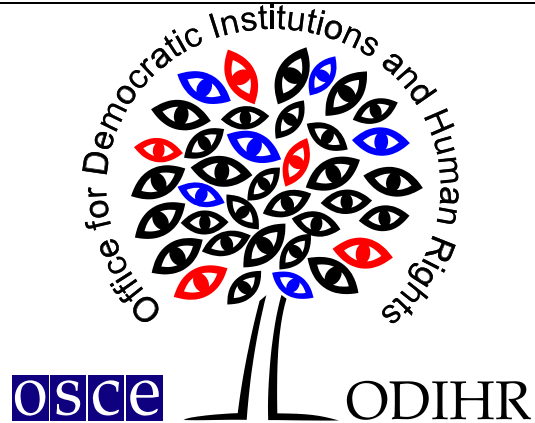


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OSCE/ODIHR OPINION

ON DRAFT

AMENDMENTS TO THE MOLDOVAN CRIMINAL CODE RELATED TO HATE CRIMES

Based on an official English translation of the draft amendments

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1. INTRODUCTION

1. *In February 2010, during an OSCE ODIHR assessment visit to the Republic of Moldova focusing on the implementation of human dimension issues, discussions commenced between the Ministry of Justice and ODIHR regarding amendments to existing hate crimes related provisions in the Criminal Code of Moldova¹ (hereinafter “the Moldovan Criminal Code” or “the Criminal Code”).*
2. *In March 2010, during an ODIHR follow-up visit, ODIHR was informed that certain draft amendments to hate crimes related articles, namely Articles 176 and 346 of the Moldovan Criminal Code (hereinafter “the draft Amendments”), had been prepared. ODIHR was provided with copies of the draft Amendments.*
3. *On 2 April 2010, the Minister of Justice of the Republic of Moldova sent an official letter to the ODIHR Director, in which he asked for ODIHR expertise on the above draft Amendments. This Opinion is provided as a response thereto.*

2. SCOPE OF REVIEW

4. The scope of the Opinion covers only the above-mentioned draft Amendments, which will be reviewed within the framework of the applicable Moldovan Criminal Code, in particular other provisions of the said Criminal Code related to hate crimes. Thus limited, the Opinion does not constitute a full and comprehensive review of all available framework legislation governing the issue of hate crimes in Moldova.
5. The Opinion raises key issues and provides indications of areas of concern. The ensuing recommendations are based on international standards and best practices on hate crimes issues, as found in the international agreements and commitments ratified and entered into by the Republic of Moldova. The recommendations are aimed at providing a framework for further discussion and a basis for future events with key stakeholders to discuss the issues raised.
6. This Opinion is based on an official translation of the draft Amendments and an excerpt of the Criminal Code, both of which have been attached to this document as Annexes 1 and 2 respectively. Nevertheless, errors from translation may result.
7. In view of the above, the OSCE ODIHR would like to make mention that this Opinion is without prejudice to any written or oral recommendations and

¹ The Criminal Code of the Republic of Moldova, No. 985-XV dated 18.04.2002, Official Monitor of the Republic of Moldova No. 128-129/1012 dated 13.09.2002, republished: Official Monitor of the Republic of Moldova No. 72-74/195 dated 14.04.2009

comments to these or other amendments to the Criminal Code that the OSCE ODIHR may make in the future.

3. EXECUTIVE SUMMARY

8. The OSCE ODIHR welcomes Moldovan legislation on or related to hate crimes. Nevertheless, in order to ensure the full compliance of the said legislation with international standards, it is recommended as follows:

3.1 Key Recommendations

- A. to remove Article 176 from the Criminal Code and incorporate it into administrative and private legislation, or a comprehensive Anti-Discrimination Law; [par. 22]
- B. to delete the protected characteristic “social hatred” from the wording of Articles 77, 145, 151, 152, 197, and 222 of the Moldovan Criminal Code; [par. 46]
- C. to clarify and expand the term “national hatred” in Articles 77, 145, 151, 152, 197, and 222 of the Moldovan Criminal Code; [par. 47]
- D. to replace the hate motivation with an indication that the crimes must have been committed because or by reason of a protected characteristic, in the aggravated circumstances listed in Articles 77, 145, 151, 152, 197, and 222 of the Moldovan Criminal Code; [par. 53]
- E. to ensure, in the Criminal Code or other law, that bias motivation should become part of perpetrators’ public criminal records; [par. 56]

3.2 Additional Recommendations

- F. to delete the terms “disadvantaged class” and the open ended formulation “or on the basis of any other criteria” from the wording of revised Article 176; [par. 24]
- G. to clarify which insulting or humiliating behaviour is covered by revised Article 346, par. 1 and that such actions and results need to be deliberate; [par. 33]
- H. to delete the protected characteristics “political opinion”, social status”, and “disadvantaged class” from the wording of revised Article 346, par. 1, as well as the open-ended formulation “or on the basis of any other criteria”; [pars. 35-36]

- I. to delete the term “violent acts” from the wording of revised Article 346, par. 2 and replace it with references to specific violent offences as found in the Moldovan Criminal Code; [par. 37]
- J. to delete the terms “disadvantaged class” and the open-ended formulation “or on the basis of any other criteria” from the wording of revised Article 346, par. 2; [par. 38]
- K. to make the protected characteristics mentioned in revised Article 346 consistent with those mentioned in Articles 77, 145, 151, 152, 197 and 222 of the Moldovan Criminal Code; [par. 39]
- L. to extend the planned inclusion of sexual orientation as a protected characteristic to Articles 77 and 197 of the Criminal Code; [par. 44]
- M. to amend Articles 77, 145, 151, 152, 197 and 222 of the Moldovan Criminal Code by:
 - 1. adopting a broad definition of “race”, in line with international standards; [par. 50]
 - 2. extending the protected characteristic “religion” to cover “religion and belief”;[par. 51]
 - 3. specifying that aggravated circumstances will also apply if bias-motivated crimes were committed due to the association or affiliation of the victim with a protected group, even if this was based on an erroneous assumption; [par. 54]
 - 4. clarifying that aggravated circumstances will also apply if the bias motive was one of several motives; [par. 55] and
- N. to amend Article 197 so that it also applies in cases where the damaging or destruction of goods does not cause large scale damage. [par. 59]

