National, Racial, or Religious Hostility or Discord

"Deliberate actions and public calls including through mass-media, either printed or electronic, which are aimed at inciting national, racial, or religious hostility or discord, the humiliation of national honor and dignity, direct or indirect limitations of rights, or that offer direct or indirect advantages to citizens based on their national, racial, or religious affiliations, shall be punished by a fine of up to 250 conventional units or by community service for 180 to 240 hours or by imprisonment for up to 3 years."

Furthermore, Article 176. Violation of Citizens' Equality of Rights, describes in its para. 1 discrimination "on the grounds of sex, race, color, language, religion, political, or any other opinions; national or social origin; association with a national minority; property; birth or any other situation," and in p. 2 refers to "encouragement or support" of such actions by the mass media.

²⁰⁹ Article 197. "Deliberate Destruction or Damaging

of Goods,” and Art. 222 “Profanation of graves,” contain the corresponding specific aggravation, while in Art. 288 “Vandalism,” the specific aggravation is formulated in para.2c as: “against goods with a historical, cultural, or religious value.”

²¹⁰ There is no certainty that the term “national” in this case refers to citizenship, although it is used in conjunction with the term “ethnic.”

²¹¹ Art. 176 also lists beliefs that may relate to worldview, attitudes and political affiliation.

²¹² The term “social hatred” is likely to mean something closer to the concept of “class-specific hatred.”

²¹³ Age is referred to in Art. 176.

²¹⁴ Other characteristics are referred to in Art. 176.

²¹⁵ Principality of Monaco Freedom of Public Expression Act No. 1.299 of 15 July 2005

Section 16

“A five-year prison sentence and the fine stipulated in Article 26.4 of the Criminal Code, or one of these penalties only, shall be imposed on anyone who, by one of the means listed in the preceding section, directly incites one of the following offences, where that incitement is not acted upon:

1. intentional homicide, intentional assault causing bodily injury or sexual assault;
2. theft, extortion or intentional destruction or damage putting people at risk;
3. acts of terrorism or attempts to justify such acts.

The same penalties shall apply to anyone who, by one of the means listed in Section 15, incites hatred or violence towards a person or group of people on account of their origin, their membership or non-membership of a particular ethnic group, nation, race or religion or their actual or supposed sexual orientation.”

²¹⁶ The article on defamation in the Freedom of Public Expression Act basically reproduces the article quoted above.

Section 24

“Defamation committed, by the same means, against an individual shall carry a prison sentence of one month to one year and the fine stipulated in Article 26.3 of the Criminal Code, or one of these penalties only. Defamation committed, by the same means, against a person or a group of people on account of their actual or supposed membership or non-membership of a particular ethnic group, nation, race or religion, or their actual or supposed sexual orientation, shall carry a prison sentence of one month to one year and the

fine stipulated in Article 26.3 of the Criminal Code, or one of these penalties only.”

²¹⁷ Presumably, the origin in the article quoted above is limited to national origin.

²¹⁸ Art. 207 of the Criminal Code of Monaco: “Anyone who insults a religious object by means of words or actions, either in a place of worship or a place used for worship at the time or during a religious ceremony performed elsewhere, or insults a minister of religion in the course of his or her duties, shall be subject to a prison sentence from one to six months and/or fine according to para. 2 of Art. 26.”

See also Section 43 of the Freedom of Public Expression Act:

“Defamation or insults against a public officer, a depositary or agent of public authority, a citizen asked to perform a public service or hold public office on a temporary or permanent basis, a minister of one of the state-funded religions, or a witness on account of his or her testimony, shall be prosecuted only upon a complaint lodged by the person concerned or, as appropriate, by the Minister of State, the Archbishop, the Director of the Judiciary or the Mayor.”

²¹⁹ Art. 86 of the Criminal Code of Mongolia, Violation of the equal rights of nations and ethnic groups.

“86.1. Propaganda intended to incite ethnic, racial or religious hatred between peoples, direct or indirect restriction of their rights by discrimination or establishing privileges shall be punishable with imprisonment for a term of 6 to 10 years.”

In several articles, the Mongolian Criminal Code distinguishes between “ethnic” and “national,” but, apparently, the second term also refers to ethnicity rather than to citizenship. There is also Art. 144 “Promotion and dissemination of vicious religious teachings,” but it apparently does not apply to manifestations of religious intolerance, places limits on some religious teachings as “vicious.”

²²⁰ Article 370 of the Criminal Code of Montenegro, Causing national, race and religious hatred, divisions and intolerance

“Anyone who causes and spreads national, religious or race hatred, divisions or intolerance among people, national minorities or ethnic groups living in Montenegro, shall be punished by imprisonment for a term of six months to five years. If an act described in Paragraph 1 of this Article is done by coercion, maltreatment, endangering of safety, exposure to mockery of national, ethnic or religious symbols, by damaging another person’s goods, by desecration of monuments, memorial-tablets or tombs, the offender shall be punished by imprisonment for a term of one to eight years. Anyone who commits an act referred to in Paragraphs 1 and 2 of this Article by abusing his/her position or authority or if as the result of these acts

riots, violence or other severe consequences for the cooperative life of people, national minorities or ethnic groups living in Montenegro occur, shall be punished, for an act as described in Paragraph 1 of this Article by imprisonment for a term of one to eight years, and for an act described in Paragraph 2, by imprisonment of two to ten years.

²²¹ Vandalism is seen as a form of hate speech and is considered an aggravating circumstance in relation to it..

²²² Article 137d of the Criminal Code of the Netherlands:

1. "Any person who verbally or by means of written or pictorial material publicly incites hatred against or discriminating of other persons or violence against the person or the property of others on account of their race, religion, convictions, sex, heterosexual or homosexual preference or physical, mental or intellectual disability, shall be liable to a term of imprisonment not exceeding one year or to a fine of the third category."

²²³ Article 137c

1. "Any person who verbally or by means of written or pictorial material gives intentional public expression to views insulting to a group of persons on account of their race, religion or convictions, their heterosexual or homosexual preferences or physical, mental or intellectual disability, shall be liable to a term of imprisonment not exceeding one year or to a fine of the third category."

Article 137e

1. Any person who for reasons other than the provision of factual information:

a. makes public an utterance which he knows or can reasonably be expected to know is insulting to a group of persons on account of their race, religion or convictions, heterosexual or homosexual preference, or physical, mental or intellectual disability, or which incites hatred against or discrimination of other persons or violence against the person or property of others on account of their race, religion or convictions, heterosexual or homosexual preference or physical, mental or intellectual disability;

b. distributes any object which he knows or can reasonably be expected to know contains an utterance, or has in his possession any such object with the intention of distributing it or making the said utterance public; shall be liable to a term of imprisonment not exceeding six months or to a third category fine."

²²⁴ The broad term "beliefs" is used in Dutch legislation.

²²⁵ See para. b of Art. 137e above.

²²⁶ Article 147 of the Criminal Code of the Netherlands states:

"A term of imprisonment of not more than three months

or a fine of the second category shall be imposed upon:

1. a person who publicly, either orally or in writing or by image, offends religious sensibilities by malign blasphemies;

2. a person who ridicules a minister of religion in the lawful execution of his duties;

3. a person who makes derogatory statements about objects used for religious celebration at a time and place at which such celebration is lawful."

²²⁷ Norwegian Criminal Code Article 77

"Now provides that such an aggravating circumstance occurs when the background of an offence is inter alia, another person's religion or belief, skin color, national or ethnic origin or other circumstances concerning groups who are in special need of protection."

²²⁸ Article 135a of the Norwegian Criminal Code states:

"Any person who willfully or through gross negligence publicly utters a discriminatory or hateful expression shall be liable to fines or imprisonment for a term not exceeding three years. An expression that is uttered in such a way that it is likely to reach a large number of persons shall be deemed equivalent to a publicly uttered expression, cf. Section 7, No. 2. The use of symbols shall also be deemed to be an expression. Any person who aids and abets such an offence shall be liable to the same penalty.

A discriminatory or hateful expression here means threatening or insulting anyone, or inciting hatred or persecution of or contempt for anyone because of his or her

- skin colour or national or ethnic origin,
- religion or life stance, or
- homosexuality, lifestyle or orientation."

²²⁹ The above article lists insult of the people in the group, as well as calls for contempt towards such persons.

²³⁰ Art. 292 of the Norwegian Criminal Code on vandalism considers the following, to be aggravating circumstances, among others: a racist motive and the fact that the damaged object has a "historical, ethnic or religious significance to the public or to a large number of people."

²³¹ Reference is made to "any other circumstances relating to groups in need of special protection."

