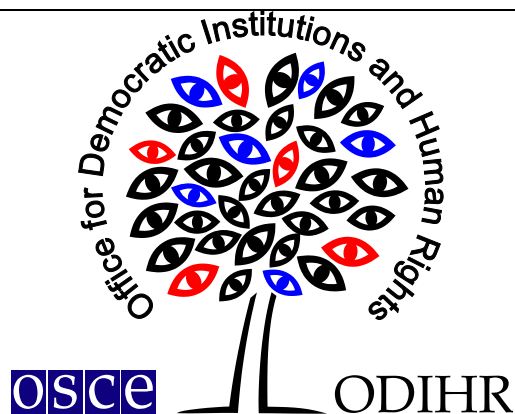


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**COMMENTS ON DRAFT AMENDMENTS TO
CERTAIN PROVISIONS OF THE CRIMINAL
CODE OF THE FORMER YUGOSLAV REPUBLIC
OF MACEDONIA REGARDING BIAS-
MOTIVATED CRIMES**

**based on an unofficial English translation of the draft amendments
provided by the OSCE Mission to Skopje**

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Annex: Proposals for amending the Criminal Code (CC) regarding hate crimes

I. INTRODUCTION

1. *On 11 February 2016, the Head of the OSCE Mission to Skopje sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) a request for legal review of draft amendments to certain provisions of the Criminal Code of the former Yugoslav Republic of Macedonia regarding definition, processing and sanctioning of hate crimes (hereinafter “the Draft Amendments”).*
2. *On 16 February 2016, the OSCE/ODIHR responded to this request, confirming the Office’s readiness to prepare legal comments on the compliance of these draft amendments with OSCE commitments and international human rights standards.*
3. *These legal comments were prepared in response to the above request. The OSCE/ODIHR conducted this assessment as part of its general mandate of supporting OSCE participating States in legal reform efforts related to the human dimension. In the area of “hate crime”-related legislation, this mandate is also explicitly set out in OSCE Ministerial Council Decision No. 4/03 on Tolerance and Non-discrimination whereby the OSCE participating States committed to “where appropriate, seek the ODIHR’s assistance in the drafting and review of such legislation [to combat hate crimes]”.¹*

II. SCOPE OF REVIEW

4. The scope of these Comments covers only the Draft Amendments submitted for review. Thus limited, the Comments do not constitute a full and comprehensive review of the specific provisions of the Criminal Code or the entire legal and institutional framework of criminal law, criminal procedure or anti-discrimination legislation.
5. The Comments raise key issues and provide indications of areas of concern. In the interests of conciseness, the Comments focus more on those provisions that require improvements rather than on the positive aspects of the Draft Amendments. The ensuing recommendations are based on international standards and OSCE commitments related to “hate crime” legislation. The Comments will also seek to highlight, as appropriate, good practices from other OSCE participating States in this field. Besides, in accordance with the 2004 OSCE Action for the Promotion of Gender Equality and commitments to mainstream a gender perspective into OSCE activities, the legal review analyses the potentially different impact of the Draft Amendments on women and men.²
6. These Comments are based on an unofficial English translation of the Draft Amendments provided by the OSCE Mission to Skopje, which is attached to this document as an Annex. Errors from translation may result.
7. In view of the above, the OSCE/ODIHR would like to make mention that the Comments are without prejudice to any written or oral recommendations and comments

¹ See OSCE Ministerial Council Decision No. 4/03 on Tolerance and Non-discrimination, taken at the Maastricht Ministerial Council Meeting on 2 December 2003, par 6, available at <http://www.osce.org/mc/19382>.

² See OSCE Action Plan for the Promotion of Gender Equality adopted by Decision No. 14/04, MC.DEC/14/04 (2004), par 32, available at <http://www.osce.org/mc/23295?download=true>.

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related to this and other related legislation of the former Yugoslav Republic of Macedonia that the OSCE/ODIHR may make in the future.

III. EXECUTIVE SUMMARY

8. At the outset, the OSCE/ODIHR would like to reiterate that the current Draft Amendments reflect many international standards and good practices in the area of bias-motivated crime legislation and constitute a major improvement compared to the current legal framework for the punishment of such crimes in the former Yugoslav Republic of Macedonia.
9. Nevertheless, the Draft Amendments should be enhanced in certain areas, in order to make the legislation more comprehensive and effective. In particular, the drafters should ensure that protected characteristics and modes of protection in cases of bias-motivated crimes are consistent throughout the Criminal Code. Legislation should be adapted to make sure that not only actual or presumed membership of a group which exhibits certain characteristics is protected, but also actual or presumed association with such a group. It should also be ensured that the standard of proof for a crime committed with bias motivation is the same throughout the Criminal Code. Furthermore, the OSCE/ODIHR recommends a number of changes to the list of protected characteristics and the list of crimes covered by specific sentencing enhancements.
10. More specifically, and in addition to what was stated above, the OSCE/ODIHR makes the following key recommendations to further enhance the Draft Amendments:
 - A. to bring the list of protected characteristics and the general wording of Article 39 par 5 in line with the wording of Article 122 par 23, and thereby make both provisions consistent; [pars 23-25]
 - B. to specify in law that judges are obliged to put on record the reasons for applying or not applying the provision of Article 39 par 5 of the current Criminal Code in cases which involve potential bias motives on part of the perpetrator; [par 26]
 - C. to ensure that crimes committed with a bias motive against persons who are merely associated with groups of persons with protected characteristics are included in Article 122 par 23 of the Draft Amendments; [par 29]
 - D. to either explain in Article 122 par 23 that the word “hate” throughout the Criminal Code refers to “hate crimes” as defined in new Article 122 paragraph 23 or, alternatively to replace the term “hate” with “bias” and the term “hate crime” with “bias-motivated crime”; [pars 30-31]
 - E. to remove political affiliation and age from the list of protected characteristics in Article 122 par 23 and to delete the expression “belonging to a marginalized group”; [pars 34-40, par 46]
 - F. to slightly expand the list of property crimes in the Criminal Code for which specific penalty enhancements are foreseen in cases where crimes are committed with a bias motive and to include theft, severe theft, robbery, armed robbery or burglary; [par 48] and
 - G. to supplement the adoption of the Draft Amendments with trainings for law-enforcement agencies, prosecutors, judges and the wider population as well as general awareness-raising campaigns and continuous monitoring. [pars 49-51]

Additional Recommendations, highlighted in bold, are also included in the text of the comments.