4. ANALYSIS AND RECOMMENDATIONS

4.1 International Definitions and Standards Related to Hate Crimes Legislation

- 9. Hate crimes are usually defined as criminal acts committed with a bias motive.² This means that any crime, be it a crime against a person, his/her life, bodily integrity or property, will be a hate or bias-motivated crime if at least one of the motives is that person’s presumed or actual membership or association with a defined group of persons. Such groups usually share an often visible, immutable, fundamental characteristic, such as nationality, ethnicity, language, religion, sexual orientation or similar ground, constituting a marker for group identity.³ In hate crimes legislation aiming at special

² See Hate Crime Laws: A Practical Guide, published by OSCE ODIHR in 2009, to be found under <http://www.osce.org/item/36671.html>, p. 16.

³ Ibid, p. 38.

protection for such groups, such characteristics are called “protected characteristics”.⁴

10. While hate crimes are discriminatory in that the perpetrator treats his/her victim differently than others by singling him/her out only because of, e.g., his/her appearance or other protected characteristic, they need to be distinguished from general discriminatory behaviour. While the latter involves actions that are not necessarily criminal actions (e.g. hiring or failing to hire an employee, issuing an administrative order, etc.), a hate crime will only exist if the underlying action is already a criminal act.⁵ This is reflected in the legislation governing both phenomena: Anti-discrimination legislation belongs into the sphere of civil or administrative law, while hate crimes provisions are always part of criminal legislation.
11. In addition, hate crimes need to be distinguished from the criminal offence of hate speech included in certain countries’ criminal codes. In such cases, the basic, underlying action of speaking is not criminal in nature, but this action is transformed into a crime due to its prohibited content. Thus, one of the main requirements for a hate crime, namely the basic underlying criminal action, is missing.⁶
12. On an international level, protection from all forms of hate crimes emanates from general international agreements against discrimination, such as the International Covenant on Civil and Political Rights⁷ and the International Convention on the Elimination of All Forms of Racial Discrimination⁸ (hereinafter “CERD”). The latter treaty even requires that “all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin” shall be considered offences punishable by law.⁹ The UN Office of the High Commissioner for Human Rights went even further in its General Recommendation No. 30 on the CERD by recommending the introduction in criminal law of a provision stating that “committing an offence with racist motivation or aim constitutes an aggravating circumstance allowing for a more severe punishment”.¹⁰ The International Criminal Tribunal for the Former Yugoslavia (hereinafter “the ICTY”) also followed this approach in its judgment in the *Kunarac et al.* case, where it considered ethnic and gender discrimination of the victims as aggravating circumstances when deliberating on the sentence for the main accused.¹¹
13. The Council of Europe’s Commission on Intolerance and Racism (hereinafter “ECRI”)¹² has also called upon Member States to ensure that national laws,

⁴ Ibid, p. 16.

⁵ Ibid, p. 25.

⁶ Ibid, pp. 25-26.

⁷ The UN International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966. Acceded to by the Republic of Moldova on 26 January 1993.

⁸ Adopted by UN General Assembly resolution 1206 (XX) of 21 December 1965. Acceded to by the Republic of Moldova on 26 January 1993.

⁹ See Article 4(a) of the CERD.

¹⁰ Office of the High Commissioner for Human Rights, General Recommendation No. 30: Discrimination Against Non Citizens, 10 January 2004, par. 22.

¹¹ ICTY judgment Prosecutor v. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic, case no. IT-96-23-T& IT-96-23/1-T, 22 February 2001, par. 867.

¹² The Republic of Moldova acceded to the Council of Europe on 13 July 1995.

including criminal laws, “specifically counter racism, xenophobia, anti-semitism and intolerance, inter alia by providing [...] that racist and xenophobic acts are stringently punished through methods such as defining common offences but with a racist or xenophobic nature as specific offences [and] enabling the racist or xenophobic motives of the offender to be specifically taken into account”.¹³ Further, ECRI has recommended that Member States criminalize different forms of hate speech and that for all crimes that do not involve hate speech, the creation of racist groups or genocide, racist motivation should constitute an aggravating circumstance.¹⁴ In the case of *Angelova and Iliev v. Bulgaria* before the European Court of Human Rights (hereinafter “the ECtHR”), the ECtHR specifically mentioned the separate criminalization of racially motivated murders or serious bodily injuries and explicit penalty-enhancing provisions relating to such offences as one of the means to “attain the desired result of punishing perpetrators who have racist motives”.¹⁵

14. In 2008, the European Union passed a Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, in an attempt to approximate criminal legislation in EU member states in the above field.¹⁶ Article 4 of the Framework Decision states that “Member States shall take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance [for criminal offences other than hate speech], or alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties”.
15. Numerous OSCE Commitments also concern OSCE Member States’ fight against discrimination and hate crimes, notably Ministerial Council Decision 4/03 on Tolerance and Non-Discrimination¹⁷ of 2003 and Permanent Council Decision 621 of 2004 on Tolerance and the Fight against Racism, Xenophobia and Discrimination.¹⁸

4.2. The draft Amendments to the Criminal Code

¹³ ECRI General Policy Recommendation No. 1 on Combating Racism, Xenophobia, Antisemitism and Intolerance, adopted by ECRI on 4 October 1996, A. CONCERNING LAW, LAW ENFORCEMENT AND JUDICIAL REMEDIES.