²³² Art. 135a of the Criminal Code uses the very vague expressions "life stance" and "lifestyle," but the former is paired with religion, and the latter appears between the words "homosexuality" and "orientation," indicating that these expressions are quite limited in meaning.

²³³ Article 330 of the Norwegian Criminal Code states:

"Any person who establishes or participates in any

association that is prohibited by law, or whose purpose is the commission or encouragement of offences, or whose members pledge themselves to unconditional obedience to any person, shall be liable to fines or to detention or imprisonment for a term not exceeding three months. If the purpose of the association is to commit or encourage felonies, imprisonment for a term not exceeding six months may be imposed.”

²³⁴ Paragraph 142 of the Norwegian Criminal Code states:

“Any person who by word or deed publicly insults or in an offensive or injurious manner shows contempt for any creed whose practice is permitted in the realm or for the doctrines or worship of any religious community lawfully existing here, or who is accessory thereto, shall be liable to fines or to detention or imprisonment for a term not exceeding six months.

A prosecution will only be instituted when the public interest so requires.”

²³⁵ Article 119 of the Polish Criminal Code states:

“1) Whoever uses violence or makes an unlawful threat towards a group of person or a particular individual because of their national, ethnic, political or religious affiliation, or because of their lack of religious beliefs, shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years. 2.) The same punishment shall be imposed on anyone who incites commission of the offence specified under 1.)”

²³⁶ Art. 118 of the Polish Criminal Code punishes murder committed on grounds of ethnic, racial, political or religious affiliation.

²³⁷ According to the same Art. 119 of the Criminal Code, the *corpus delicti* of “a call to commit hate crimes” is the basis for the criminalization of statements.

There is also other wording in Art. 126a, which is basically a repetition: it refers to “public calls” to the offences qualified by, among other things, para. 1 of Art. 119. The penalty provided is a fine or imprisonment of from 3 months to 5 years.

There is also another relevant article:

Article 256. Promotion of fascism or other totalitarian system

“An offence is committed by anyone who promotes a fascist or other totalitarian system of government or who incites hatred based on national, ethnic, race or religious differences or on the lack of any religious denomination.

Such offence is subject to a fine, or to the penalty of deprivation of liberty for up to two years.”

²³⁸ Article 257. Publicly insulting a group of people or an individual person by reason of their national, ethnic or racial affiliation

“An offence is committed by anyone who publicly insults

a group within the population or a particular person because of his national, ethnic, race or religious affiliation or because of his lack of any religious denomination or for these reasons breaches the personal inviolability of another individual: such offence is punishable by imprisonment for up to three years.”

²³⁹ The Act on the Institute of National Remembrance of 18 December 1998 stipulates penalties of up to three years in prison for public denial conflicting with the facts of the crimes committed against Poles and Polish citizens during World War II, including those committed by the Nazis and Communists, as well as the facts of politically motivated repressions of the following years.

“Art. 1. The act regulates:

1) the recording, collecting, storing, processing, securing, making available and publishing of the documents of the state security authorities, produced and accumulated from July 22, 1944 until July 31, 1990, as well as the documents of the security authorities of the Third Reich and the Soviet Union relating to:

a)

- the Nazi crimes,

- the communist crimes,

- other crimes against peace, humanity or war crimes, perpetrated on persons of Polish nationality or Polish

citizens of other nationalities between September 1, 1939 until July 31, 1990,

b) other politically motivated reprisals, instigated by the officers of the Polish law enforcement agencies or the judiciary or persons acting on their order which were disclosed in the contents of the rulings made on the strength of the Act, dated February 23, 1991, on considering as invalid the rulings made in the cases of persons oppressed for their activities for the cause of an independent Polish State (Journal of Laws No. 34, section 149, with later amendments).

Art. 55. Anyone who publicly and contrary to the facts denies crimes referred to in art. 1, point 1 shall be subject to a fine or the penalty of imprisonment of up to 3 years. The sentence shall be made public.”

²⁴⁰ Art. 195 of the Polish Criminal Code contains the usual provisions that criminalize unlawful interference with worship and the like. The following additional paragraph was added: “Anyone found guilty of offending religious feelings through public calumny of an object or place of worship is liable to a fine, restriction of liberty or a maximum two-year prison sentence.”

²⁴¹ Aggravating circumstances associated with the motive of hatred on the grounds of racial, religious or political hatred, are provided for the crimes of murder and of inflicting bodily harm (Articles 132 and 146 of the Portuguese Criminal Code, respectively).

²⁴² Article 240 of the Criminal Code of Portugal, Racial or religious discrimination

2. "Anyone who, in a public assembly, in writing intended to be divulged or by any means of mass communication:

a. provokes acts of violence against a person or a group of persons because of his race, color, ethnic or national origin or religion; or

b. defames or insults a person or group of persons because of his race or ethnic or national origin or religion, especially through the negation of war crimes or of crimes against peace and humanity, intending to incite to racial or religious discrimination or to encourage it, is punishable with imprisonment from six months to five years."

Article 251. Slander based on religious belief

1. "Anyone who publicly offends or derides a person because of his religious belief or function, in a manner sufficient to breach the peace, is punishable with imprisonment of up to one year or a fine of up to 120 days' pay.

2. The same penalty applies to anyone "who desecrates a place or object of cult of religious veneration in a manner sufficient to breach the peace."

²⁴³ See above cl. B of part 2 of Art. 240 of the Portuguese Criminal Code.

²⁴⁴ It can be assumed that the concept of "political hatred" is likely to relate not only to membership in certain organizations, but this is debatable.

²⁴⁵ Portuguese law No. 64/78 of 6 October 1978 concerning the fascist party contains this reference in its chapter on the prohibition of these groups.

²⁴⁶ The reference is to mention of the denial of war crimes or crimes against humanity in Art. 240 of the Criminal Code. See above.

²⁴⁷ Art. 75, p. 1, cl. c in the new Romanian Criminal Code, which came into force in February 2014, and Art. 77 cl. h) stipulate that the commission of the crime "for reasons related to race, nationality ethnicity, language, gender, sexual orientation, political opinion or allegiance, wealth, social origin, age, disability, chronic non-contagious disease or HIV/AIDS infection" is an aggravating circumstance

²⁴⁸ Art. 317 stipulates a fine or imprisonment for a term of six months to three years for "inciting hatred on grounds of race, nationality, ethnicity, language, religion." In the new edition of the Criminal Code, Art. 369 refers to inciting the public to hatred or discrimination against a category of individuals through any means, without specifying these categories.

Article 166. Propaganda in favor of a Totalitarian State
"Systematic dissemination, by any means whatsoever, of ideas, conceptions or doctrines advocating the creation of a totalitarian state, including incitement to murder people considered to belong to an inferior race is subject to imprisonment of from 6 months up to 5 years and to disqualification from the exercise of certain rights.

Emergency Ordinance No. 31 of 13 March 2002 on banning organizations and symbols of a fascist, racist or xenophobic character and banning promotion of the religion of persons who are guilty of committing crimes against peace and humanity

Article 1

"For the prevention and control of incitement to national, racial or religious hatred, discrimination and the perpetration of crimes against peace and humanity, the present ordinance regulates the banning of organizations and symbols of a fascist, racist or xenophobic character and the banning of promotion of the religion of persons who are guilty of committing crimes against peace and humanity.

This offence is punishable for from 6 months up to 5 years' imprisonment and disqualification from the exercise of certain rights."

This ordinance allows the disseminating, selling or manufacturing (or depositing for the purpose of disseminating) of the mentioned symbols, as well as their public use, only if these are for the purpose of art, science, research, education, security, protection of public order, health, public morality or protection of the rights and fundamental liberties of the human being.

Law No. 48 of 16 January 2002 for approval of Government Ordinance No. 137/2000 regarding the prevention and punishment of every form of discrimination

Article 19

"According to this ordinance, it is a minor offence, unless the deed falls under the sentence of the criminal law, for any conduct to be displayed in public with a character of nationalist-chauvinist propaganda, of instigation to racial or national hatred, or that type of behavior with the purpose or aim of affecting dignity or creating an atmosphere that is intimidating, hostile, degrading, humiliating or outrageous, directed against a person, a group of people or a community and connected with their affiliation to a certain race, nationality, ethnic group, religion, social or non-favored category or their beliefs, sex or sexual orientation."

²⁴⁹ The law includes a reference to HIV-positive status.

²⁵⁰ Income level, social origin, age.

²⁵¹ Unpopular groups in the aforementioned Act number 48.

²⁵² Social groups in the aforementioned Act number 48.