IV. ANALYSIS AND RECOMMENDATIONS

1. The Concept of “Bias-Motivated Crime” or “Hate Crime”

11. Based on its commitments and publications, the OSCE considers “hate crimes” to be crimes committed with a bias motive. The rationale behind punishing crimes which are at least partly committed with a bias motive more severely than crimes committed without such motivation is the necessity to “counter pervasive prejudice against certain groups and compensate the damage this causes to victims, other members of the same group and society as a whole”.³ The potential damage to society as a whole also includes potential public order and security threats stemming from tensions between different groups, which could lead to interethnic or social unrest.⁴ In this respect, hate crimes are “message crimes” by which the perpetrator sends a message not only to the individual victim but also to other members of the victim’s (perceived or actual) group and to society as a whole that members of the victim’s group are not welcome and do not belong to society.⁵ Even though there are several theories, explained below, on what distinguishes “hate crimes” from other crimes, it is clear that “hate crimes” do not necessarily require the perpetrator to feel hatred towards a specific group that a victim belongs to (actually or perceived) or is associated with. While the technically correct and therefore preferred term would be “bias-motivated crime”, the term “hate crime” is also often used as an established umbrella term for the kind of crimes addressed in the Draft Amendments. It has to be emphasized, however, that, technically, the word “hate” is a misnomer, as “hate” as the actual motivation for the commission of the crime is not required.
12. A bias motive requires that a perpetrator chooses his or her victims on the basis of a shared characteristic, which, in the context of “hate crime” legislation, are referred to as “protected characteristics”. These characteristics are either immutable or otherwise fundamental to a person’s identity, such as nationality, national or ethnic origin, colour, language, religion or belief, sexual orientation, gender identity, or disability.⁶
13. Unlike “hate speech”, which is explicitly prohibited on the international level for example in Article 20 par 2 of the International Covenant on Civil and Political Rights (hereinafter “ICCPR”)⁷ or Article 4 (a) of the International Convention on the

³ European Union Agency for Fundamental Rights, *Hate crime in the European Union*, page 1, available at https://fra.europa.eu/sites/default/files/fra-factsheet_hatecrime_en_final_0.pdf.

⁴ OSCE/ODIHR, *Hate Crime Laws: A Practical Guide* (2009) (hereinafter “2009 ODIHR Practical Guide on Hate Crime Laws”), page 20, available at <http://www.osce.org/odihr/36426?download=true>.

⁵ *ibid.* page 17 (2009 ODIHR Practical Guide on Hate Crime Laws).

⁶ *ibid.* page 38 (2009 ODIHR Practical Guide on Hate Crime Laws).

⁷ UN International Covenant on Civil and Political Rights, adopted by the UN General Assembly by Resolution 2200A (XXI) of 16 December 1966. The former Yugoslav Republic of Macedonia succeeded to the ICCPR on 18 January 1994 .

Elimination of All Forms of Racial Discrimination (hereinafter “CERD”)⁸, the concept of bias-motivated crime requires a base offence, meaning an action which is in and of itself prohibited and sanctioned by means of criminal law.⁹

14. In contrast, hate speech is sanctioned in a number of countries because the content of a specific expression is meant to incite violence, hostility or discrimination against a certain protected group.¹⁰ If the content of the expression were not offensive in itself, then the speaker would merely be exercising his or her right to freedom of expression in line with internationally protected human rights.

2. International and Regional Standards related to Bias-Motivated Crimes

15. The idea of protecting individuals from bias-motivated crimes stems from the anti-discrimination framework in international law. Article 2 par 1 of the ICCPR and Article 1 par 1 of the CERD prohibit discrimination on a number of specified grounds when it comes to the enjoyment of other protected human rights and fundamental freedoms. This includes rights such as the right to life or the right to security of person and protection by the State against violence or bodily harm.
16. With regard to thematically specific international human rights conventions, Article 16 par 5 of the UN Convention on the Rights of Persons with Disabilities (hereinafter “CRPD”) obliges State Parties to “put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted”.¹¹
17. At the regional level, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “ECHR”)¹² protects against discrimination in conjunction with the enjoyment of another right protected by the ECHR. The Convention’s Protocol No. 12 provides for a general prohibition of discrimination with respect to any right set forth by law.

⁸ UN International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the UN General Assembly by Resolution 2106 (XX) of 21 December 1965. The former Yugoslav Republic of Macedonia succeeded to this Convention on 18 January 1994.

⁹ While recognizing that the term “race” is a purely social construct that has no basis as a scientific concept, for the purpose of the opinion, the term “race” or “racial” may be used in reference to international instruments applying such a term to ensure that all discriminatory actions based on a person’s (perceived or actual) alleged “race”, ancestry, ethnicity, colour or nationality are covered - while generally preferring the use of alternative terms such as “ancestry” or “national or ethnic origin” (see e.g., *op. cit.* footnote 4, pages 41-42 (2009 ODIHR Practical Guide on Hate Crime Laws); see also the footnote under the first paragraph of Council of Europe’s Commission on Intolerance and Racism (hereinafter “ECRI”), General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, adopted on 13 December 2002, available at https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N7/Recommendation_7_en.asp#P127_11468. Except when part of a citation from a legal instrument or case law, the words “race” or “racial” are thus placed in quotation marks in these Comments to indicate that underlying theories based on the alleged existence of different “races” are not accepted.

¹⁰ *Op. cit.* footnote 4, pages 25-26 (2009 ODIHR Practical Guide on Hate Crime Laws).

¹¹ UN Convention on the Rights of Persons with Disabilities, adopted by General Assembly resolution 61/106 on 13 December 2006. The former Yugoslav Republic of Macedonia ratified the CRPD on 29 December 2011.

¹² The Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950, entered into force on 3 September 1953. The former Yugoslav Republic of Macedonia ratified the ECHR on 10 April 1997.

