

Introduction

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About Hate Crime

What is an Anti-LGBTI Hate Crime?

There is no agreed definition of “hate crime” used in all EU member states. State authorities and international bodies have conceptualized the problem in several ways for the purpose of reporting and recording, policing and prosecuting, as well as providing victim support. Some of the key issues that continue to be debated include: (1) whether discriminatory or insulting speech or stirring up hatred based on race, ethnicity, sexual orientation or other similar grounds should be seen as a type of hate crime; and (2) which victim categories should be selected for protection.

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Considering the first question, the OSCE defines hate crimes as “criminal offenses committed with a bias motive” (OSCE 2009). Since an act of speaking, without the enactment of the prohibited content, is not a crime (unlike, e.g. homicide, physical assault or damage of property), the OSCE argues that this conceptualization excludes hate speech (ODIHR 2009:25). On the other hand, FRA (2016a), taking stock of the fact that all EU member states ban incitement to violence and hatred, argues that “[i]ncitement to violence or hatred against a protected category of persons – commonly referred to as ‘hate speech’ – is both a criminal offense and an expression of discrimination and hence a sub-category of the wider concept of hate crime” (P. 15).

The lack of agreement at the international level has consequences at the national level. For example, Croatia adopted a legal definition of hate crime deriving from that of the OSCE while Poland uses a working definition which is similarly based on that of the OSCE, but is inclusive of hate speech (see chapters four and 10). Most other countries either do not use the term hate crime at all, use it without defining it, or have come up with their own conceptualizations (e.g. the United Kingdom; see chapter 11). As there is no agreement among member states, the

term “hate crime” is used in this report as a floating (empty) signifier, unless otherwise defined by the authors of the respective country chapters. Some authors chose to speak of hate crime only in the way it is understood by the OSCE; others consider also, the issues connected with criminal discrimination and hate speech. In contrast, the understanding of the term “hate-motivated incident” (or “hate incident”) is uniform. It follows the definition proposed in the *Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity* (CoE 2010), where the term is “used to encompass any incident or act – whether defined by national legislation as criminal or not – against people or property, that involves a target selected because of its real or perceived connection with or membership of a group.”

As mentioned above, the bias motive of a crime refers to a protected characteristic. While all hate crime laws define which characteristics are protected in a specific jurisdiction, the catalogue usually includes categories related to racism and xenophobia (e.g. race, national or ethnic origin) and religion, and, increasingly, sexual orientation, disability, gender identity and other grounds.¹

Protected characteristics are usually enumerated but rarely defined, in national hate crime laws. In this report the understanding of sexual orientation, gender identity, gender expression and sex characteristics follows the definitions proposed by international experts on LGBTI rights in the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2006) and *Yogyakarta Principles +10* (2017). According to these documents:

- Sexual orientation refers “to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with individuals of a different gender or the same gender or more than one gender”;
- Gender identity refers “to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth”;



1 Excerpts of hate crime laws from across the OSCE region, including protected grounds, are available at the Legislationline.org; service operated by the OSCE Office for Democratic Institutions and Human Rights.

- Gender expression is understood “as each person’s presentation of the person’s gender through physical appearance”; and
- Sex characteristics are understood “as each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty”.

The victim categories included in hate crime laws are usually abstract (e.g. “religion” instead of “Catholicism” or “Sikhism”; “sexual orientation” rather than “homosexual orientation”) to avoid creating group-specific rights. For example, while sexual or gender majority people may become victims of hate crimes based on sexual orientation, gender identity, gender expression or sex characteristics, the perpetrators usually seek to target LGBTI people. For this reason, in this report we understand the expression “anti-LGBTI hate crime” as pertaining to bias motivation (i.e. negative attitudes towards LGBTI persons) not the identity of victims. In this sense, people who do not identify themselves as LGBTI can also be targeted.