²⁵³ This issue is regulated by said Emergency Ordinance No. 31 of March 13, 2002, cl. A Art. 2 of which defines a "fascist, racist or xenophobic group" as a group of three people who "acts in favor of fascist, racist or xenophobic ideas, concepts and doctrines of hate, violence on ethnic, racial or religious superiority or inferiority, anti-Semitism, extreme nationalism, xenophobia and calls for the use of violence to change the constitutional order and democratic institutions." Art. 3 stipulates the punishment for taking part in such an organization and assisting it to be from 3 to 15 years in prison.

²⁵⁴ Emergency Ordinance No. 31 of March 13, 2002 [Entered into force in May 2006].

Art. 6: "The public denial of the Holocaust, genocide or crimes against humanity or their consequences shall be punished with imprisonment from six months to five years and revocation of rights."

²⁵⁵ According to para. "E" p. 1, Art. 63 of the Criminal Code of the Russian Federation, the following constitute aggravating circumstances to any crime: "a crime motivated by political, ideological, racial, ethnic or religious hatred or enmity or hatred or enmity against any social group."

²⁵⁶ Similarly-worded specific aggravations are listed in 11 articles of the Russian Criminal Code: 105 ("Murder"), 111 ("Intentional Infliction of a Grave Injury"), 112 ("Intentional Infliction of Injury of Average Gravity to Health"), 115 ("Intentional Infliction of Light Injury"), 116 ("Battery"), 117 ("Torture"), 119 ("Threat of murder or Infliction of Grave Injury to Health"), 150 ("Involvement of a minor in the commission of a crime"), 213 ("Hooliganism"), 214 ("Vandalism"), 244 ("Outrages upon Bodies of the Deceased and Their Burial Places.") In this last case, the wording is expanded by the addition of the following phrase: "as well as in relation to sculptural and architectural structures, dedicated to the fight against fascism or victims of fascism, or to the burial places of fighters against fascism".

²⁵⁷ The main corpus delicti of Art. 2052 of the Criminal Code: "Public Calls for Committing of Terrorist Activity or Public Justification of Terrorism," contains an important note: "In the present article 'the public justification of terrorism' means a public statement on the recognition of the ideology or practices of terrorism as correct, and worthy of support and a following."

Article 280. Public Appeals for the Performance of Extremist Activity [Note: This article and the one that follows were introduced in October 2014. – A.V.]

1. Public appeals for the performance of extremist activity

–
"Shall be punishable with a fine in an amount of up to 300 thousand roubles, or in the amount of the wage or salary, or any other income of the convicted person for a period of up to two years, or by compulsory labor for a term of up to three years, or by arrest for a term of four to six months, or by deprivation of liberty for a term of up to three years with the deprivation of the right to occupy certain posts or to engage in a certain activity for the same time term.

2. The same acts, committed with the use of the mass media, or information-communication networks, including the Internet

shall be punishable by compulsory labor for a term of up to five years with deprivation of the right to hold specified offices or to engage in specified activities for a term of up to three years or without such, or by deprivation of freedom for a term of up to five years with deprivation of the right to hold specified offices or to engage in specified activities for a term of up to three years."

Article 282. Incitement to hatred or Enmity, as Well as Abasement of Human Dignity.

1. Actions aimed at the incitement to hatred or enmity, as well as abasement of dignity of a person or a group of persons on the basis of sex, race, nationality, language, origin, attitude to religion, as well as affiliation to any social group, if these acts have been committed in public or with the use of mass media,

shall be punishable with a fine in the amount of 100 thousand to 300 thousand rubles, or in the amount of a wage/salary or any other income of the convicted person for a period of one to two years, or with deprivation of the right to hold specified offices or to engage in specified activities for a term of up to three years, or with obligatory labor for a term of up to 360 hours, or with corrective labor for a term of up to one year, or with compulsory labor for a term of up to two years, or with deprivation of liberty for the same term.

2. The same deeds committed:

- a) with the use of violence or with the threat of its use;
- b) by a person through his official position;
- c) by an organized group,

– shall be punishable with a fine in the amount of 100 thousand to 500 thousand rubles, or in the amount of a wage/salary or any other income of the convicted person for a period of one to three years, or with deprivation of the right to hold specified offices or to engage in specified activities for a term of up to five years, or with obligatory labor for a term of up to 480 hours, or with corrective labor for a term of one to two years, or with compulsory labor for a term of up to five years, or with deprivation of liberty for the same term."

²⁵⁸ See the corpus delicti of Art. 282 of the Russian Criminal Code above.

²⁵⁹ This is considered to be a specific aggravation in Art. 214 and 244 of the Russian Criminal Code (see above).

²⁶⁰ The characteristic of “origin” used in Art. 282 of the Russian Criminal Code is given no explanation.

²⁶¹ The characteristic of belonging to a particular social group has no universally accepted interpretation nor any interpretation that has been approved by authoritative entities.

²⁶² Art. 282¹. Organizing an Extremist Community.

1. “Creation of an extremist community, that is, of an organized group of persons for the preparation or committing of crimes with an extremist thrust, as well as the leadership of such an extremist community, of a part of it or of the structural subdivisions included in such community, and also setting up an association of the organizers, leaders or other representatives of the parts or of the structural subdivisions of such community for the purposes of elaboration of the plans or the conditions for committing crimes with an extremist thrust –

shall be punished by a fine in an amount of two to five hundred thousand rubles or in an amount of the wages or of a different income of a convict for a period of eighteen months to three years, or by compulsory labor for a term of up to five years with restraint of liberty for a term of one to two years, or by the deprivation of freedom for a time term of two to eight years with the deprivation of the right to occupy certain posts or to engage in certain activities for a term of up to ten years, and with restriction of freedom for a term of from one to two years.

1.1. Inducement, recruitment or other engagement of a person into the activities of an extremist community –

shall be punished by a fine in an amount from two to five hundred thousand rubles or in an amount of the wages or of a different income of a convict for a period of one to two years, or by compulsory labor for a term of up to four years with restraint of liberty for a term of one to two years, or by the deprivation of freedom for a time term of up to six years, and with the restriction of freedom for a term of from one to two years.

2. Participation in an extremist community –

shall be punished with a fine in an amount of up to 100 thousand rubles, or in the amount of the wages or of the other income of the convicted person for a period of up to one year, or by compulsory labor for a term of up to three years with deprivation of the right to hold specified offices or to engage in specified activities for a term of up to three years or without such and with restraint of liberty for a term

of up to one year, or by imprisonment for a term of up to four years with the deprivation of the right to occupy specific posts or to engage in specific kinds of activity for a term of up to five years, or without any term and with restriction of liberty for a term of up to one year

3. The actions envisaged in the first and second parts of the present Article committed by a person with the use of his official status, –

shall be punished with a fine in an amount of 300 thousand to 700 thousand rubles, or in the amount of the wages or of other income of the convicted person for a period of two to three years, or by compulsory labor for a term of up to five years with deprivation of the right to hold specified offices or to engage in specified activities for a term of up to three years or without such and with restraint of liberty for a term of one to two years, or by imprisonment for a term of four to ten years with the deprivation of the right to occupy specific posts or to engage in specific kinds of activity for a term of up to ten years or without such and with restriction of liberty for a term of from one to two years.

Note.

1. A person who voluntarily stops his/her participation in the activities of a social or religious association or other organization in respect of which a court of law has rendered an effective decision on the liquidation thereof or on the prohibition of its activities in connection with the exercise by it of extremist activities, shall be relieved of criminal liability unless a different corpus delicti is contained in his/her actions.

2. Crimes with an extremist thrust referred to in this Code mean those crimes committed by reason of political, ideological, racial, national or religious hatred or enmity or by reason of hatred or enmity with respect to some social group provided for by appropriate Articles of the Special Part of this Code and by item (f) of Part One of Article 63 of this Code.

Art. 282². Organizing the Activity of an Extremist Community.

1. Organizing the activity of a public or religious association or of another organization, with respect to which a court has adopted an already enforced decision on the liquidation or prohibition of the activity in connection with the performance of an extremist activity, except for the organizations recognized as terrorist organizations in accordance with the law of the Russian Federation – shall be punished with a fine in an amount of 300 thousand to 500 thousand rubles, or in the amount of the wages or of other income of the convicted person for a period of two to three years, or by compulsory labor for a term of up to five years with deprivation of liberty for a term of up to two years or without such, or by arrest for a term of from four to six months, or by imprisonment for a term of two to eight years and with the deprivation of the right to occupy certain posts or to engage in certain activities for a term of up to ten years or without such, and with the

restriction of freedom for a term of up to two years or without such.