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18. The ECtHR has held that “[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”¹³ and is irreconcilable with Article 14 of the ECHR. This holds true for all bias-motivated crimes (including, specifically, cases where they are committed with anti-religious,¹⁴ homophobic,¹⁵ “racial”¹⁶ or political motives¹⁷), also where the treatment which is in violation of the ECHR is inflicted by private individuals.¹⁸ Generally, where there is an indication that a crime may have a bias motive, investigative authorities are under an obligation to “do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence”.¹⁹
19. Other Council of Europe (CoE) conventions focus on specific examples of bias-motivated crimes. For example, the Convention on preventing and combating violence against women and domestic violence (hereinafter “Istanbul Convention”), in its Article 4 (d) speaks of the promotion and protection, through the necessary legislative and other measures, of the right for everyone, particularly women, to live free from violence in both the public and the private sphere.²⁰ On another note, the Additional Protocol to the CoE Convention on Cybercrime explicitly concerns the criminalization of acts of a racist and xenophobic nature committed through computer systems. While the former Yugoslav Republic of Macedonia is party to both this Convention and its Additional Protocol²¹, it has signed, but not ratified the Istanbul Convention, and is recommended

¹³ *Identoba and Others v. Georgia*, ECtHR judgment of 12 May 2015 (Application no. 73235/12), par 67, available at <http://hudoc.echr.coe.int/eng?i=001-154400>; see also *Bekos and Kotropoulos v. Greece*, ECtHR judgment of 13 December 2005, Application No. 15250/02, par 69, available at <http://hudoc.echr.coe.int/eng?i=001-71594> and *Šečić v. Croatia*, ECtHR judgment of 31 May 2007, Application No. 40116/02, par 66, available at <http://hudoc.echr.coe.int/eng?i=001-80711>; however, the duty to investigate to unmask bias motives is not absolute and the ECtHR has also ruled in a number of cases that, in light of the circumstances, the national authorities did not have compelling reasons to suspect a bias motivation, see with further references European Union Agency for Fundamental Rights (FRA), *Report on Making hate crime visible in the European Union: acknowledging victims' rights*, 2012 (hereinafter “2012 EU FRA Report on Making Hate Crime Visible”), page 18, available at <http://fra.europa.eu/sites/default/files/fra-2012-hate-crime.pdf>.

¹⁴ *Milanovic v. Serbia*, ECtHR judgment of 14 December 2010, Application No. 44614/07, available at <http://hudoc.echr.coe.int/eng?i=001-102252>.

¹⁵ *Op. cit.* footnote 13 (*Identoba and Others v. Georgia*).

¹⁶ *Nachova and Others v. Bulgaria*, ECtHR (Grand Chamber) judgment of 6 July 2005, Application Nos. 43577/98 and 43579/98, par 160, available at <http://hudoc.echr.coe.int/eng?i=001-69630>

¹⁷ *Virabyan v. Armenia*, ECtHR judgment of 2 October 2012 (Application no. 40094/05), pars 218-219, available at <http://hudoc.echr.coe.int/eng?i=001-113302>.

¹⁸ *Šečić v. Croatia*, ECtHR judgment of 31 May 2007, Application No. 40116/02, par 67, available at <http://hudoc.echr.coe.int/eng?i=001-80711>.

¹⁹ *Balázs v. Hungary*, ECtHR judgment of 20 October 2015 (Application no. 15529/12), par 52, available at <http://hudoc.echr.coe.int/eng?i=001-158033>.

²⁰ The CoE’s Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS No. 210 entered into force on 1 August 2014.

²¹ The CoE’s Convention on Cybercrime (CETS No. 185) was ratified by the former Yugoslav Republic of Macedonia on 15 September 2004 and entered into force on 1 January 2005; the Protocol to the CoE’s Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed

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- to do so in order to enhance effective prevention and punishment of violence against women.
20. CoE Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity furthermore recommends legislative and other measures to counter “hate crime” and hate speech against lesbian, gay, bisexual or transgender (“LGBT”) persons due to the discrimination, marginalization and violence that they have been exposed to in the past.²²
 21. Within the OSCE, Ministerial Council Decision No. 9/09 on Combatting Hate Crime requests States to enact “specific, tailored legislation to combat hate crimes, providing for effective penalties that take into account the gravity of such crimes”.²³ Additionally, a number of other OSCE commitments address the prevention of and reaction to “hate crime”.²⁴
 22. As a candidate country to EU accession, the former Yugoslav Republic of Macedonia committed to make its legislation compliant with the EU *acquis*.²⁵ 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 obliges EU Member States to take the necessary measures to ensure that racist or xenophobic motivation of crimes is considered to be an aggravating factor or that such motivation is taken into account in the determination of penalties.²⁶ EU Directive 2012/29 of 2012 establishing minimum standards on the rights, support and protection of victims of crime requires States to conduct individual assessments of victims to avoid repeat or secondary victimization and to establish whether a bias-motivated crime has occurred.²⁷

through computer systems (CETS No. 189) was ratified by the former Yugoslav Republic of Macedonia on 14 September 2005 and entered into force on 1 March 2006.

²² CoE’s Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010, available at [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec\(2010\)5&Language=lanEnglish&Site=COE&BackColorInternet=](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec(2010)5&Language=lanEnglish&Site=COE&BackColorInternet=)

²³ See OSCE Ministerial Council Decision No. 9/09 on Combating Hate Crimes, 2 December 2009, par 9, available at <http://www.osce.org/cio/40695?download=true>.

²⁴ See e.g., *op. cit.* footnote 1 (OSCE Ministerial Council Decision No. 4/03), par 8; OSCE Permanent Council Decision No. 621 on Tolerance and the Fight against Racism, Xenophobia and Discrimination of 29 July 2004, par 1; and Annex to Decision No. 3/03 on the Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area, MC.DEC/3/03 of 2 December 2003, par 9, available at <http://www.osce.org/odihr/17554?download=true>.

²⁵ Following the entry into force of the Stabilisation and Association Agreement with the EU on 1 April 2004, the former Yugoslav Republic of Macedonia was officially granted candidate status for EU membership on 16 December 2005. Accession negotiations between the EU and the former Yugoslav Republic of Macedonia have not yet officially started.

²⁶ Article 4 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, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32008F0913>.