¹⁴ ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, adopted on 13 December 2002, par. 21.

¹⁵ ECtHR judgment *Angelova and Iliev v. Bulgaria* of 26 July 2007, application no. 55523/00, par. 104. See also the ECtHR’s judgments in *Nachova and others v. Bulgaria* of 6 July 2005, application nos. 43577/98 and 43579/98, pars. 162-168 and in *Šečić v. Croatia* of 31 May 2007, where the ECtHR also stressed the obligation of State bodies to distinguish between racially-motivated crimes and other crimes.

¹⁶ 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.

¹⁷ OSCE MC Decision 4/03 of 2 December 2003: “The Ministerial Council [...]8. Recognizes the need to combat hate crimes [...]”.

¹⁸ OSCE PC Decision No. 621 on Tolerance and the Fight against Discrimination, Xenophobia and Discrimination of 29 July 2004: “The Permanent Council [...] Decides, 1. The Participating States commit to: - Consider enacting or strengthening, where appropriate, legislation that prohibits discrimination based on, or incitement to hate crimes [...]”.

16. As noted earlier, the Moldovan Criminal Code contains numerous provisions that address hate or bias motivated crimes. This approach is welcomed. At the same time, it is important, in legislation, to differentiate between hate crimes and general anti-discrimination principles on the one hand, and hate crimes and hate speech on the other (see pars 10 and 11 *supra*). The ensuing recommendations concerning the draft Amendments and other hate crimes related provisions of the Criminal Code focus on this issue, but also on general international and OSCE standards of reviewing hate crimes.

4.2.1 Draft Amendment to Article 176 of the Criminal Code

17. In its present form, Article 176 is titled “Infringement of the right to equality of citizens”. It criminalizes any infringement of the rights and freedoms of citizens that causes serious damages, if committed by a public official based on gender, race, colour, language, religion, political opinions or any other opinions, ethnic or social origin, affiliation to a national minority, property or any other situation.
18. While the draft Amendment to Article 176 (hereinafter “revised Article 176”) retains the anti-discriminatory nature of the provision, many aspects of the Article have been clarified and reformulated. For example, it is now clear that this Article applies to all persons, not only to citizens. Also, the very general term “infringement” has now been replaced with more specific actions (distinction, exclusion, restriction or preference). Any person may now be perpetrator of this crime (while paragraph 2 foresees aggravated penalties for public individuals), if the difference in treatment has no reasonable or objective justification. The revised Article 176 foresees enhanced fines for legal entities.
19. Despite these improvements in the wording of the provision, the provision *per se* still raises serious issues. The main issue in this context is the question whether Article 176, even in its revised form, is a criminal law provision.
20. As stated above (see par. 10 *supra*), hate crimes need to be distinguished from more general anti-discrimination provisions, which are not criminal law provisions, but are usually incorporated in separate anti-discrimination legislation, or in administrative or private laws (e.g. labour laws).
21. In the revised Article 176, the underlying action is the “distinction, exclusion, restriction, or preference of one person, group of people or community”. Distinguishing, excluding, restricting or preferring certain people to others are *per se* not criminal acts. Since the criminal base action is missing, Article 176 cannot be qualified as a hate crime and thus should not be part of a criminal code.
22. Instead, due to its nature as a general anti-discrimination provision, it is recommended to remove Article 176 from the Criminal Code and incorporate it into administrative or civil legislation, or a comprehensive Anti-Discrimination Law.
23. At the same time, even if part of other or more general anti-discrimination legislation, the wording of the revised Article 176 itself would benefit from some revision. While the current wording of the revised Article 176 contains

numerous characteristics that are also reflected in international and European anti-discrimination instruments, a number of characteristics remain unclear and vague. In particular the term of a “disadvantaged class” does not appear to have a clear definition. Apart from the fact that the term “class” may be subject to broad and diverse interpretation, the associated adjective “disadvantaged” is also vague and difficult to interpret in an objective manner.

24. Further, the list of characteristics contained in the revised Article 176 is open-ended in that it protects “any other criteria which has [as] purpose or effect the restriction or removal of recognition, use or exercise, on equal terms, [of] the rights and freedoms recognized by [the] Constitution, legislation or international treaties to which Moldova is party”. This open-ended formulation is too unclear to enable those applying the law to understand what kinds of criteria are described here and when such criteria aim or result in rights or freedoms being restricted or removed. Also, the mere mention of “rights and freedoms” protected by the Constitution, legislation or international treaties, without specifying which rights are being referred to, is too vague as to meet general international standards of legal certainty and foreseeability of laws. It is thus recommended to delete any reference to “disadvantaged class”, as well as the open-ended formulation of “any other criteria” referring to violations of rights and freedoms, as quoted above.
25. Any anti-discrimination legislation should also include definitions of both direct and indirect discrimination together with relevant exemptions, exceptions and justifications, in line with international and European standards. The scope of the law should include discrimination in public and private life and it should also protect affiliation and association (including presumed association) with any of the protected characteristics, not only, as in the revised Article 176, with a “disadvantaged class”.