2. Participation in the activity of a public or religious association or of another organization, towards which the court has adopted an already enforced decision on the liquidation or prohibition of the activity in connection with the performance of an extremist activity, except for those organizations recognized as terrorist organizations in accordance with the law of the Russian Federation –

shall be punished with a fine in an amount of up to 300 thousand rubles, or in the amount of the wages or other income of the convicted person for a period up to two years, or by compulsory labor for a term of up to three years with restraint of liberty for a term of up to one year or without such, or by arrest for a term of up to four months, or by the deprivation of freedom for a term of up to four years with the deprivation of the right to occupy certain posts or to engage in certain activities for a term of up to five years or without such and with restriction of liberty for a term of up to one year or without such.

3. Actions envisaged under the first or second part of this article, committed by a person using his official position, –

shall be punished with a fine in an amount of 300 to 700 thousand rubles, or in the amount of the wages or other income of the convicted person for a period of two to three years, or by compulsory labor for a term of up to five years with the deprivation of the right to occupy certain posts or to engage in certain activities for a term of up to three years, or by restraint of liberty for a term of one to two years, or by the deprivation of freedom for a term of up to seven years with the deprivation of the right to occupy certain posts or to engage in certain activities for a term of up to ten years or without such and with restriction of liberty for a term of up to two years.

Note. A person who has voluntarily ceased participation in the activity of a public or religious association or of another organization, towards which a court has passed an already enforced decision on the liquidation or prohibition of the activity in connection with the performance of an extremist activity, shall be relieved of criminal liability, unless a different corpus delicti is contained in his activity.”

Since December 2013 the Russian Criminal Code also features Art. 280⁴. Public calls for action aimed at violating the territorial integrity of the Russian Federation.

“1. Public calls for action aimed at violating the territorial integrity of the Russian Federation, –

shall be punished with a fine in an amount of 100 to 700 thousand rubles, or in the amount of the wages or other income of the convicted person for a period of one to two years, or by compulsory labor for a term of up to three years, or by arrest for a term of four to six months, or by the deprivation of freedom for a term of up to four years with the deprivation of the right to occupy certain posts or to engage

in certain activities for the same term.

2. The same acts, committed with the use of the mass media, or electronic information-communication networks, including the Internet, –

shall be punished by community service for a term of up to four hundred eighty hours with the deprivation of the right to occupy certain posts or to engage in a certain activity for a term of up to three years, or by the deprivation of freedom for a term of up to five years with the deprivation of the right to occupy certain posts or to engage in a certain activity for the terms of up to three years.”

²⁶³ A new Art. 354¹. Rehabilitation of Nazism was introduced in May of 2014.:

1. “A person who publicly denies facts recognized by the international military tribunal that judged and punished the major war criminals of the European Axis countries, who approves of the crimes this tribunal judged, and who spreads intentionally false information about the Soviet Union’s activities during World War II, –

shall be punished with a fine in an amount of up to 300 thousand rubles, or in the amount of the wages or other income of the convicted person for a period of up to two years, or by the deprivation of freedom for the same term.

2. The same acts committed by a person using his official position or using the mass media, as well as the artificial creation of prosecution evidence, –

shall be punished with a fine in an amount of 100 to 500 thousand rubles, or in the amount of the wages or other income of the convicted person for a period of up to one year, or by compulsory labor for a term of up to five years or by the deprivation of freedom for the same term with the deprivation of the right to occupy certain posts or to engage in a certain activity for the terms of up to three years.

3. Spreading of information on military and memorial commemorative dates related to Russia’s defense that is clearly disrespectful of society, and public desecration of symbols of Russia’s military glory, –

shall be punished with a fine in an amount of up to 300 thousand rubles, or in the amount of the wages or other income of the convicted person for a period of up to two years, or by community service for up to three hundred sixty hours, or by forced labor for the period of up to one year.”

²⁶⁴ In August of 2013 Art. 148 of the Russian Criminal Code was expanded to include two new sections: 1. Public action expressing clear disrespect for society and committed to insult religious feelings of believers, –

shall be punished with a fine in an amount of up to 300 thousand rubles, or in the amount of the wages or other income of the convicted person for a period of up to two years, or by community service for up to three hundred sixty hours, or by forced labor for the period of up to one year, or

by deprivation of freedom for the same period.

2. Actions under the first part of this article committed in places specially designated for worship and other religious rites and ceremonies, –

shall be punished with a fine in an amount of up to 500 thousand rubles, or in the amount of the wages or other income of the convicted person for a period of up to three years, or by community service for up to four hundred eighty hours, or by forced labor for the period of up to three year, or by deprivation of freedom for the same period with restriction of freedom for the period of up to one year or without such.”

²⁶⁵ Article 267 of the Criminal Code of San Marino– Blasphemy or contempt for the deceased

“Whoever publicly blasphemes is liable to reprehension or a fine of days of first degree.

Whoever publicly expresses contempt for the deceased is liable to the same penalty, at the request of the close relatives.”

Article 260. Religious insult

“Whoever desecrates the symbols or the objects of cult or worship of a religion which is not contrary to morals or publicly mocks the acts of a cult is liable to first-degree imprisonment.

The same penalty is applicable to attacks on the honor or prestige of a priest in or due to the exercise of his functions.

Whoever desecrates the sacred relics of San Marino is liable to second-term imprisonment.”

²⁶⁶ Art.54a of the Serbian Criminal Code reads:

“If a criminal offence is committed from hate based on race or religion, national or ethnic affiliation, sex, sexual orientation or gender identity of another, the court shall consider such circumstance as aggravating except when it is not stipulated as a feature of the criminal offence.”

²⁶⁷ Article 317. Incitement of national, racial, and religious hatred or intolerance:

(1) “Whoever instigates or exacerbates national, racial or religious hatred or intolerance among the peoples and ethnic communities living in Serbia, shall be punished by imprisonment of six months to five years.

(2) If the offence specified in paragraph 1 of this Article is committed by coercion, maltreatment, compromising security, exposure to derision of national, ethnic or religious symbols, damage to other persons, goods, desecration of monuments, memorials or graves, the offender shall be punished by imprisonment of one to eight years.

(3) Whoever commits the offence specified in paragraphs 1 and 2 of this Article by abuse of position or authority, or if these offences result in riots, violence or other grave consequences to co-existence of peoples, national minorities or ethnic groups living in Serbia, shall be punished for the offence specified in paragraph 1 of this Article by imprisonment of

one to eight years, and for the offence specified in paragraph 2 of this Article by imprisonment of two to ten years.

Article 387. Racial and Other Discrimination

Whoever on the grounds of race, color, nationality, ethnic origin, or other personal characteristic violates fundamental human rights and freedoms guaranteed by universally accepted rules of international law and international treaties ratified by Serbia shall be punished by imprisonment of six months to five years.

Whoever propagates ideas of superiority of one race over another or propagates racial intolerance or instigates racial discrimination shall be punished by imprisonment of three months to three years.”

²⁶⁸ Vandalism motivated by hatred is interpreted as an aggravating factor for hate speech – See above. para. 2 Art. 317 of the Serbian Criminal Code.

²⁶⁹ The Slovak Criminal Code contains an article that can be used as a way to criminalize any hate crime, but the article does not explicitly mention the hate motive.. The corpus delicti of Section. 359 “Violence against a Group of Citizens and against an Individual” is as follows: “Any person who threatens a group of citizens with killing, inflicting grievous bodily harm or other aggravated harm, or with causing large-scale damage, or who uses violence against a group of citizens, shall be liable to a term of imprisonment of up to two years “. Furthermore, cl. “a” of para. 2 of this Article stipulates a prison term of from 1.5 to three years if the crime is committed with a specific motivation provided for by Art. 140 (see below).

²⁷⁰ Sec. 140 of the Slovak Criminal Code provides two aggravating circumstances. Clause d refers to the aim of the crime to incite hatred or call for violence on the following grounds: “affiliation to any race, nation, nationality, skin color, ethnicity, origin family or for their religion,” if this is the reason for the threat. Cl. f refers to the motive of hatred on national, ethnic or racial grounds, or because of skin color or sexual orientation.

²⁷¹ The same motives (with a direct reference to Sec. 140) are also considered to be specific aggravations for a number of crimes, including cl. “e” p. 2 Sec. 144 – First degree murder, cl. “d” p. 2 Sec. 145 – Second degree murder, cl. “d” p. 2 Sec. 147 – Killing, cl. “c” p 2 Sec. 154 – Participating in a suicide, cl. “c” p. 2 Sec. 155 – Grievous bodily harm, cl. “b” p. 2 Sec. 156 – Moderate bodily harm, cl. “b” p. 3 Sec. 159 – Wrongful Taking of Organs, Tissues and Cells and Criminal Sterilization, cl. d p. 2 Sec. 360 – Threats, cl. “b” p. 2 Sec. 365 – Desecrating graves, cl. “d” p. 2 Sec. 366 – Indecent Interference with a Dead Body..