²⁷ EU Directive 2012/29/EU adopted on 25 October 2012, the provisions of which EU Member States had to incorporate into their national laws by 16 November 2015, pars 455-57 and Article 22 par 3, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0029&from=en>.

3. Bias-Motivated Crimes in the Criminal Code of the former Yugoslav Republic of Macedonia

23. The adoption of effective measures to prevent, identify and punish bias-motivated crimes was recently recommended to the former Yugoslav Republic of Macedonia in the 2014 Report of the Working Group on the UN Universal Periodic Review. The report explicitly recommended to “[f]ight impunity for violence against marginalized persons motivated by their ethnicity, religion, or sexual orientation, particularly through an improved awareness of public opinion, and the police and judicial authorities”.²⁸
24. Currently, the Criminal Code of the former Yugoslav Republic of Macedonia includes in its Article 39 par 5 a general provision obliging courts to take certain bias motives into account during sentencing discussions. The provision reads: “[w]hen determining the sentence, the court shall especially consider whether the crime has been committed against a person or group of persons or property, directly or indirectly, because of his/her sex, race, color of skin, gender, belonging to a marginalized group, ethnic origin, language, citizenship, social origin, religion or religious belief, other beliefs, education, political adherence, private or social status, mental or physical disability, age, family and marital status, property status, health condition, or any other ground provided in law or ratified international agreement.”²⁹
25. The Draft Amendments are not meant to replace this provision, but aim to supplement it by introducing “hate” as an aggravating factor (leading to enhanced penalties) with regard to specific crimes enshrined in the Criminal Code. This two-tier approach is welcome, as the general, sentencing-enhancing provision of Article 39 par 5 can then still serve as a supplementary umbrella provision obliging judges to consider bias-motivation, within the established maximum penalty for any specific crime, also for crimes which are not covered by the Draft Amendments. Thus, the Draft Amendments and the existing Article 39 par 5 appear to complement each other. At the same time, it is noted that the protected grounds or characteristics mentioned in Article 39 par 5 differ from the ones listed in Article 122 par 23, as proposed by the Draft Amendments. As explained below in pars 34-46, the list of protected characteristics should not be overly broad and should be limited to immutable or fundamental characteristics which are a marker of group identity. **It is therefore recommended to adapt the list of protected characteristics in Article 39 par 5 to Article 122 par 23, so that both provisions are consistent. Crimes committed against a person based on their presumed belonging to a protected group or because of a mere association with this group should also**

²⁸ Recommendation 101.40 made by Belgium, Human Rights Council, Report of the Working Group on the Universal Periodic Review – The former Yugoslav Republic of Macedonia (26 March 2014), page 18, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/MKSession18.aspx>; other relevant recommendations in the report are “101.44 Include a specific prohibition of discrimination based on sexual orientation and gender identity in line with international standards in the antidiscrimination legislation and take appropriate measures to end impunity for violence and intimidation of the LGBT community (Netherlands); Adopt measures to prevent incidents of violence on the grounds of sexual orientation (Canada)” (ibid. page 18); “101. 45 Amend anti-discrimination legislation to include sexual orientation and gender identity as specific grounds for discrimination and to open prompt, impartial and effective investigations into attacks on LGBTI individuals or organisations (Austria)” (ibid. pages 18-19); “101.46 Strengthen anti-discrimination legislation to prohibit discrimination on the basis of sexual orientation and gender identity, and take effective measures to combat violence and discrimination against LGBTI people (Australia);” (ibid. page 19)

²⁹ Additionally, the Criminal Code of the former Yugoslav Republic of Macedonia lists endangering security (Article 144 par 4) and causing of hate, discord or intolerance on national, racial, religious and other discriminatory ground (Article 319 par 1) as two crimes in which bias motives lead to enhanced penalties.

be included. The same holds true for the bias motivations listed in Article 144 par 4 and Article 319 par 1 of the current Criminal Code. In adapting the wording, law-drafters should bring the provisions in line with what is recommended in pars 29 and 34-46 below.

26. Moreover, it is good practice to require courts to put on record the reasons for applying or not applying sentence-enhancing provisions in cases of bias-motivated crime.³⁰ This increases the visibility of bias-motivated crimes, also within the judiciary and makes a history of bias-motivated crime known to investigative authorities.³¹ It furthermore can serve as a way to demonstrate to the victim that a bias motivation has been taken into account and to the public that courts follow a zero tolerance policy for bias-motivated crime in society. Finally, an acknowledgement of a bias motivation on public record is also crucial in terms of data collection, which plays a part in the prevention and identification of “hate crimes”. **It is therefore recommended to specify in law that judges are obliged to put on record the reasons for applying or not applying the provision of Article 39 par 5 of the current Criminal Code in cases which involve potential bias motives on the part of the perpetrator.**

4. General Remarks about the Draft Amendments to the Criminal Code of the former Yugoslav Republic of Macedonia

27. The Draft Amendments propose to introduce a new paragraph 23 into Article 122 of the Criminal Code, defining a “hate crime” as “a criminal act against a person or legal entity or property related to it, that is committed entirely or partially because of the actual or presumed characteristic of the person”, followed by a list of concrete protected characteristics. Additionally, the Draft Amendments include a number of specific penalty-enhancing provisions for particular crimes which are already part of the Criminal Code, in cases where they are committed with a bias motivation.³²
28. At the outset, the OSCE/ODIHR welcomes this new provision as it helps to enhance and specify the current concept of bias-motivated crimes, already set out in Article 39 par 5 of the Criminal Code. Firstly, the new paragraph 23 of Article 122 acknowledges the concept of so-called “mixed motives”, acts which are only partially committed with a bias motivation. Such acts are considered to be “hate crimes” as long as a bias motivation is one of the motives behind the act.³³ Furthermore, the explicit inclusion of the formulation “actual or presumed” characteristics is welcomed. A crime shall be

³⁰ *Op. cit.* footnote 4, page 37 (2009 ODIHR Practical Guide on Hate Crime Laws).

³¹ *ibid.* (2009 ODIHR Practical Guide on Hate Crime Laws).