The language used by authors of the national chapters, and specifically the acronyms describing the community (LGBT, LGBTI or LGBTQ, etc.) has been an object of reflection and discussion among authors and between authors and editors. Collectively, we have decided that rather than be standardized, the acronyms should reflect the different legal and social realities in the countries. As a result, the language of each chapter reflects the differing levels of recognition of sexual orientation, gender identity, gender expression and sex characteristics as protected grounds, as well as preferences of the communities as to how they like to call themselves.

What is the Impact of Anti-LGBTI Hate Crimes?

Hate crimes are often described as signal or message crimes. They are designed to spread fear, anger, insecurity and the feeling of vulnerability among targeted communities. They negatively influence the mental health and social life of victims and impact on vicariously targeted communities.

There is an accumulation of research revealing the harms caused by hate crimes. Multiple studies show that the psychological consequences of hate crimes are likely to be more severe than those caused

by similar but otherwise motivated crimes (Corcoran, Lader, and Smith 2015; Herek 2009; Iganski and Lagou 2015). According to Chakraborti, Garland, and Hardy (2014:41), repetitive, “normalized” victimization, only known to those who experience it and relatively insignificant for outsiders, can be particularly detrimental. The *Sussex Hate Crime Project* found that hate crimes, regardless of the type, were often linked to “[i]ncreased feelings of vulnerability, anxiety, anger, and sometimes shame” with victims “[b]eing more security conscious, avoidant, and more active within the community” (Paterson et al. 2018:1).

Hate crimes also have indirect effects on the targeted communities and the society. If unaddressed, they may impact negatively on the security level of communities and neighborhoods and lead to a heightened sense of security risks. Some communities may feel targeted, which leaves them feeling vulnerable and angry (Bell and Perry 2015). Inadequate responses to hate crimes experienced by community members can be linked with lower trust in the criminal justice system (Paterson et al. 2018:1). There is also an economic dimension to hate crime; for individual victims, time off from work due to injuries may result in loss of income. For minority community centers, replacing broken windows or installing security cameras cost time and money which could otherwise be spent on programmatic activities. For the government, more hate crimes mean increases in the costs of policing, prosecuting and sentencing, as well as the cost of providing mental health and victim support services.

What Do We Know About Anti-LGBTI Hate Crime Laws and Policies in the EU?

There are a growing number of national and cross-national comparative studies looking at the situation of victims of hate crimes or LGBTI people in the EU. With the speed of development in the legal and policy frameworks, such reports quickly become outdated. For example, the number of EU member states that recognize homophobic intent as an aggravating factor in common crimes increased from 10 to 15 between 2008 and 2015 (FRA 2009:126, 2015:62).² The victims’ situation



2 In addition, FRA noted (2015:63) that the courts in Austria and the Netherlands apply enhanced penalties for crimes motivated by homophobia, despite the lack of relevant legal provisions.

further changed following the entry into force of the Victims' Rights Directive in 2015. However, while some countries seem to be well researched we know relatively little about others. For example, while Latvia has been examined in several in-depth reports on hate crime laws and policies (Kamenska 2017; Kamenska and Brands-Kehris 2008; Oakley 2008), Italy and Greece have been an object of researchers' interest less often.

When research for this project commenced, we aimed to build upon the results of various national reports along with the research conducted within the *HateNoMore* project (KPH 2016), two FRA reports based on interviews with professionals (2016a, 2016c) and FRA's comparative legal analysis (FRA 2015). In addition to these however, this report also builds on a number of findings from the recent *Lifecycle of Hate Crime* report (Schweppe, Haynes, and Walters 2018). All the above use different methodologies and cover different topics and geographical areas but each of them touches upon the legal and policy situation of victims of anti-LGBTI violence.