²⁷² Sec. 424. Incitement to national, racial and ethnic hatred

(1) “Any person who threatens an individual or group of persons because of their affiliation to any race, nation, nationality, skin color, ethnicity, gender or origin, and of their religious confession, or who restricts their rights and freedoms and opportunities, based on the foregoing considerations, or who encourages the restriction of rights and liberties of a nation, nationality, race or ethnic group, shall be punished by imprisonment of up to three years.

(2) As in paragraph 1, the following penalty shall be imposed on any person who associates or assembles to commit an act referred to in paragraph 1

(3) imprisonment of two to six years if the offender commits the criminal offense referred to in paragraph 1 or 2

- a) in connection with a foreign power or foreign agent,
- b) publicly,
- c) with the specific motivation,
- d) as a public official,
- e) as a member of an extremist group, or
- f) in a crisis situation.

Sec. 424a. Incitement, defamation and threats to persons belonging to one race, nation, nationality, color, ethnic origin or gender

(1) Any person who publicly

a) incites violence or hatred directed against a group of persons or individuals for their belonging to any race, nation, nationality, skin color, ethnicity, family of origin or for their religion, if it is a pretext for inciting the previous reasons, or

b) defames such a group or individual or threatens them; publicly justifies acts deemed under Articles 6, 7 and 8 of the Rome Statute of the International Criminal Court to constitute genocide, crimes against humanity or a war crime or offense considered in Article 6 of the Statute of the International Military Court attached to the Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis for a crime against peace, a war crime or crime against humanity, if such offense is committed against such a group of people or an individual, or if the offender or participant in this offense was convicted by an international court, and the conviction was not canceled in the prescribed procedures; publicly denies or downplays such serious offenses,

shall be punished by imprisonment of one to three years.

(2) Imprisonment for two to five years is applied if the offender commits the criminal offense referred to in paragraph 1 above regarding a special theme. [These themes are provided in Art. 140 of the Criminal Code, see above. – A.V.]”

²⁷³ Sec. 423. Defamation of nation, race and beliefs

(1) “Any person who publicly defames

a) any nation, its language, any race or ethnic group, or
b) an individual or group of persons because of their affiliation to any race, nation, nationality, skin color, ethnicity, origin, gender or religion or their lack of religious belief,

shall be punished by imprisonment of one to three years.

(2) Imprisonment for two to five years is applied if the offender commits the criminal offense referred to in paragraph 1

- a) in a group of at least two persons,
- b) in connection with a foreign power or foreign agent,
- c) as a public official,
- d) in a crisis situation, or
- e) with the specific motivation.

²⁷⁴ Cl. b para. 2 Sec. 365 of the Slovak Criminal Code.

²⁷⁵ Either family origin or simply origin.

²⁷⁶ Sec. 422a of the Slovak Criminal Code

Manufacturing of Extremist Materials

(1) “Any person who manufactures extremist materials or participates in such manufacture shall be liable to a term of imprisonment of three to six years.

(2) The offender shall be liable to a term of imprisonment of four to eight years if he commits the offence referred to in paragraph 1

- a) acting in a more serious manner,
- b) in public, or
- c) in the capacity of a member of an extremist group.

Sec. 422b. Dissemination of extremist materials

(1) Any person who disseminates, transports, procures, makes, markets, imports, exports, offers, sells, consigns or distributes extremist materials, shall be punished by imprisonment of one to five years.

(2) Imprisonment of three to eight years is applied if the offender commits the criminal offense referred to in paragraph 1

- a) in a grave manner,
- b) in public, or
- c) as a member of an extremist group.

Sec. 422c

Possession of extremist materials

“[any person] who harbors extremist materials shall be punished by imprisonment of up to two years.”

The definition of what constitutes extremist materials is defined in cl. 8 Sec. 130 of the Slovak Criminal Code:

“... for the purposes of this Act, ‘extremist materials’ refer to written texts, graphics, videos, and sound recordings:

a) of texts and declarations, banners, badges, passwords or symbols of groups and movements that lead to the suppression of basic human rights and freedoms,

b) of programs or ideologies of groups and movements that lead to the suppression of basic human rights and freedoms,

c) advocating, promoting or inciting hatred, violence or unjustifiably different treatment to an individual or group of persons because of their belonging to any race, nation,

nationality, color, ethnic origin, gender or their religious belief.

d) approving or justifying acts considered by Article 6 of the Statute of the International Military Tribunal of Justice, annexed to the Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis, and by relevant articles of the Statute of the International Criminal Court, or of under other international law, the power of which was recognized by the Slovak Republic, for genocide or for a crime against humanity, if the perpetrator or participant in the crime was convicted by an international court established under the international public law, the jurisdiction of which is recognized by the Slovak Republic, and the conviction was not canceled in the prescribed procedures, or

e) denying of grave crimes considered by Article 6 of the Statute of the International Military Tribunal of Justice, annexed to the Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis, and by relevant articles of the Statute of the International Criminal Court, or of under other international law, the power of which was recognized by the Slovak Republic, for genocide or for a crime against humanity, if the perpetrator or participant in the crime was convicted by an international court established under the international public law, the jurisdiction of which is recognized by the Slovak Republic.

9. The material is considered to be extremist in accordance with paragraph 8, if it is produced, distributed, put into circulation or made publicly accessible or harbored with intention to incite hatred, violence or unjustifiably different treatment against an individual or a group of persons because of their belonging to a race, nation, nationality, color, ethnic or family origin, or because of their religious belief. Everything listed above also pertains to a replica of extremist material or its imitation, which is interchangeable with the original.

²⁷⁷ Sec. 421 of the Slovak Criminal Code

(1) Any person who supports or fabricates propaganda for a group of persons or movement which, using violence, the threat of violence or the threat of other serious harm, demonstrably aims at suppressing citizens' fundamental rights and freedoms, shall be liable to a term of imprisonment of one to five years.

(2) The offender shall be liable to a term of imprisonment of four to eight years if he commits the offence referred to in paragraph 1

- a) in public,
- b) in the capacity of a member of an extremist group,
- c) acting in a more serious manner, or
- d) in a crisis situation.

Sec. 422

(1) Any person who publicly, especially by means of

banners, badges, uniforms or slogans, shows sympathy for the group or movements that advocate violence, the threat of violence or other serious injury leading to the suppression of fundamental rights and freedoms of persons, shall be punished by imprisonment for a six months to three years.

(2) As in paragraph 1 those persons shall be punished, who in the act referred to in paragraph 1 shall use altered flags, insignia, uniforms or slogans that appear authentic.

²⁷⁸ See above cl. b para. 1 Sec. 424a of the Slovak Criminal Code.

²⁷⁹ Defamation of religion as such is expressly covered by p. 1 Sec. 423 of the Slovak Criminal Code.

²⁸⁰ The Slovenian Criminal Code treats the violation of equality to be a specific aggravation if the former is the aim of the crimes of murder (p. 3 Art. 116) and torture (p. 1 art. 265).

Equality is defined in Art. 131 of the Criminal Code on discrimination, which lists a range of characteristics in its para. 1: "Whosoever due to differences in respect of nationality, race, skin color, religion, ethnic roots, gender, language, political or other beliefs, sexual orientation, financial situation, birth, genetic heritage, education, social position or any other circumstance, deprives or restrains another person of any human right or liberty recognized by the international community or laid down by the Constitution or the statute, or grants another person a special privilege or advantage on the basis of such discrimination, shall be punished by a fine or sentenced to imprisonment for not more than one year."

²⁸¹ Art. 297. Slovenian Criminal Code, Public Incitement to Hatred, Violence or Intolerance.

(1) "Whoever publicly provokes or stirs up ethnic, racial, religious or other hatred, strife or intolerance, or provokes any other inequality on the basis of physical or mental deficiencies or sexual orientation, shall be punished by imprisonment of up to two years.

(2) The same sentence shall be imposed on a person who publicly disseminates ideas on the supremacy of one race over another, or provides aid in any manner for racist activity or denies, diminishes the significance of, approves, disregards, makes fun of, or advocates genocide, holocaust, crimes against humanity, war crimes, aggression, or other criminal offences against humanity.

(3) If the offence under the preceding paragraphs has been committed by publication in mass media, the editor or the person acting as the editor shall be sentenced to the punishment referred to in paragraphs 1 or 2 of this Article, unless the offence was contained in a live broadcast and he was not able to prevent the actions referred to in the preceding paragraphs.

(4) If the offence under paragraphs 1 or 2 of this Article

was committed by coercion, maltreatment, endangering of security, desecration of national, ethnic or religious symbols, damaging the movable property of another, desecration of monuments or memorial stones or graves, the perpetrator shall be punished by imprisonment of up to three years.