³² These are murder (Article 123), bodily injury (article 130), severe bodily injury (Article 131), coercion (Article 139), unlawful deprivation of liberty (Article 140), Torture and other cruel, inhuman or degrading treatment and punishment (Article 142), threatening the safety (Article 144), prevention or disturbance of public gathering (Article 155), rape (Article 186), sexual assault of a helpless person (Article 187), sexual assault upon a child who has not turned 14 years of age (Article 188), not providing medical help (Article 208), damage to objects of others (Article 243), abuse of official position and authorization (Article 353), act of violence (Article 386), desecration of a grave (Article 400).

³³ *Op. cit.* footnote 4, pages 53-56 (2009 ODIHR Practical Guide on Hate Crime Laws). Pursuant to the ECtHR, [p]erpetrators may be influenced by “situational factors equally or stronger than by their biased attitude towards the group the victim belongs to”; see *op. cit.* footnote 19 (*Balázs v. Hungary*) par 70.

classified as a bias-motivated crime also if the perpetrator wrongly assumes that the victim belongs to a certain protected group.³⁴

29. However, the proposed formulation should be slightly expanded to also explicitly include cases where crimes are committed against persons associated with a certain group.³⁵ While the current wording does not prevent the application of the new provision to cases of association, it would be preferable to clearly include it in the Draft Amendments. An example for such a case would be if the Caucasian partner of a person of African descent is attacked by a group of hooligans who believe in the supremacy of the “white race”. This is a “hate crime” even though the partner does not himself or herself belong to the group against which bias is portrayed. **It is recommended to expand the scope of the Draft Amendments accordingly, so that also crimes against persons associated with certain groups are covered in Article 122 par 23.**

5. Bias Motivation

30. It is noted that whereas the new Article 122 par 23 defines a “hate crime” as “a criminal act (...) committed entirely or partially *because of* the actual or presumed characteristic of a person” [emphasis added], the specific provisions in the Criminal Code which relate to particular crimes speak explicitly of “hate” as a motive, which is inconsistent. The latter formulation seems to be narrower than the more openly worded general provision in Article 122 par 23.
31. Overall, the concept of “hate” is often difficult to define in practice, since it is subjective and may require an assessment of the perpetrator’s mental state of mind while committing the crime; proving “hate” as a constitutive element of certain criminal offences will thus often be challenging and sets very high standards which may render it difficult to apply the respective provisions in practice. In certain countries, the legislation refers to hate, contempt, hostility or prejudice to describe the type of motivation required for a crime to be categorized as bias-motivated. Other countries do not employ such terminology but use more general terms similar to those used in Article 122 par 23 (“because of”). At the same time, proof of the specific feeling of “hatred” is generally not required, regardless of the legislative approach chosen. In any case, **the Draft Amendments should use unified terminology in this respect. This could be done by explaining in Article 122 that throughout the Criminal Code, the word “hate” refers to bias-motivated crimes as defined in new Article 122 paragraph 23. Alternatively, in order to provide additional clarity and guidance to practitioners and interested parties, the drafters could consider replacing the term “hate” with “bias” and the term “hate crime” with “bias-motivated” crime, as the technically correct term.**
32. In this respect, it is important to understand what is meant when a crime is committed “because of” a certain protected characteristic. “Bias-motivated crimes” exist when the perpetrator *intentionally* selects his or her victim based on one or several protected characteristics and where such selection is evidenced by written or spoken words, images, objects, actions, demonstrations of hostility, or other evidence of bias. The mere fact of a victim having a protected characteristic, on the other hand, in the absence of

³⁴ *Op. cit.* footnote 4, pages 50-51 (2009 ODIHR Practical Guide on Hate Crime Laws).

³⁵ *ibid.* pages 49-51 (2009 ODIHR Practical Guide on Hate Crime Laws).

evidence of intentional targeting, does not suffice to establish a hate crime. In any event, in all cases where a crime has been committed against certain persons with protected characteristics, authorities need to take all reasonable measures to investigate whether the above-mentioned elements exist and whether or not the respective criminal act is a “hate crime”.

33. Bearing in mind that “hate crime” provisions may nevertheless not cover all potential cases committed against certain categories of persons who are considered to deserve special protection due to their situation or the specific challenges that they face, this does not mean that certain cases cannot be covered by other criminal provisions. For instance, certain criminal offences committed against juveniles, pregnant women, persons with disabilities or elderly persons can lead to enhanced penalties, but do not constitute “hate crimes”. The Criminal Code of the former Yugoslav Republic of Macedonia knows such enhanced penalties, for example, for murder committed while knowing that the victim was pregnant³⁶, for rape of persons with disabilities³⁷ or for sexual assault of persons below the age of 14.³⁸

6. Protected Characteristics

34. Many States have adopted “hate crime” legislation only in recent years, and there are a variety of different approaches in national legislation. While there are few clear international standards, there are good practice examples with regard to which characteristics should be protected under criminal legislation. Characteristics protected by “hate crime” legislation are usually said to fulfill three criteria: one, the characteristics are noticeable from the outside, either from a person’s appearance or from contextual circumstances; two, they are immutable or fundamental to a person and three, they are markers of group identity, embedding an individual into a broader group context with a common group identity.³⁹
35. Characteristics which are noticeable from the outside are those that can be deduced either from the victims’ appearance or from other contextual elements (i.e. the victim participated in an event at a Jewish cultural center and is attacked upon leaving the center by a perpetrator who knows or assumes that the victim is Jewish or in another way associated with the Jewish community). Such characteristics are protected because bias-motivated crimes are identity crimes, where the victim is chosen as a representative of a group for which the perpetrator means to express disdain. This cannot be the case if the perpetrator is not able to assume, be it from the victim’s appearance, clothing or from other contextual elements, that he or she belongs to a specific group. In the latter cases, it will be difficult to prove the existence of a bias-motivated crime during an investigation and ensuing criminal trial.
36. Immutable or fundamental characteristics are either unchangeable or an otherwise intrinsic part of a person’s sense of self.⁴⁰ Even though one’s religion is not an immutable characteristic, as it may be possible to adopt a new or no religion, a person’s

³⁶ Article 123 par 2 number 6 of the Criminal Code of the former Yugoslav Republic of Macedonia.

³⁷ *ibid.* Article 187.