FRA's legal analysis of protections against discrimination based on sexual orientation, gender identity and sex characteristics (2015) provides a short, pan-EU overview of legal responses to anti-LGBTI hate crime. As the deadline for the implementation of the Victims' Rights Directive coincided with the publication of the report this issue is not covered there. Also not covered are the views of professionals on the barriers victims face in reporting, or the organizational and procedural factors which impede recording or access to justice for victims. The *HateNoMore* research (KPH 2016) analyzes the levels of the transposition of the Victims' Rights Directive with regard to LGBT victims of crimes but it covers only select, Central and East European countries (Croatia, Hungary, Latvia, Lithuania and Poland). Meanwhile, comparative analysis of professionals' opinions on reporting and recording hate crimes, as well as procedural and organizational aspects of access to justice, are discussed in the reports *Ensuring justice for hate crime victims: professional perspectives* (FRA 2016a), covering all of the EU; and in the comparative report from the *Lifecycle of Hate Crime* project (Schweppe et al. 2018), which covers the Czech Republic, Ireland, Latvia, Sweden and the United Kingdom.

Common Obligations and Commitments to Fight Anti-LGBTI Hate Crime

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The need to address hate crimes is grounded in the obligations set out in international and regional agreements. These obligations can be general, referring to notions such as the right to life or the ban on torture, or specific, referring to gender-based violence or the rights of hate crime victims.

Under the International Covenant on Civil and Political Rights (UN General Assembly 1966) States must address acts of violence and deprivation of life by adopting laws and other measures to ensure that everyone is protected from such acts. Article 20 of the ICCPR bans some forms of hate speech while Article 26 prohibits discrimination. The International Convention on the Elimination of all Forms of Discrimination (UN General Assembly 1965) provides that “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 color or ethnic origin” shall be prohibited (Article 4).

At the level of the Council of Europe, Article 14 of the European Convention on Human Rights (CoE 1950) guarantees the enjoyment of the rights and freedoms guaranteed in the Convention (including the right to life and security) without discrimination on any ground. The European Convention on Preventing and Combating Violence against Women and Domestic Violence (so called Istanbul Convention) (Council of Europe 2011) requires signatory states to “take the necessary legislative and other measures to prevent all forms of violence covered by the scope of this Convention” (Article 12). This includes gender-based violence and violence affecting women because they are women (including violence against LBT women).

At the level of the EU, the Council Framework Decision 2008/913/JHA of 28 November 2008, on combating certain forms and expressions of racism and xenophobia by means of criminal law (Council of the European Union 2008), requires states to adopt all necessary measures to ensure that any racist and xenophobic motivation of a crime is considered an aggravating circumstance under the national legal framework. Minimum standards regarding the rights, support and protection of victims of crimes are set out in Directive 2012/29/

EU of the European Parliament and the Council of the European Union of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime (Victims' Rights Directive) (European Parliament and Council of the European Union 2012). The Directive recognizes victims of hate crimes and victims who are vulnerable because of a protected characteristic (including gender, gender identity or expression and sexual orientation) as a specific category of victims deserving special treatment. It requires member states to assess victims' support and protection needs and protect them from secondary victimization, intimidation and retaliation.

In addition to the above instruments, commitment to fight against discrimination, hate speech and hate crimes is expressed in numerous OSCE commitments, notably the Ministerial Council Decision No. 9/09 on Combating Hate Crimes (OSCE 2009), as well as ECRI's general policy recommendations (ECRI 2002, 2016). The specific need to address hate crimes based on sexual orientation and gender identity is recognized in the Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (CoE 2010).

Case Law of the European Court of Human Rights

The European Court of Human Rights has ruled on issues connected with hate crime and hate speech on numerous occasions.³ In *Vejdeland and others v. Sweden* (ECtHR 2012b) the Court applied for the first time, the principles relating to hate speech in the context of sexual orientation, holding that prosecution of applicants for the distribution of leaflets with homophobic content did not violate their freedom of expression. In the landmark case *Identoba and others v Georgia* (ECtHR 2015b), concerning violence during the celebrations of the International Day Against Homophobia in Tbilisi, the Court recognized, for the first time, the state's duty to address hate crimes based on sexual orientation. The Court ruled that



3 Some important cases where the Court ruled on racist violence include: *Nachova and others v Bulgaria* (ECtHR 2005), *Šečić v. Croatia* (ECtHR 2007b), *Angelova and others v Bulgaria* (ECtHR 2007a), *Abdu v Bulgaria* (ECtHR 2014) and *Balázs v. Hungary* (ECtHR 2015a). In *Đorđević v. Croatia* (ECtHR 2012a) the Court found a violation of the ECHR in a case concerning violence based on disability.