(5) If the acts under paragraphs 1 or 2 of this Article were committed by an official in abusing their official position or rights, such official shall be punished by imprisonment of up to five years.

(6) Material and objects bearing messages as described in paragraph 1 of this Article, and all devices intended for their manufacture, multiplication and distribution, shall be confiscated, or their use disabled in an appropriate manner.

²⁸² See the beginning of para. 2 of Art. 297 of the Slovenian Criminal Code.

²⁸³ In para. 4 of Art. 300 of the Criminal Code, vandalism is introduced as a specific aggravation for hate speech.

²⁸⁴ The law refers to financial situation, birth, genetic inheritance, education and social status.

²⁸⁵ Any other circumstances that deprive or restrict the other person of any right or freedom recognized by the international community or laid down in the Constitution or the law.

²⁸⁶ See above: in the second part of the formulation of para. 2 Art. 297 of the Criminal Code, the Holocaust is listed among other objects of denial.

²⁸⁷ P. 4 Art. 297 of the Criminal Code also mentions desecration of religious symbols, but only if it is a part of the crime under paras.1 and 2. of the Article.

²⁸⁸ Article 22 of the Spanish Criminal Code states:
“The following shall be considered aggravating circumstances:

4. Commission of an offence for reasons of racism, anti-Semitism or any other type of discrimination based on the victim’s ideology, religion or belief, race, national origin, gender, sexual orientation, illness or disability.”

²⁸⁹ Para. 1 Art. 150 of the Spanish Criminal Code: “Anyone who incites discrimination, hatred or violence towards any group or association for reasons of racism, anti-Semitism or on any other grounds based on ideology, religion or belief, civil status, ethnicity or race, national origin, gender, sexual orientation, illness or disability shall be subject to a one- to three-year prison sentence or to a six- to twelve-month fine.”

²⁹⁰ Para. 2 of the same Art. 150 states: “The same

punishment shall be applicable to anyone who, knowing it to be false or showing reckless contempt for the truth, disseminates offensive information about groups or associations in connection with their ideology, religion or beliefs or their members’ ethnicity, race, national origin, gender, sexual orientation, illness or disability.”

²⁹¹ Social status.

²⁹² Para. 5 of Art. 515 prohibits organizations “that promote discrimination, hate or violence against persons, groups or associations due to their ideology, religion or belief, or due to their members or any of them belonging to an ethnic group, race or nation, their gender, sexual preference, family situation, illness or handicap, or that incite to do so.” According to Art. 517, “The founders, directors and chairpersons of associations will be liable to imprisonment of up to four years, and active members will be liable to imprisonment of up to three years. Under Art. 519, provocation, conspiracy and solicitation to commit the offence of criminal association shall also be punished.

²⁹³ Art. 607 of the Spanish Criminal Code describes the crime of genocide in part one of the article. Part two of the article reads: “Dissemination, by any means, of any doctrine that denies or justifies the offences set out in the preceding paragraph of this article, or attempts to rehabilitate any regime or institution encouraging practices similar to those described in the preceding paragraphs, shall carry a one- to two-year prison sentence.”

²⁹⁴ Art. 524: “Anyone who performs an act of profanation offensive to legally registered religious beliefs in a church or other place of worship or during a religious ceremony shall be subject to a prison sentence of six months to one year or a four- to ten-month fine.” [The Spanish CC stipulates that the fine is imposed in days and the sum per day – from 2 to 400 euros – is defined by the court depending on the circumstances of the accused. – A.V.]

Art. 525: “1. Anyone who, with the intention of offending members of a religious denomination, mocks their dogmas, beliefs, rites or ceremonies – in public, orally, in writing or in any kind of document – or publicly harasses those who profess or practice their beliefs shall be subject to an eight- to twelve-month prison sentence.

2. Anyone who mocks – in public, orally or in writing – those who do not profess any religion or belief shall be subject to the same penalty.”

²⁹⁵ Chapter 29, Section 2, point 7 of the Criminal Code of Sweden:

“whether a motive for the crime was to aggrieve a person, ethnic group or some other similar group of people by reason

of race, color, national or ethnic origin, religious belief or other similar circumstance.”

²⁹⁶ Chapter 16, Section 8 of the Swedish Criminal Code reads:

“A person who, in a disseminated statement or communication, threatens or expresses contempt for a national, ethnic or other such group of persons with allusion to race, color, national or ethnic origin, or religious belief shall be sentenced for agitation against a national or ethnic group to imprisonment for two years or, if the crime is petty, to a fine.”

²⁹⁷ Expression of contempt is contained in the same article.

²⁹⁸ Other similar circumstances.

²⁹⁹ Attack with the aim of discrimination referred to in Art. 261a of the Swiss Criminal Code below.

³⁰⁰ Article 261A of the Criminal Code of Switzerland—Racial discrimination

“Anyone who publicly incites hatred of or discrimination against a person or a group of people on account of their race, ethnic group or religion; anyone who publicly spreads an ideology aimed at the systematic belittling or denigration of members of a race, ethnic group or religion; anyone who, with the same intention, organizes or encourages acts of propaganda or participates in such acts; anyone who, by means of words, written material, images, actions, assault or any other means, publicly belittles or discriminates against a person or a group of people on account of their race, ethnic group or religion in such a way as to violate their human dignity, or who, for the same reasons, denies, grossly minimizes or attempts to justify genocide or other crimes against humanity; anyone who refuses to supply a public service to a person or a group of people on account of their race, ethnic group or religion; shall be subject to a prison sentence or a fine.”

³⁰¹ The same article: “denies, grossly minimizes or attempts to justify genocide or other crimes against humanity.”

³⁰² Article 261 of the Swiss Criminal Code, – Violation of freedom of religion and freedom of worship

“Anyone who publicly and basely insults or ridicules other people's beliefs in matters of faith, particularly faith in God, or profanes an object of religious veneration, anyone who maliciously impedes the celebration of a religious rite safeguarded by the Constitution or disrupts or publicly ridicules such a rite, anyone who maliciously profanes a place or object used for worship or for a religious rite safeguarded by the Constitution, shall be subject to a prison sentence of up to six months or a fine.”

³⁰³ Cl. “f” Art. 62 of the Tajik Criminal Code: “commission of a crime on the basis of national or religious hostility, revenge for lawful acts of other persons, and with the purpose of hiding or facilitating another crime.”

³⁰⁴ The aggravation is formulated as: “on the ground of national, racial, religious, locality hatred or hostility, as well as vendetta.” It is found in Art. 104 (“Murder”), 110 (“Intentional Major Bodily Injury”), 111 (“Intentional Minor Bodily Injury”), 117 (“Torture”) and 243 (“Desecration of Corpses and Places of Their Burial”) of the Criminal Code of Tajikistan.

³⁰⁵ Article 189. Arousing National, Racial, Local or Religious Hostility.

(1) “The actions, which lead to arousing national, racial, local or religious hostility, or dissention, humiliating national dignity, as well as propaganda of the exclusiveness of citizens by a sign of their relation to religion, national, racial, or local origin, if these actions were committed in public or using means of mass media, are punishable by up to 5 years of restriction of liberty or imprisonment for the same period of time.

(2) The same actions, if committed:

- a) repeatedly;
- b) using violence or threat of its use;
- c) using an official position;
- d) by a group of individuals or a group of individuals in a conspiracy, –

are punishable by imprisonment for a period of 5 to 10 years simultaneously with or without deprivation of the right to hold certain positions or to be involved in certain activities of 2 to 5 years.

(3) The actions, specified in paragraphs 1 and 2 of the present Article, if they:

- a) are committed by an organized group;
- b) carelessly caused the death of a person or other serious consequences;
- c) caused forcible expulsion of a citizen from his permanent place of residence;
- d) were committed by a dangerous or an especially dangerous recidivist, –

are punishable by imprisonment for a period of 8 to 12 years simultaneously with or without deprivation of the right to hold certain positions or to be involved in a certain activity for up to 5 years.”

³⁰⁶ Art. 243 of Criminal Code (“Desecration of Corpses and Places of Their Burial”) lists not only hate motive as a specific aggravation, but also desecration “in relation to sculptural or architectural buildings devoted to the struggle against fascism, or graves of persons who took part in the struggle against fascism.”

³⁰⁷ Local hostility and the motive of religious fanaticism.

³⁰⁸ Art. 307² of the Tajik Criminal Code, Organization of an extremist community.