³⁸ *ibid.* Article 188.

³⁹ *Op. cit.* footnote 4, page 38 (2009 ODIHR Practical Guide on Hate Crime Laws).

⁴⁰ *Ibid.* page 38 (2009 ODIHR Practical Guide on Hate Crime Laws).

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religion is considered to be such a fundamental part of personal identity that it is protected by the vast majority of national “hate crime” laws.⁴¹

37. As explained in par 11 above, bias-motivated crimes are meant to send a message to the victim, to other persons belonging to the victim’s group and to society as a whole. Therefore, only characteristics which are markers of group identity should be protected by “hate crime” legislation.
38. The Draft Amendments currently include the following protected characteristics: “race, colour of skin, national and ethnic belonging, religion or religious belief, mental or physical disability, sex or gender identity, sexual orientation, political affiliation, age or belonging to a marginalized group”. This list covers most of those groups which are most frequently targeted for bias-motivated crimes, and thus constitutes a major improvement to the list set out in Article 39 par 5 of the current Criminal Code, which includes a number of characteristics that are not immutable or markers of group identity.
39. At the same time, by broadening the scope of protected characteristics too much, lawmakers might unintentionally water down the concept of bias-motivated crimes. Bias-motivated crimes are message crimes and sanctioning them in criminal legislation implies that criminal justice systems, and the societies that they belong to, will not tolerate crimes committed against someone for the mere fact that this person (allegedly or factually) was a member of a specific group or associated with this group. This message might be lost if the number of protected groups is too large and if the understanding of what actually constitutes a group is too broad.
40. When including a protected characteristic, lawmakers should therefore ask themselves whether the inclusion of said characteristic will enhance implementation of the law, or whether it will perhaps be difficult to apply in practice. In the case of political affiliation, it is noted that while this ground is sometimes included as a protected characteristic in domestic legislation,⁴² it is not an immutable or fundamental characteristic and can often change over time. Additionally, it is a vague term open to various interpretations and potentially very difficult to prove in practice. **For this reason, it is recommended to remove political affiliation as a protected characteristic from the Draft Amendments. At the same time, it is also recommended to remove age as a protected characteristic from the list, since it is questionable whether age alone is truly a marker of group identity. Including this characteristic might also pose particular difficulties when distinguishing between a mere opportunistic crime and a “hate crime”.**⁴³
41. When deciding on the list of protected characteristics, lawmakers should also generally consider the social and historic context in a given country. The text of the law should reflect an understanding of the current social problems and potential historic oppression and take this into account when deciding on characteristics. In the context of the former Yugoslav Republic of Macedonia, Roma constitute a group that has frequently been

⁴¹ Ibid. (2009 ODIHR Practical Guide on Hate Crime Laws).

⁴² For instance, the ECtHR has considered that there exists a duty for state authorities “to take all reasonable steps to unmask any political motive and to establish whether or not intolerance towards a dissenting political opinion may have played a role in [violent incidents]” while recognizing that “proving political motivation will often be extremely difficult in practice” and that the “State’s obligation to investigate possible political overtones to a violent act is an obligation to use best endeavours and not absolute”; see *op. cit.* footnote 17, pars 218-219 (*Virabyan v. Armenia*).

⁴³ *Op. cit.* footnote 4, page 38 (2009 ODIHR Practical Guide on Hate Crime Laws).

victimized; there have also been allegations of ill-treatment and improper investigations into acts committed by the police against members of this group.⁴⁴ Another group that is often targeted by bias-motivated crimes is that of LGBT persons.⁴⁵ Both ethnicity and sexual orientation are protected grounds in the Draft Amendments, which is laudable.

42. In the definition of Article 122 par 23, the Draft Amendments also refer to “a criminal act against a person or legal entity or property related to it”. It is assumed that the drafters mean property owned by both natural persons and legal entities. In this case, **it is recommended to revise the wording of this provision, so that it becomes clear that it refers not only to property owned by legal entities, but also to that owned by private persons.**
43. **For reasons of simplicity and to ensure consistency with commonly used legal terminology, the terms “ethnicity” or “ethnic origin” and “nationality” are preferable to “national or ethnic belonging”. For the same reasons, the drafters should remove the word “or” in “sex or gender identity”, as sex and gender identity are two separate characteristics.**
44. Furthermore, the drafters should ensure that the term “religion or religious belief” covers not only the lack of any religious belief, such as atheism, but also non-religious belief (“*Weltanschauung*”). **It is therefore suggested to adapt the wording of this provision accordingly and to change the provision to “religion or belief”.**
45. With regard to the characteristic of “disability”, the drafters should be clear about what this concept entails. According to the preamble to the CRPD, “disability is an evolving concept and [...] results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others”.⁴⁶ This means that also diseases, if they are incurable or if they result in certain physical, mental or psychological impairments, can fall under the definition of disability if persons suffering from such diseases cannot effectively participate in society on par with others. It is worth noting in this context that HIV/AIDS has been recognized as potentially falling within the ambit of disability, if it affects persons living with the disease in the way outlined above.⁴⁷
46. Finally, it is crucial that criminal offences are defined in a manner that enables an individual to align his or her behavior with the law and foresee that certain actions will trigger criminal sanctions. While open-ended lists are common in anti-discrimination legislation, violations in this area will generally be sanctioned by means of private or administrative law and not trigger criminal sanctions. In criminal law, where consequences of violations of the law can be quite severe, and may even lead to the deprivation of liberty, it is particularly important that laws are drafted in a way which is

⁴⁴ Council of Europe, *Recommendation CM/ResCMN(2012)13 on the implementation of the Framework Convention for the Protection of National Minorities by “the former Yugoslav Republic of Macedonia”* (4 July 2012), available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ca6ca;

⁴⁵ US Department of State, Bureau of Democracy, *Human Rights and Labor, Country Reports on Human Rights Practices for 2014 – Macedonia*, available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>.

⁴⁶ *Op. cit.* footnote 11, preamble (CRPD).