4.2.2 Draft Amendment to Article 346 of the Criminal Code

26. Currently, Article 346, par. 1 prohibits “deliberate actions, public instigation, including through mass-media, written or electronic, targeted to provoke national, racial or religious enmity or discord, to humiliate the national honor and dignity, as well as the direct or indirect limitation of the rights or establishing of direct or indirect advantages for citizens depending on their national, racial or religious affiliation.”
27. The draft Amendment to Article 346 (hereinafter “the revised Article 346”) similarly covers public instigations, including those committed by written or electronic mass media, but requires that these instigations “insult, humiliate, incite to discrimination or hatred against a group of people or person”. Also, contrary to the currently applicable Article 346, the revised Article 346 no longer requires such instigations to be deliberate actions.
28. Paragraph 2 of the revised Article 346 criminalizes “public calls to violent actions” against the same target group mentioned in par. 1 of this provision.
29. The revised Article 346 further includes protected characteristics in both paragraphs, namely real or presumed membership to a group based on race, nationality, ethnic origin, language, religion, sex, age, state of health, sexual

orientation, political opinion, social status, and affiliation to a disadvantaged class or on the basis of any other criteria. Similarly to the revised Article 176, both criminal offences contained in the revised Article 346 foresee enhanced fines for legal entities.

30. It is welcomed that certain unclear terminology has been removed from the wording of Article 346 (e.g. “humiliation of national honor and dignity”, “direct or indirect limitation of rights” or “direct or indirect advantages for citizens”). However, the nature of Article 346, at least its par. 1, as a provision criminalizing certain forms of speech has remained the same.
31. The criminalization of hate speech exists in numerous OSCE participating States and aims at limiting each person’s freedom of speech in cases where this freedom interferes with the basic rights of others. However, such limitation should not be too general or extensive, in particular when, as here, it explicitly covers media outlets, otherwise it risks going beyond the permissible limitations to the right to freedom of expression. Both Article 19 of the ICCPR and Article 10 of the ECHR stress the importance of freedom of opinion, respectively expression and both provisions list specific exceptional situations where this right may be curtailed.¹⁹ According to the case law of the ECtHR, the notion of freedom of expression is also applicable to information or ideas that “offend, shock or disturb”.²⁰ The exceptions listed in Article 10, par. 2 of the ECHR must be narrowly interpreted and the necessity for restrictions must be convincingly established.²¹
32. Particularly the press, due to the important function that it fulfills in a democratic society, has a relatively wide margin of appreciation in this respect, provided it reports about matters of public interest in good faith.²² Although the press must not overstep certain bounds, journalistic freedom also covers “possible recourse to a degree of exaggeration, or even provocation”.²³
33. According to the revised Article 346, par. 1, “public instigations which [...] insult, humiliate or incite to discrimination or hatred” of persons or groups of persons constitute punishable criminal offences. However, neither the revised Article 346, nor any other provisions of the Criminal Code provide any guidance on how to define what will in practice constitute an insult or humiliating action. Given the case law of the ECtHR, it may well prove

¹⁹ According to Article 19, par. 3 of the ICCPR: “The exercise of the rights provided for in paragraph 2 of this article [namely the right to freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.” According to Article 10, par. 2 of the ECHR, “The exercise of these freedoms [i.e. the freedom of expression] [...] 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.”

²⁰ See the ECtHR judgment of *Bodrožić v. Serbia* of 23 June 2009, no. 32550/05, pars. 46 and 56. See also, instead of others, the judgment *Vogt v. Germany* of 26 September 1995, Series A no. 323, pp. 25–26, par. 52.

²¹ See the *Vogt v. Germany* judgment, par. 52.

²² See, in this context, the *Bodrožić v. Serbia* judgment, par. 46.

²³ *Ibid.*, par. 47.

difficult to distinguish between permissible information or ideas that shock, disturb, even provoke public expression and public instigations that insult or humiliate persons or groups of persons. Furthermore, the revised Article 346 no longer requires the criminal action to be deliberate and thus fails to take into account cases where certain actions or expressions cause insult, humiliation or incite to discrimination without intent. It appears excessively harsh to criminalize public instigations that were not committed with the intention to insult. It is therefore recommended to outline specifically which forms of insulting or humiliating behaviour are covered by Article 346 and to clarify that the actions and results mentioned therein are required to be committed with intent, that is the requisite *mens rea* of the perpetrator must be present.

34. Similarly to Article 176, Article 346, both in its current and in its revised form, is not a hate crime provision. Instead, Article 346 is an example of hate speech, as it criminalizes certain forms of expression aimed at stirring up hatred or discrimination, while its base action, namely the act of expressing oneself, is in itself not a criminal offence. As mentioned above (see par. 11 *supra*), it is important to distinguish between hate crimes and hate speech.
35. Nevertheless, it is not usual for a hate speech provision to include such a wide array of protected characteristics. For instance, if expressing hatred for a person's political opinion can be prosecuted under the revised Article 346, this could lead to arbitrary criminal investigations against certain persons merely for criticizing a certain political opinion or party. It is recommended to delete "political opinion" as a protected characteristic in the revised Article 346, par. 1.
36. The protected characteristics of "social status" and of "affiliation to a disadvantaged class" are also quite unclear and could lend themselves to a wide-ranging, potentially arbitrary interpretation (with regard to the latter term, see par. 23 *supra*). Criminalizing incitement to hatred or discrimination of persons based on their social status could very well lead to unwanted situations where persons could be prosecuted for criticizing social inequality or individuals more powerful or wealthier than themselves. Finally, as with the revised Article 176, it is noted that open-ended characteristics such as "any other criteria" are too vague to meet the requirements of legal certainty and foreseeability of the law (see par. 24 *supra*). It is thus recommended to amend the revised Article 346, par. 1 accordingly.
37. Paragraph 2 of the revised Article 346 criminalizes the public incitement to violent acts against certain protected (real or presumed) groups of persons. In this context, it is noted that the term "violent acts" is unclear. The revised Article 346 does not define the nature of these impermissible violent acts and contains no references to corresponding criminal provisions. In order to clarify this provision and underline the illegality of the intended acts, it is recommended to delete the term "violent acts" and instead specify which violent criminal offences such public calls for violence will need to refer to (e.g. bodily harm, coercion or murder).
38. As in par. 1 of revised Article 346 and Article 176, it is recommended to delete the terms "disadvantaged class" and the reference to "any other criteria" (see par. 24 *supra*).