“1. Creation of an extremist community, that is, an organized group of persons for preparing or committing crimes motivated by ideological, political, racial, national, regional or religious hatred or enmity, as well as based on hatred or enmity against any social group, envisaged by Articles 157, 158, 160, 185, 188, 189, 237, 237 (1), 242, 243 of this Code (extremist crimes), as well as the leadership of such an extremist community, a part of it or a structural subdivision of such organization, and also the creation of an association of organizers, leaders or other representatives of structural units or parts of the community for planning and (or) creating conditions for the commission of extremist crimes –

shall be punished by imprisonment for a term of five to eight years, and disqualification from holding certain positions or engaging in certain activities for a term of two to five years.

2. Participation in an extremist community – shall be punished by a fine of one thousand to two thousand notional values or imprisonment from two to five years, and disqualification from holding certain positions or engaging in certain activities for up to three years.

3. Acts stipulated by the first or second part of this article, committed repeatedly or by using official position –

shall be punished by imprisonment for a term of eight to twelve years, and disqualification from holding certain positions or engaging in certain activities for a period of three to five years.

Note:

A person who has voluntarily ceased participation in an extremist community, shall be exempt from criminal liability, if his act does not contain a different *corpus delicti*.”

Art. 307³. Organization of the activities of an extremist association.

“1. Organization of the activity of a political party, public or a religious association or another organization, in respect of which there is a court decision which took legal effect about the prohibition of their activity or the liquidation on account of the implementation of extremism by them,

- shall be punished by imprisonment for five to eight years with the deprivation of the right to hold specific posts or to practice a specific activity for the period of two to five years.

2. Participation in the activity of a political party, public or a religious association or another organization, in respect of which there is a court decision which took legal effect about the prohibition of their activity or the liquidation on account of the implementation of extremism by them,

- shall be punished by a fine in the amount of one to two thousand calculation indices or by imprisonment for the

period of two to three years.

Note. A person who willingly stopped participating in the activity of a political party, public or a religious association or other organization, in respect of which there is a court decision which took legal effect about the prohibition of their activity or liquidated on account of the implementation of extremism by them, shall be acquitted of criminal liability, if his offences do not have another *corpus delicti*.”

Art. 307⁴. Organization of training or a training group of a religious-extremist nature.

“1. Organization of training or a training group of a religious-extremist nature, as well as leading or participating in such training, regardless of the place of training –

shall be punished by imprisonment for a term of five to eight years with confiscation of property.

2. The same action:

- Committed with abuse of official position;

- Related to the financing of such groups –

shall be punished by imprisonment for a term of eight to twelve years, with disqualification from holding certain positions or engaging in certain activities for a period of five years with confiscation of property.”

³⁰⁹ Art. 216 of the Turkish Criminal Code. Provoking people to be rancorous and hostile

(1) Any person who openly provokes a group of people belonging to a different social class, religion, race, sect, or coming from another region, to be rancorous or hostile against another group, is punished with imprisonment from one year to three years in case such act causes risk from the point of view of public safety.

(2) Any person who openly humiliates another person just because he belongs to a different social class, religion, race, sect, or coming from another region, is punished with imprisonment from six months to one year.

(3) Any person who openly disrespects the religious belief of a group is punished with imprisonment from six months to one year if such act causes a potential risk to the public peace.

³¹⁰ Paras. 2 and 3 of Art. 216 of the Turkish Criminal Code (see above).

See also cl. “b” and cl. “c” p. 3 of Art. 125: “Any person who acts with the intention of harming the honor, reputation or dignity of another person through concrete performance or giving impression of intent, is sentenced to imprisonment from three months to two years or imposed a punitive fine. In order to punish the offense committed in absentia of the victim, the act should be committed in presence of least three persons.

(2) The offender is subject to the above stipulated punishment in case of commission of an offense in writing or by use of audio or visual means directed to the aggrieved party.

(3) In case of commission of an offense with defamatory intent;

a) Against a public officer,

b) Due to disclosure, change or attempt to spread religious, social, philosophical belief, opinion and convictions and to obey the orders and restriction of the one's religion,

c) By mentioning sacred values in view of the religion with which a person is connected,

the minimum limit of punishment shall not be less than one year.

(4) The punishment is increased by one sixth in case of performance of defamation act openly; if the offense is committed through the press and by use of any publication; in this case, the punishment is increased by up to one third."

³¹¹ Art. 153 of the Turkish Criminal Code – Damage to places of worship and cemeteries, contains para. 3, which reads: "The punishment to be imposed is increased by one third in case of commission of offenses mentioned in first and second subsections with the intention of insulting a religious group."

³¹² Regional origin, and social class are referred to in art. 216 of the Turkish Criminal Code.

³¹³ In addition, the Turkish law on associations of 1908 (amended in 1983) prohibits participation in the activities of banned organizations under threat of imprisonment.

³¹⁴ Cl. "f" Art. 58 of the Criminal Code of Turkmenistan mentions, "a crime motivated by ethnic or religious hatred, revenge for lawful actions of other persons as well as to facilitate or conceal another crime."

³¹⁵ The specific aggravation is as follows: "on the basis of social, ethnic, racial or religious hatred or enmity." This is applied in the same set of articles on violent crimes as in Kazakhstan.

³¹⁶ The corpus delicti of Art. 177 of the Criminal Code ("Incitement of social, national or religious enmity") reads as follows: "Deliberate acts aimed at inciting social, national, ethnic, racial or religious hatred or hostility, humiliation of national dignity, as well as propaganda of exclusivity or inferiority of citizens according to their attitude towards religion, social, national, ethnic or racial origin."

³¹⁷ "Social enmity" is featured.

³¹⁸ Cl. 3 p. 1 Art. 67 of the Criminal Code of Ukraine refers to: "commission of an offense based on racial, national or religious enmity and hostility."

³¹⁹ The specific aggravation "based on racial, national or religious intolerance" applies to the articles on "Murder," "Intentional infliction of grievous bodily harm," "Intentional infliction of moderate bodily harm," "Beating and torment," "Torture," and "Death threat."

³²⁰ Art. 161. of the Criminal Code of Ukraine, Violation of citizens' equality based on their race, nationality or religious preferences.

1. "Willful actions inciting national, racial or religious enmity and hatred, humiliation of national honor and dignity, or the insult of citizens' feelings in respect to their religious convictions, and also any direct or indirect restriction of rights, or granting direct or indirect privileges to citizens based on race, color of skin, political, religious and other convictions, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics, –

shall be punishable by a fine of 200 to 500 tax-free minimum incomes, or restraint of liberty for a term up to five years, with or without the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

2. The same actions accompanied with violence, deception or threats, and also committed by an official, –

shall be punishable by a fine of 500 to 1000 tax-free minimum incomes, or restraint of liberty for a term of two to five years, with or without the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

3. Any such actions as provided for by paragraph 1 or 2 of this Article, if committed by an organized group of persons, or where they caused grave consequences, –

shall be punishable by imprisonment for a term of five to eight years.

Another corpus delicti, which should be included into hate speech category, is covered by p. 2 Art. 110 of the Criminal Code.

Art. 110. Trespass against territorial integrity and inviolability of Ukraine.

1. Willful actions committed to change the territorial boundaries or national borders of Ukraine in violation of the order provided for in the Constitution of Ukraine, and also public appeals or distribution of materials with appeals to commit any such actions, –

shall be punishable by restraint of liberty for a term up to three years, or imprisonment for the same term.

2. Any such actions, as provided for by paragraph 1 of this Article, if committed by a member of public authorities or repeated by any person, or committed by an organized group, or combined with inflaming national or religious enmity, –

shall be punishable by restraint of liberty for a term of three to five years, or imprisonment for the same term.

3. Any such actions, as provided for by paragraphs 1 and

2 of this Article, if they caused the killing of people or any other grave consequences, – shall be punishable by imprisonment for a term of seven to twelve years.”

³²¹ Humiliation of national honor and dignity are mentioned in Art. 161 of the Ukrainian Criminal Code.

³²² Ideologically motivated vandalism is limited to the destruction of religious objects, regardless of the motive of the action.

Art. 178. Damage of religious architecture or houses of worship.

“Damage or destruction of a religious architecture or a house of worship, –

shall be punishable by a fine up to 300 tax-free minimum incomes, or community service for a term of 60 to 240 hours, or arrest for a term up to six months, or restraint of liberty for a term up to three years, or imprisonment for the same term.

Art. 179. Illegal retention, desecration or destruction of religious sanctities

Illegal retention, desecration or destruction of religious sanctities, –

shall be punishable by a fine up to 200 tax-free minimum incomes, or community service for a term of 60 to 240 hours, or arrest for a term up to six months, or restraint of liberty for a term up to three years, or imprisonment for the same term.”

³²³ Art. 300. Importation, making or distribution of works that propagandize violence and cruelty, racial, national or religious intolerance and discrimination.