⁴⁷ See e.g., UN OHCHR, World Health Organization and UNAIDS, *Policy Brief on Disability and HIV* (April 2009), page 1, available at http://www.who.int/disabilities/jc1632_policy_brief_disability_en.pdf.

clear, foreseeable and specific.⁴⁸ **This is why vague and open-ended lists of protected characteristics, as entailed in the Draft Amendments through the formulation “belonging to a marginalized group” should be avoided, as they might be in conflict with the fundamental principle of legality. It is therefore recommended to delete the above term from Article 122 par 23. As mentioned in par 25 above, the list of protected characteristics in the Draft Amendments is different from the list currently included in Article 39 par 5 of the Criminal Code. Article 39 par 5 should be adapted to Article 122 par 23, taking into account the recommendations in this section, to ensure that both provisions are consistent.**

7. Specific Crimes

47. The Draft Amendments cover most of the base offences which are commonly covered in legal systems applying specific penalty enhancements to tackle bias-motivated crimes (see par 27 above, footnote 32). Generally, specific penalty-enhancing provisions should only be included for the most frequent forms of bias-motivated crimes in order to not water down the message that bias-motivated crimes are unique crimes which lead to harsher sanctions due to their strong condemnation by society.
48. On the other hand, even though sentences for, for example, harassment or property crimes tend to be quite low, the inclusion of these crimes as base offences for specific penalty enhancement might send a powerful message that also these kinds of bias-motivated offences are not tolerated in society.⁴⁹ **In light of this, the drafters should consider adding specific penalty enhancements to further property crimes which are often considered to be base offences for bias-motivated crimes. These are, in particular, arson, theft, severe theft, robbery, armed robbery or burglary.**

8. Final Comments

49. As mentioned under par 41 above, legislative measures tackling bias-motivated crime are most effective when lawmakers are aware of and have assessed the historic and social context in their respective country, and where legislation is then tailored to afford special protection to those groups which are most frequently victims of bias-motivated crimes. Furthermore, effective “hate crime” legislation should also continuously be monitored after it has been adopted to see if and how the law is implemented.
50. Some Criminal Codes furthermore include evidentiary standards which facilitate the interpretation and therefore the investigations of crimes and the application of the law.⁵⁰ Even though these standards do not necessarily need to be included in the Criminal Code itself, some form of guidelines or other tools to identify bias indicators are crucial

⁴⁸ *Op. cit.* footnote 4, page 46 (2009 ODIHR Practical Guide on Hate Crime Laws); see also OSCE/ODIHR Opinion on Draft Amendments to the Moldovan Criminal and Contravention Codes relating to Bias-motivated Offences, par 44, available at <http://legislationline.org/countries/country/14>.

⁴⁹ *Op. cit.* footnote 4, page 37 (2009 ODIHR Practical Guide on Hate Crime Laws).

⁵⁰ E.g., France and the United Kingdom, see *op. cit.* footnote 4, page 52 (ODIHR Practical Guide on Hate Crime Laws).

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to ensure that these indicators are correctly identified, investigated and considered in criminal proceedings.⁵¹

51. At the same time, the proper implementation of the provisions in the Draft Amendments will depend on a variety of other factors. Training of law enforcement agencies, prosecutors and judges is key in this respect, as are general awareness-raising campaigns, also, where appropriate, in minority languages, to encourage the understanding and reporting of bias-motivated crime. Successful investigations into potential bias-motivated crimes will also depend to a large extent on society's degree of confidence and trust in law enforcement agencies and the criminal justice system. If institutions are seen as biased or corrupt, individuals, particularly persons from marginalized groups, are less likely to report such crimes.
52. Additionally, it is also recommended to disaggregate official data on victims of crimes by ethnicity, gender, religion etc., and to supplement such data with crime victimization surveys, which may help provide insights into why individuals might be hesitant to report bias-motivated crime and learn of their experience with law enforcement agencies.⁵² The collection of reliable statistical and other data on bias-motivated crimes, including on forms of violent manifestations of racism, xenophobia, discrimination, and anti-Semitism is part of applicable OSCE commitments.⁵³
53. Finally, recommendations at the international level highlight the need for direct and meaningful participation of all criminal justice agencies, civil society, in particular marginalized and minority groups, and other stakeholders throughout the process of amending legislation on preventing and combating bias-motivated crimes.⁵⁴ Consequently, policy and law makers in the former Yugoslav Republic of Macedonia should ensure that all stakeholders and interested parties are fully consulted and informed, and that they are able to submit their views throughout the amendment process. Public discussion and an open and inclusive debate will increase an overall understanding of the various factors involved, enhance confidence in and ownership of the adopted legislation, and ultimately improve implementation.

[END OF TEXT]

⁵¹ See also e.g., OSCE/ODIHR, Preventing and Responding to Hate crimes – A Resources Guide for NGOs in the OSCE Region (2009) pages 21-26, available at <http://www.osce.org/odihr/prosecutorsguide?download=true>; see also *op. cit.* footnote 19, par 21 (*Balázs v. Hungary*); Prosecuting Hate Crimes: A Practical Guide (2014), page 46, available at <http://www.osce.org/odihr/prosecutorsguide?download=true>, which refers to the use of bias indicators by prosecutors and provides the example of the leaflet on hate crimes for police officers provided by the Polish Ministry of Interior (pages 47-48); see also pages 12-14 of the Hate Crime Data Collection Guidelines and Training Manual of the Federal Bureau of Investigation (27 February 2015), available at <https://www.fbi.gov/about-us/cjis/ucr/hate-crime-data-collection-guidelines-and-training-manual.pdf>, which list a number of elements that may be considered to establish whether a crime was motivated by bias.

⁵² *Op. cit.* footnote 13, page 11 (2012 EU FRA Report on Making Hate Crime Visible).

⁵³ See *op. cit.* footnote 1, par 6 (OSCE Ministerial Council Decision No. 4/03) and par. 14 (c) of the OSCE Ministerial Council Decision No. 13/06 on Combating Intolerance and Discrimination and Promoting Mutual Respect and Understanding, taken at the Brussels Ministerial Council Meeting on 5 December 2006, available at <http://www.osce.org/mc/23114?download=true>.

⁵⁴ See *op. cit.* footnote 4, pages 13-14 (2009 ODIHR Practical Guide on Hate Crime Laws).