39. Finally, in order to obtain consistency in different provisions of the Moldovan Criminal Code, the protected characteristics included in the revised Article 346 should be identical to the protected characteristics included in other criminal provisions. Penalty-enhancing hate crimes provisions of the current version of the Moldovan Criminal Code (namely, Articles 77, 145, 151, 152, 197 and 222) foresee aggravated sentences only in a few situations, namely if a criminal act is committed out of social, racial, national or religious hatred. The protected characteristics in the revised Article 346 should be made consistent with those included in Articles 77, 145, 151, 152, 197 and 222 of the Criminal Code.

4.3. Other Hate Crimes Related Provisions in the Criminal Code

40. This opinion would not be complete without a brief review of certain provisions in the Criminal Code providing for aggravated circumstances in cases where crimes were committed out of bias or hatred (penalty-enhancing provisions). These hate crimes provisions, while for the most part in line with international legislative standards in this field, would nevertheless benefit from revision. In order to ensure that all hate crimes provisions in the Criminal Code are in line with international standards and commitments, the opportunity should be taken to review not only Articles 176 and 346 of the Criminal Code, but also other provisions mentioned above,²⁴ more specifically, Articles 77, 145, 151, 152, 197 and 222 of the Criminal Code.
41. The following section of the Opinion will discuss certain general issues common to most or all of the above-mentioned hate crimes provisions, but will also focus on one specific individual provision, namely Article 197 of the Criminal Code.

4.3.1 General Comments on All Penalty-Enhancing Hate Crimes Provisions

42. Article 77 is a general punishment-enhancing provision stating that when determining punishment, the commission of a crime due to “social, national, racial or religious hatred” shall be considered as aggravating circumstances. The other provisions mentioned above foresee aggravated punishment in cases where certain crimes (deliberate murder (Article 145), intentional severe bodily injury or damage to health (Article 151), intentional less severe bodily injury or damage to health (Article 152), deliberate destruction or damaging of goods (Article 197), or profanation of graves (Article 222)) were committed with a hate motive. These latter specific provisions constitute *leges speciales* in relation to Article 77, as outlined in Article 77, par. 2.
43. At the outset, it should be noted that the principle of considering hate crimes as aggravated crimes clearly demonstrates the Moldovan State’s awareness of the special nature of such crimes and the need to treat them differently from other crimes.²⁵ Such a commitment on the side of the State is essential in the

²⁴ See par. 39 *supra*.

²⁵ See the *Angelova and Iliev v. Bulgaria* judgment, par. 117, where the ECtHR found that Bulgaria had failed to “make the required distinction from other, non-racially motivated offences, which constitutes

fight against hate crimes and intolerance. The verb “shall” used in Article 77 also implies that judges (and also prosecutors) are obliged to take hate or bias motives into consideration when debating the criminal sentence. This obligation on the judiciary and prosecution provides concrete guidelines for judges and prosecutors when assessing potential hate crimes cases and is very much welcomed.

44. One positive development is the fact that the draft Law includes sexual orientation as a protected characteristics in some of the above provisions (Articles 145, 151 and 152, as well as Article 171 (rape)). In this context, it is recommended to extend this characteristic to the more general provision of Article 77, but also to the deliberate destruction of goods (Article 197).
45. At the same time, it is noted that certain terms applied in the above hate crimes provisions are quite ambiguous, namely the terms “social hatred” and “national hatred”. Presumably, the term social hatred is meant to refer to situations where crimes were committed against a certain social group. The term social group is, however, not easy to define – it is unclear how such a group would distinguish itself from other groups (whether by social status, social behaviour, or some other social feature).
46. Another difficulty in this context is the fact that the social characteristic does not appear to be immutable nor in a certain manner essential to a person’s self, nor is it usually shared by persons who as a group have experienced discrimination, exclusion or oppression or who share some other fundamental bonds of identity.²⁶ In practice, it may thus become difficult to prove that a crime was committed for “social hatred” and not, e.g. for motives of greed. For the above reasons, it is recommended to delete “social hatred” from the list of characteristics in Article 77, and likewise in Articles 145, 151, 152, 197 and 222 of the Criminal Code.
47. The term “national hatred” listed in Articles 77, 197 and 222 is similarly vague in that it does not specify whether such hatred refers to a victim’s nationality or national or ethnic origin. A person’s nationality is “a legal bond between a person and a State” which “does not indicate the person’s ethnic origin”²⁷ and will usually imply a person’s citizenship or legal status conferred by a state.²⁸ National origin, on the other hand, is usually used to refer to an individual’s ethnic or cultural origin and is often used interchangeably with the terms “ethnic origin” or “ethnicity”.²⁹ It can, however, also be used to mean “nationality”.³⁰ In order to avoid confusion, it is recommended to clarify in the above provisions whether the aggravated circumstances refer to hatred against

unjustified treatment irreconcilable with [the anti-discrimination principles inherent in] Article 14 of the Convention”.

²⁶ See Hate Crime Laws: A Practical Guide, p. 45.

²⁷ Article 2 (a) of the Council of Europe’s European Convention on Nationality, ETS No. 166, signed in Strasbourg on 6 November 2007, ratified by the Republic of Moldova on 30 November 1999.