“1. Importation into Ukraine for sale or distribution purposes, or making, storage, transportation or other movement for the same purposes, or sale or distribution of works that propagandize violence and cruelty, racial, national or religious intolerance and discrimination, and also compelling others to participate in creation of such works, –

shall be punishable by a fine up to 150 tax-free minimum incomes, or arrest for a term up to six months, or restraint of liberty for a term up to three years, with the forfeiture of works that propagandize violence and cruelty, racial, national or religious intolerance and discrimination, and means of their making and distribution.

2. The same actions in regard to motion pictures and video films that propagandize violence and cruelty, racial, national or religious intolerance and discrimination, and also selling works that propagandize violence and cruelty, racial, national or religious intolerance and discrimination, to minors or disseminating such works among minors, –

shall be punishable by a fine of 100 to 300 tax-free minimum incomes, or restraint of liberty for a term up to five

years, with the forfeiture of motion pictures and video films that propagandize violence and cruelty, racial, national or religious intolerance and discrimination, and means of their making and showing.

3. Any such acts as provided for by paragraph 1 or 2 of this Article, if repeated, or committed by a group of persons upon their prior conspiracy, and also compelling minors to participate in the creation of works that propagandize violence and cruelty, racial, national or religious intolerance and discrimination, –

shall be punishable by imprisonment of three to five years with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years and forfeiture of works, motion pictures and video films that propagandize violence and cruelty, racial, national or religious intolerance and discrimination, and means of their making and showing.”

³²⁴ Insult of citizens' feelings in respect to their religious convictions is contained in Art. 161 of the Ukrainian Criminal Code.

³²⁵ All US states except for Arkansas, Georgia, Indiana, South Carolina, Utah and Wyoming include in their legislation a hate motive as a general aggravating circumstance. [In Utah, there are laws that contain the concept of hate crimes, though the concept is not actually defined.] Motives related to race, religion and ethnicity are represented in the laws of all states, with the exception of the six states mentioned above. The categories of race and ethnicity in the United States are understood differently than they are in Europe: however, since they are all listed together, this is not especially significant. This includes the characteristics of “origin,” “country of origin,” and others, because of the high variety of terms used in the laws of different states. Other characteristics are represented differently in different states: the data, which were mainly provided by the Anti-Defamation League (ADL) are provided in a separate table in Annex 2. However, this table is likely to be incomplete. It contains all characteristics found in at least some states.

³²⁶ The First Amendment to the U.S. Constitution actually prohibits hate speech laws, but a public threat of an ideological nature can be considered to be a crime. Historically, such laws were adopted against the practice of the Ku Klux Klan. It is in this context that many states prohibit the wearing of hoods, masks and other accessories covering the face. The following states also criminalize the public burning of a cross, if such act can be regarded as a threat: Alabama, Arizona, California, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Oklahoma, North Carolina, South Dakota, Virginia and the District of Columbia [according to the ADL]. It is important that in the light of Supreme Court rulings, the

burning of a cross is an offence only if it can be considered as a threat by specific people – this is itself criminal. See the case *Virginia v. Black* (2003).

In addition, some states consider advocacy of hate crimes not to be protected by the Constitution and consequently that it constitutes a crime. This is reflected in the laws of Alabama and Colorado.

³²⁷ Most US states consider an attack against property motivated by hate is considered in most states as similar to attacks against a person. In some states, an attack against the property of a number of institutions, including religious buildings and cemeteries, is criminalized separately. In general, this kind of vandalism is criminalized in all states except Alaska, Iowa, New Hampshire, North Dakota, Utah, Vermont, West Virginia and Wyoming (according to the ADL).

³²⁸ The laws of various US states feature the categories of sexual orientation, gender and transgender/gender identity either separately or together. See the Table in Annex 2. In the framework of this table we assume that the latter identity is anyway reducible to the first two.

³²⁹ The term “political affiliation” as used in the USA can be understood as participation in a political group and as certain political beliefs.

³³⁰ In Maine, Maryland, Florida and the District of Columbia, the protected characteristics include homelessness, in Oregon – sexual orientation of a member of the victim’s family, in Vermont – an enlisted man’s status, and in the District of Columbia – marital status the fact of admission to university, and also “the family responsibility.”

³³¹ Cl. “k” Art. 56 of the Criminal Code of Uzbekistan: “based on racial or national hatred or discord.”

³³² The wording of the specific aggravation is “on the grounds of ethnic or racial hatred.” Another item – “religious prejudice” – probably refers not to hate crimes, but rather to “honor crimes,” though this is open to an alternate interpretation. This specific aggravation is applicable to murder and to grievous and severe bodily harm.

³³³ Art. 156 of the Uzbek Criminal Code, Incitement of Ethnic, Racial or Religious Hatred.

“Production, possession for the purpose of distribution or dissemination of materials promoting national, racial, ethnic or religious hatred, committed after the application of administrative penalty for the same act – is punishable by a fine of up to six hundred minimum

monthly wages, or correctional labor of up to three years or imprisonment of up to three years.

Intentional acts, humiliating ethnic honor and dignity and insulting religious or atheistic feelings of individuals, carried out with the purpose of incitement to hatred, intolerance, or division on a national, ethnic, racial, or religious basis, as well as the explicit or implicit setting of limitations on rights or preferences on the basis of national, racial, or ethnic origin, or religious beliefs –

shall be punished with imprisonment of up to five years.

The same actions committed:

a) in a way dangerous to lives of other persons;

b) with infliction of serious bodily injuries;

c) with forced eviction of individuals from the places of their permanent residence;

d) by an authorized official;

e) by previous concert of a group of individuals –

shall be punished with imprisonment of from five to ten years.

³³⁴ “Religious prejudice” probably refers to “honor crimes” rather than to hate crimes, although another interpretation is possible.

³³⁵ Art. 244 of the Uzbek Criminal Code, 1. Production and Dissemination of Materials Containing a Threat to Public Security and Public Order.

“Production or keeping with the purpose of dissemination any materials that contain ideas of religious extremism, separatism, and fundamentalism, calls for pogroms or violent eviction, or which are aimed at creating a panic among the population, which have been committed after imposition of an administrative penalty for the same acts –

shall be punished with a fine of from fifty to one hundred minimum monthly wages, or correctional labor of up to three years, or arrest of up to six months, or imprisonment of up to three years.

Any form of dissemination of information and materials containing ideas of religious extremism, separatism, and fundamentalism, calls for pogroms or violent eviction of individuals, or aimed at creating a panic among the population, as well as the use of religion for the purposes of a breach of civil concord, dissemination of calumnious and destabilizing fabrications, and committing other acts aimed against the established rules of conduct in society and of public security –

shall be punished with a fine of from seventy-five to one hundred minimum monthly wages, or arrest of up to six months, or imprisonment of from three to five years.

The actions foreseen in Paragraph 1 or 2 of this Article, committed:

a) by previous concert of a group of individuals;

b) with use of official capacity;

c) with use of financial or other material aid received from religious organizations, as well as from foreign States, organizations, and nationals – shall be punished with imprisonment of from five to eight years.”

³³⁶ Art. 216. Illegal Establishment of Public Associations or Religious Organizations

“Illegal establishment or reactivation of illegal public associations or religious organizations as well as active participation in the activities thereof –

shall be punished with a fine of from fifty to one hundred minimum monthly wages, or arrest of up to six months, or imprisonment of up to five years.

Art. 216¹. Inducement to Participate in Operation of Illegal Public Associations or Religious Organizations

Inducement to participate in operation of public associations, religious organizations, movements or sects, which are illegal in the Republic of Uzbekistan, after infliction of administrative penalty for the same actions –

shall be punished with a fine of from twenty-five to fifty minimum monthly wages, correctional labor of up to three years, or arrest of up to six months, or imprisonment of up to three years.

Art. 244². Establishment, Direction of or Participation in Religious Extremist, Separatist, Fundamentalist or Other Banned Organizations.

Establishment, direction of or participation in religious extremist, separatist, fundamentalist or other banned organizations –

shall be punished with imprisonment of from five to fifteen years.

The same actions that have resulted in grave consequences –

shall be punished with imprisonment of from fifteen to twenty years.

A person shall be discharged from liability for the offense punishable under Paragraph 1 of this Article, if he voluntarily communicated about the existence of banned organizations and assisted in the detection of the offense.

³³⁷ Uzbek law refers to equal protection of citizens in connection with their religious or atheistic convictions.

ABOUT THE AUTHOR

Alexander Verkhovsky, born in 1962, in 1989-1992 was editor-in-chief of samizdat independent newspaper Panorama in Moscow. In 1991-2002 - vice-president of Panorama Information and Research Center. Since 2002 - director of SOVA Center for Information and Analysis.

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