... [w]hen investigating violent incidents, such as ill-treatment, State authorities have the duty to take all reasonable steps to unmask possible discriminatory motives. Treating violence and brutality with a discriminatory intent on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.

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In *MC and AC v. Romania* (ECtHR 2016) the Court found that the authorities had not taken reasonable steps to unveil the possible homophobic motives behind the attack on participants in a Pride event, failing to ensure adequate investigation and violating Article 3 taken in conjunction with Article 14 of the Convention.

Supranational Mechanisms and Initiatives Used to Tackle Anti-LGBTI Hate Crime

At the international level, hate crimes against LGBTI people are conceptualized as a human rights issue. For example, the EU Fundamental Rights Agency (2012) argues that, if a member state's "criminal justice system overlooks the bias motivation behind a crime, then this amounts to a violation of Article 14 of the European Convention of Human Rights" (P. 7). According to the Agency, hate crimes violate "fundamental rights, namely to human dignity and with respect to non-discrimination", and like other international human rights bodies, it fights with hate crime as part of its mandate. Below, we present briefly, the international and regional legal framework relevant to anti-LGBTI hate crimes, human rights review and monitoring mechanisms, as well as key policy initiatives to tackle anti-LGBTI hate crimes.

Human Rights Monitoring and Review Mechanisms

While particular UN human rights monitoring and review bodies differ in their mandates and activities, discrimination and violence targeting LGBTI people is increasingly becoming a topic of discussions and consequently, a source of recommendations provided to UN member states. There are several international bodies to which NGOs can provide evidence on the human rights situation of LGBTI people, including on discrimination and violence. This information is then used in as-

sessing the human rights record and implementation of commitments of the country in question. The institutions include several UN treaty bodies⁴ and the UN Human Rights Council. Within the UN Human Rights Council, LGBTI issues are discussed as part of the Universal Periodic Review, where countries are peer-reviewed by representatives of other states.⁵ In addition, they fall within the mandate of several so called “special procedures”, i.e. independent experts charged with working on a specific human rights topic or specific regions. The first independent expert on issues related to sexual orientation and gender identity was appointed in 2016.

At the regional level, the Council of Europe’s Commission against Racism and Intolerance (ECRI), until recently, largely concerned with racism, has started to include the issue of intolerance against LGBTI people in its country monitoring exercises, beginning from the fifth monitoring cycle.

Supporting States in Implementing Obligations

Apart from the human rights monitoring and review role described above, supranational institutions have taken up work to help states build professional responses to hate crime and hate speech, including those targeting LGBTI communities. In particular, the OSCE Office for Democratic Institutions and Human Rights, the EU Fundamental Rights Agency, ECRI and the European Commission are active in this field.

ODIHR’s mandate, based on the OSCE commitments to tolerance and non-discrimination (see above), includes collecting data and statistics on hate crimes in OSCE participating states, reviewing existing



- 4 The Committee against Torture; the Human Rights Committee; the Committee on the Elimination of Racial Discrimination; the Committee on the Elimination of Discrimination against Women; the Committee on the Rights of the Child; and the Committee on the Rights of People with Disabilities. All documents related to the monitoring process, including shadow reports submitted to the treaty bodies by NGOs, are available on the website of the Office of the UN High Commissioner for Human Rights at <https://www.ohchr.org/EN/pages/home.aspx>.
- 5 Inputs for the UPR process coming from civil society groups, as well as reports of the working groups with recommendations for states, are available on the website of the Office of the UN High Commissioner for Human Rights at <https://www.ohchr.org/EN/pages/home.aspx>.