²⁸ See Hate Crime Laws: A Practical Guide, p. 43.

²⁹ Ibid, pp 42-43.

³⁰ “Ethnic” statistics and data protection in the Council of Europe Countries, ECRI study report 2007, p. 27.

- a person's nationality, national origin or ethnic origin.³¹ In order to cover all relevant defined groups, one option would be to include hatred or bias based on nationality, national and ethnic origin into the wording of all of the above-mentioned articles, along with definitions of these terms in Chapter XIII of the Criminal Code on the Meaning of Terms and Expressions in the Code.
48. The term "race" is also problematic in that it is a purely social construct that has no basis as a scientific concept³² and is thus difficult to define. The UNESCO, in its statement on "the Race Question" of 1950, noted early on that there was great confusion on the notion of race and recommended dropping the term altogether and replacing it with the term "ethnic groups".³³ Later, the International Union of Anthropological and Ethnological Studies (hereinafter "the IUAES") confirmed this,³⁴ while proposing to amend the UNESCO statement. The IUAES noted that "[p]ure races in the sense of genetically homogeneous populations do not exist in the human species, nor is there evidence that they have ever existed in the past history of the human family".³⁵
49. While trying to avoid the term "race", international organizations and agreements do utilize the term "racial discrimination" or racism. This is because racial intolerance and discrimination as a subjective motive on the side of a perpetrator or person discriminating against another is easier to define than the objective term "race". In this context, the European Union Agency for Fundamental Rights found that "there is no term that, as yet, can effectively encapsulate ethnic discrimination in the same way that 'racism' continues to capture a range of discriminatory ideologies and practices". Racism or racial discrimination is interpreted broadly on a European and international level,³⁶ to ensure that all discriminatory actions based on a person's (perceived or actual) race, ancestry, ethnicity, colour or nationality are covered.
50. While the term "racial hatred", as found in Articles 77, 145, 151, 152, 197 and 222, is thus not inconsistent with international standards, it is recommended to

³¹ According to one definition for ethnicity, it is "a collectivity within a larger population having real or putative common ancestry, memories or a shared past, and a cultural focus upon one or more symbolic elements which define the group's identity, Ibid.

³² See Hate Crimes: A Practical Guide, p. 41.

³³ „The Race Question“, UNESCO statement, issued 18 July 1950 in response to a resolution of the UN Economic and Social Council of 1948 calling upon UNESCO to consider the timeliness "of proposing and recommending the general adoption of a programme of dissemination of scientific facts designed to bring about the disappearance of that which is commonly called race prejudice", found under <http://unesdoc.unesco.org/images/0012/001282/128291eo.pdf>.

³⁴ See the Proposed Replacement Statement for the Unesco Documents on Biological Aspects of Race by the International Union of Anthropological and Ethnological Studies (IUAES) under <http://www.glocol.osaka-u.ac.jp/iaes/statement/race.html>: "Racist political doctrines find no foundation in scientific knowledge concerning modern or past human populations."

³⁵ Ibid.

³⁶ The CERD, in its Article 1, defines racial discrimination as "any distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". ECRI, on the other hand, has adopted an even broader definition of racism in its General Policy Recommendation No. 7, namely 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."

adopt the above international broad definition of this term in the Criminal Code. In practice, this could be done by including other characteristics such as ethnic origin, colour, or nationality in the wording of this provision, or by including a definition of “racial hatred” in Chapter XIII of the Criminal Code on the Meaning of Terms and Expressions in the Code.

51. With regard to the motivation “religious hatred”, it is presumed that this refers to hatred of other religions. In this case, it should be noted that this protected characteristic does not cover hatred of non-believers. In order to cover both believers and non-believers, international human rights agreements refer to freedom of religion and belief.³⁷ It is recommended to adapt the wording of the above articles to these standards.
52. All of the above provisions with general and specific penalty enhancements foresee aggravated sentences in cases where crimes were committed out of “hatred”. Certain OSCE States have adopted similar legislation.³⁸ In practice, however, it will be challenging to find a common definition for hatred or hostility, which are both very subjective concepts. Also, it will be difficult, if not impossible, to prove before court that a perpetrator actually hated his/her victim, since this will require an assessment of the perpetrator’s mental state of mind while committing the crime. Often, perpetrators will not actively hate their victims, but will select them due to prejudice or stereotypical information about the victims and their vulnerabilities.³⁹
53. For this reason, many OSCE participating States have opted for a different approach: They focus not on the emotional hatred or hostility of the perpetrator, but on the selection of a victim “because of” or “by reason of” this person’s actual or presumed protected characteristic.⁴⁰ This approach appears to be easier to apply in practice and may also focus more on the essence of the type of crimes that hate or bias crime legislation aims to prevent.⁴¹ Also from a victim’s point of view, it is the fact of being selected due to a special, often immutable characteristic that psychologically does the most damage, not necessarily the fact that the crime was committed due to an emotional reaction. It is thus recommended to amend the above provisions by deleting the requirement of “hatred” and instead indicating that the crime was committed because of or by reason of the victim’s (real or assumed) protected characteristic.
54. In this context, it should be noted that when amending these articles, it is important that the wording is such as to allow for crimes committed due to a victim’s affiliation or association with a certain group. Also, the affiliation or

³⁷ See Articles 18 of the ICCPR and 9 of the ECHR on freedom of thought, conscience and religion.

³⁸ E.g. Belgium, which in Article 377 *bis* of its Penal Code (adopted on 8 June 1867, last amended on 31 July 2007 by Law No. L 2007-05-15/61) provides for an increased sentence in cases involving improper sexual conduct or rape, if one of the motives of the offence is “hatred, contempt or hostility” towards the victim because of a protected characteristic. See also Article 67, par. 1 (3) of the Ukrainian Criminal Code (adopted on 1 September 2001), which lists “the commission of an offence based on racial, national, or religious enmity or hostility” as aggravating circumstances.