ANNEX:

Proposals for amending the Criminal Code (CC) regarding definition, processing and sanctioning of hate crimes

1. Introduction of a new paragraph 23 in Article 122 of the CC, which defines the hate crime as: “A hate crime, as prescribed with the provisions of this law, is a criminal act against a person or legal entity or property related to it, that is committed entirely or partially because of the actual or presumed characteristic of the person that refers to race, colour of skin, national and ethnic belonging, religion or religious belief, mental or physical disability, sex or gender identity, sexual orientation, political affiliation, age or belonging to a marginalized group”.
2. In the special provisions of the CC, hate can be introduced as a qualified type of the regular criminal act for which a more severe punishment is foreseen in the following criminal acts:
 - **Murder**, Article 123 of the CC, the word “hate” to be introduced in paragraph 4 of this article and in this case the paragraph will stipulate that “4) deprives another of life for self-interest, because of committing or covering up another crime, for ruthless revenge, **out of hate** or for other low motives”.
 - **Bodily Injury**, Article 130, following paragraph 2, a new paragraph 3 is added and it stipulates that: „Whosoever commits the crime **out of hate** will be punished with the punishment from paragraph 2.

Paragraphs 3 and 4 become paragraphs 4 and 5.

- **Severe bodily injury**, Article 131 of the CC, the word “hate” to be introduced in paragraph 2 of this article and in this case the paragraph will stipulate: “2) Whosoever commits the crime referred to in paragraph 1 while committing domestic violence **or out of hate** shall be sentenced to imprisonment of one to five years”.

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- *Coercion*, Article 139 of the CC, the word “hate” to be introduced in paragraph 2 of this article and in this case the paragraph will stipulate: “2) If the crime stipulated in paragraph 1 is committed while perpetrating domestic violence **or out of hate**, the perpetrator shall be sentenced to imprisonment from six months to three years”.
- *Unlawful deprivation of liberty*, Article 140 of the CC, the word “hate” to be introduced in paragraph 2 of this article and in this case the paragraph will stipulate: “2) If the crime stipulated in paragraph 1 is committed while perpetrating domestic violence **or out of hate**, the perpetrator shall be sentenced to imprisonment from six months to three years”.
- *Torture and other cruel, inhuman or degrading treatment and punishment*, Article 142 of the CC, the word “hate” to be introduced in paragraph 2 of this article and in this case the paragraph will stipulate: “2) If, the crime referred to in paragraph 1 causes the damaged party severe physical injury or other especially severe consequences, or it is **perpetrated out of hate**, the perpetrator shall be sentenced to imprisonment of minimum four years.
- *Threatening the safety*, Article 144 of the CC, the word “hate” to be introduced in paragraph 2 of this article and in this case the paragraph will stipulate: “2) Whosoever commits the crime referred to in paragraph 1 while perpetrating domestic violence **or out of hate** shall be sentenced to imprisonment of three months to three years”.
- *Prevention or disturbance of public gathering*, Article 155 of the CC, the word “hate” to be introduced in paragraph 2 of this article and in this case the paragraph will stipulate: “2) If the crime referred to in paragraph 1 is committed **out of hate or** by an official person by misusing his official position or authorization, he shall be sentenced to imprisonment of three months to three years”.
- *Rape*, Article 186 of the CC, the word “hate” to be introduced in paragraph 3 of this article and in this case the paragraph will stipulate: “3) If because of the crime referred to in paragraph 1 a severe body injury, death or other severe consequences were caused or the crime was committed by several persons or in an especially cruel and

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degrading manner **or out of hate**, the perpetrator shall be sentenced to minimum imprisonment of four years”.

- *Sexual assault of a helpless person*, Article 187 of the CC, the word “hate” to be introduced in paragraph 3 of this article and in this case the paragraph will stipulate: “3) If because of the crime referred to in paragraph (1) and paragraph (2) a severe bodily injury, death or some other severe consequence was caused, or if the crime was committed by several persons in an especially cruel or degrading manner **or out of hate**, the perpetrator shall be sentenced to imprisonment of minimum ten years or a life imprisonment.
- *Sexual assault upon a child who has not turned 14 years of age*, Article 188 of the CC, the word “hate” to be introduced in paragraph 2 of this article and in this case the paragraph will stipulate: “2) If a severe body injury, death or some other severe consequences have been caused because of the crime referred to in paragraph (1) or the crime has been committed by several persons or in an especially cruel and degrading manner **or out of hate**, the perpetrator shall be sentenced to imprisonment of minimum 15 year or to life imprisonment”.
- *Not providing medical help*, Article 208 of the CC, the word “hate” to be introduced in paragraph 2 of this article and in this case the paragraph will stipulate: ”2) If because of the crime referred to in paragraph 1 the person to whom medical assistance was not provided dies **or the crime was committed because of hate**, the perpetrator shall be sentenced to imprisonment of six months to five years.
- *Damage to objects of others*, Article 243 of the CC, the word “hate” to be introduced in paragraph 2 of this article and in this case the paragraph will stipulate: “2) If the damage is of a significant value or the objects are goods under temporary protection or cultural heritage **or the crime was committed because of hate**, the perpetrator shall be sentenced to imprisonment of six months to five years.
- *Abuse of official position and authorization*, Article 353 of the CC, the word “hate” to be introduced in paragraph 2 of this article and in this case the paragraph will

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stipulate: “2) If the perpetrator of the crime referred to in paragraph 1 acquires a greater property benefit, or causes greater property damage, or violates the rights of another more severely **or commits the crime because of hate**, he shall be sentenced to imprisonment of six months to five years”.

- *Act of violence*, Article 386 of the CC, the word “hate” to be introduced in paragraph 5 of this article and in this case the paragraph will stipulate: “5) if the crime referred to in paragraphs (1), (2) and (3) of this article **is caused because of hate or** results in starting a fight, riots and property damage of a great extent, the perpetrator shall be sentenced from one to five years of imprisonment”.
- *Desecration of a grave*, Article 400 of the CC, the word “hate” to be introduced in paragraph 5 of this article and in this case the paragraph will stipulate: “2) Whosoever, who commits the actions from paragraph 1 **out of hate** or desecrates two or more graves, shall be fined or sentenced to imprisonment of up to three years”.