and proposed legislation, and building the capacity of governments and civil society organizations to tackle this kind of victimization. One of ODIHR's strengths is that it has a lot of in-house expertise and can work with governments in individual states (e.g. Poland, Italy and Lithuania).⁶

The European Union Agency for Fundamental Rights documents the levels of racism, intolerance and hate crime in the EU (FRA 2014), carries out analysis of the legal and policy frameworks (FRA 2015, 2016c), as well as providing assistance and expertise at both EU and national levels. The Agency has had a pivotal role in making hate crime visible in the EU, documenting gaps in national hate crime data collection mechanisms (FRA 2012) and encouraging the sharing of good practices.⁷

ECRI, ODIHR and FRA increasingly coordinate and cooperate on issues surrounding hate crime. Since 2016, this has been carried out through the EU High Level Group on combating racism, xenophobia and other forms of intolerance, a multi-agency body tasked with assisting the European Commission with the preparation of legislative proposals and policy initiatives.⁸ The High Level Group deals with; *inter alia*, the training of law enforcement services, recording hate crime, ensuring justice, protection and support for victims. Apart from the work of the High Level Group, the Commission provides financial support to states and NGOs in the area of hate speech and hate crime through the *Rights, Equality and Citizenship* program, whose objectives include combating racism, xenophobia, homophobia and other forms of intolerance.⁹



6 One of the authors of this text – Piotr Godzisz – was previously an intern at ODIHR.

7 FRA's compendium of good practices is available at <http://fra.europa.eu/en/theme/hate-crime/compendium-practices> (retrieved 2018-06-17).

8 Information about the group's meetings and activities can be found at <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3425> (retrieved 2018-06-01).

9 Information about the program can be found at http://ec.europa.eu/justice/grants1/programmes-2014-2020/rec/index_en.htm (retrieved 2018-06-01).

Structure of the report

This report consists of 11 chapters – 10 country reports covering Belgium (Flanders), Bulgaria, Croatia, Greece, Hungary, Italy, Lithuania, Poland, Spain and the United Kingdom and a comparative chapter. The annex contains a note on methodology.

To facilitate reading and allow comparisons, all chapters follow the same structure:

1. The first section focuses on the legal framework. It covers current hate crime law provisions, other legal provisions applicable to anti-LGBTI hate crimes and incidents, as well as attempts to amend the law. The section also discusses the implementation of the provisions of the Victims' Rights Directive.
2. The second section focuses on professionals and anti-LGBTI hate crimes. It covers the various understandings of hate crime among law enforcement professionals, NGOs and other actors, and discusses the weaknesses of conceptual frameworks. It also covers vocational training and sensitization.
3. The third section covers reporting. Specifically, it presents reasons for underreporting given by interviewed professionals; discusses the accessibility of various types of hate crime reporting centers and presents existing policies and guidelines governing reporting, as well as awareness-raising activities. Professionals' views on what is most needed to improve reporting are also discussed.
4. The fourth section focuses on the rights of victims of anti-LGBTI hate crimes in the criminal justice process. It covers the rights guaranteed by the Victims' Rights Directive, existing policies and guidelines governing victims' rights, and guarantees of protection for victims.
5. The fifth section covers recording. Specifically, it reports findings on the various techniques and systems used by state agents and civil society organizations to record hate crimes, as well as the public availability of hate crime statistics.
6. The final, sixth section focuses on issues surrounding victim support. Specifically, it covers referrals, the availability, accessibility and inclusivity of various support services, as well as the issue of funding.

Special attention is paid to intersectional issues such as gender, as well as victimization on multiple grounds. Findings are illustrated by examples of promising practices identified in the course of the research. Each national report concludes with a series of recommendations for future policy and practice

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