³⁹ See Hate Crime Laws: A Practical Guide, pp. 47-48.

⁴⁰ See, e.g. the French Criminal Code, which states in Article 132-76 (1) that penalties incurred for a crime or misdemeanor will be aggravated if the offence is committed by reason of the victim’s actual or supposed membership or non-membership of a given ethnic group, nation, race or religion.

⁴¹ See Hate Crime Laws: A Practical Guide, p. 48.

association should not need to exist in reality – the aggravating circumstance should also apply in cases where the perpetrator erroneously associates a victim with a certain group.⁴² The *raison d'être* for the enhanced penalties mentioned in Articles 145, 151, 152, 197 and 222 is the perpetrator's subjective motive – any factual error should not work in his/her favour. It is thus recommended to ensure that the above provisions also include hate crimes committed due to association or affiliation of a victim with a protected group, including such crimes erroneously based on a presumed protected characteristic.

55. Further, it is important to note that in order for a crime to become a hate crime, the bias or hate motive does not need to be the only motive for the crime. Crimes in general, including hate crimes, are often committed out of a variety of reasons (mixed motives). In order to give effect to the existing legislation and take into account the complexity of criminal motives, it is recommended to clarify that the aggravating circumstances will apply even if the prohibited bias motive was only one of several motives.
56. On a practical note, it is essential that the Criminal Code or Criminal Procedure Code ensure that the bias motive for a crime committed becomes part of the public record. The public record should also contain reasons for applying or not applying a penalty enhancement. This is necessary both to facilitate data collection of hate crimes, but also to make sure that in case of recidivism, prior hate crimes may be taken into account when debating on the criminal sentence⁴³. It is thus recommended to ensure that existing bias motivation leading to an aggravated sentence is included in the public record.

4.3.2 Comments on Article 197 of the Criminal Code

57. Article 197 criminalizes the deliberate destruction or damaging of goods, provided that the destructive or damaging action causes large scale damage. According to paragraph 2 of this provision, the punishment for such actions is greatly enhanced if such actions are committed out of social, national, racial or religious hatred (imprisonment up to 6 years as opposed to a fine or community service).
58. It is welcomed that this aspect of hate crimes has been acknowledged and included in the Criminal Code. Hate crimes targeting goods and property of individuals merely because of their belonging to or association with a certain group may have an equally devastating effect on the person as it aims at destroying part of a person's private life and possessions, thus, sending a very clear, hostile message to the community. Such actions may constitute a direct and very personal threat to a person's home or work place, or may greatly affect a group of people (e.g. a family) or any other persons frequenting a targeted building or area, or using a targeted vehicle.
59. When considering the effects of such actions on the lives and well-being of targeted individuals, it is not clear why Article 197 only applies in cases where

⁴² Ibid, pp. 50-51.

⁴³ Ibid, pp. 36-37.

the actions cause large scale damage⁴⁴. Particularly actions such as hate graffiti or breaking windows will not cause sufficient damage to fall under Article 197. The special bias-motivated character of such crimes is thus not being adequately addressed in the current Criminal Code, despite the fact that the threatening and debasing psychological effect of such “minor” crimes is similar to that of damages or destruction on a larger scale. It is important for the Criminal Code to reflect the seriousness of these crimes, particularly due to the long-lasting and extreme effects that they have on the victims. For this reason, it is recommended to delete the part of Article 197 requiring destruction or damaging of goods to cause large scale damage, so that aggravated circumstances will also apply in other cases.

[END OF TEXT]

⁴⁴ According to Article 126 of the Criminal Code, large scale damage is caused if the value of stolen, obtained, received, produced, destroyed, used, transported, or stored commercial goods or goods passed through border customs, damaged by a person or by a group of persons, at the moment of the commission of the crime exceed 5000 conventional units and 2500 conventional units of a fine, respectively.

Annex 1

Draft

Law

on amending and completing the Criminal Code of the Republic of Moldova

The Parliament adopts the present organic law.

Single article - The Criminal Code of R. Moldova no. 985-XV from 18 April 2002 (republished in the Official Gazette of R. Moldova, 2009, no. 72-74, art. 195), is hereby amended and completed as follows:

1. Art. 145 para (2) shall be completed with letter l/1), which shall have the following wording:

"l/1) by reason of the victim's sexual orientation;"

2. Art. 151 para (2) shall be completed with letter i/1), which shall have the following wording:

"i/1) by reason of the victim's sexual orientation;"

3. Art. 152 para (2) shall be completed with letter j/1), which shall have the following wording:

"j/1) by reason of the victim's sexual orientation;"

4. In Art. 171, para (2) shall be completed with letter h), which shall have the following wording:

"h) committed by reason of the victim's sexual orientation".

5. The title of Chapter V of the special part [of the Code] shall have the following content:

"Chapter V. Crimes against human rights and fundamental freedoms".

6. Articles 176 and 346 shall have the following wording:

“Article 176 Discrimination

Any distinction, exclusion, restriction or preference to one person, group of people or community, without reasonable or objective justification, based on race, nationality, ethnic origin, language, religion, colour, sex, age, health status, sexual orientation, political opinion, social status, affiliation on a disadvantaged class or on the basis of any other criteria, which has [as] the purpose or effect the restriction or removal of recognition, use or exercise, on equal terms, the rights and fundamental freedoms recognized by the Constitution, legislation or international treaties to which Moldova is party, shall be punished with a fine from 200 to 500 conventional units or non-paid work of 120-200 hours to the benefit of community or imprisonment up to 1 year, the legal entity is to be punished with a fine from 1000 to 1500 conventional units.

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(2) The s[a]me acts committed by a public official shall be punished with a fine from 300-600 conventional units or non-paid work of 150 to 240 hours to the benefit of community or imprisonment up to 3 years, in both cases with (or without) forfeiture of the right to hold certain positions or exercise a certain activity for a term of between 2 and 5 years.”;

“Article 346 Incitement to hatred against persons on grounds of belonging to any nationality, race, sex, religion or other group

(1) Public instigations, including written or electronic mass-media ones, which insult, humiliate, incite to discrimination or hatred against a group of people or person on the ground of real or presumed membership to this group based on race, nationality, ethnic origin, language, religion, sex, age, state of health, sexual orientation, political opinion, social status, affiliation on a disadvantaged class or on the basis of any other criteria, shall be punished with a fine from 200 to 250 conventional units or non-paid work of 180 to 240 hours to the benefit of community or imprisonment up to 3 years, the legal entity is to be punished with a fine from 750 to 1000 conventional units.

2) Public calls to violent actions against a group of persons or one person on the ground of their real or assumed membership to that group based on race, nationality, ethnic origin, language, religion, color, sex, age, state of health, sexual orientation, political opinion, social status, affiliation to a category of disadvantaged persons, as well as based on any other criteria, shall be punished by non-remunerated work to the benefit of the community for 200 to 240 hours or by imprisonment of up to 3 years, whereas a legal entity shall be punished by a fine of 1000 to 1500 conventional units.”

Speaker of the Parliament

Annex 2

The Moldovan Criminal Code
(Excerpt)

No. 985-XV dated 18.04.2002

*Republished: Official Monitor of the Republic of Moldova No. 72-74/195 dated
14.04.2009*

Official Monitor of the Republic of Moldova No. 128-129/1012 dated 13.09.2002

[...]

Article 7. Principle of Individualization of Criminal Liability and Criminal Punishment

(1) Criminal law shall be applied with due consideration of the prejudicial nature and degree of the crime committed, the personality of the criminal, and the circumstances of the case that mitigate or aggravate criminal liability.

(2) No person can be twice subjected to criminal investigation and criminal punishment for one and the same act. [...]

Article 171. Rape

(1) Rape, i.e. sexual intercourse committed by the physical or mental coercion of the person, or by taking advantage of the victim's incapacity to defend himself/herself or to express his/her will shall be punished by imprisonment for 3 to 5 years.

(2) Rape:

a) committed by a person who has previously committed rape as set forth in par. (1);

b) committed knowingly against a juvenile;

b¹) committed knowingly against a pregnant woman;

c) committed by two or more persons;

[Letter d) excluded by Law No. 277-XVI dated 18.12.2008, in force as of 24.05.2009]

e) committed for the intentional contamination of the victim with a sexually transmitted disease;

f) involving torture of the victim;

[Letter g) excluded by Law No. 277-XVI dated 18.12.2008, in force as of 24.05.2009]

shall be punished by imprisonment for 5 to 12 years.[...]

[Art.171 amended by Law No. 277-XVI dated 18.12.2008, in force as of 24.05.2009]

[Art.171 amended by Law No. 211-XV dated 29.05.03, in force as of 12.06.03] [...]

Article 77. Aggravating Circumstances

(1) When determining punishment, the following shall be considered as aggravating circumstances:

[...]

d) the commission of a crime due to social, national, racial, or religious hatred; [...]

(2) If the circumstances mentioned in par. (1) are also set forth in the corresponding articles of the Special Part of the this Code as evidence of these criminal components, they may not be concurrently considered as aggravating circumstances.

[Art.77 amended by Law No. 277-XVI dated 18.12.2008, in force as of 24.05.2009]

Article 78. Effects of Mitigating and Aggravating Circumstances

[...]

(3) In the case of aggravating circumstances, the maximum punishment set in the

corresponding article of the Special Part of this Code may be applied. [...]

Article 145. Deliberate Murder

(1) The murder of a person shall be punished by imprisonment for 8 to 15 years.

(2) Murder [...]

1) committed from motives of social, national, racial, or religious hatred; [...]

shall be punished by imprisonment for 12 to 20 years or by life imprisonment.

*[Art.145 amended by Law No. 277-XVI dated 18.12.2008, in force as of 24.05.2009]
[...]*

Article 151. Intentional Severe Bodily Injury or Damage to Health

(1) Intentional severe bodily injury or life-threatening damage to health or that caused the loss of sight, hearing, speech or another organ, or the cessation of its functioning, mental disease or some other form of health damage accompanied by the permanent loss of at least one-third of the capacity to work or resulting in a miscarriage or an incurable disfiguration of the face and/or adjacent areas shall be punished by imprisonment for 3 to 10 years.

(2) The same action committed: [...]

i) from motives of social, national, racial or religious hatred; [...]

shall be punished by imprisonment for 5 to 12 years.

[Par. 3 art.151 excluded by Law No. 277-XVI dated 18.12.2008, in force as of 24.05.2009]

(4) The actions set forth in par. (1) or (2) that cause the death of the victim shall be punished by imprisonment for 8 to 15 years.

[Art.151 amended by Law No. 277-XVI dated 18.12.2008, in force as of 24.05.2009]

Article 152. Intentional Less Severe Bodily Injury or Damage to Health

(1) Intentional less severe bodily injury or damage to health that are not life threatening and did not cause the consequences specified in art. 151, which, however, are followed by a prolonged health disorder or a significant and permanent loss of less than one-third of the capacity to work shall be punished by community service for 140 to 240 hours or by imprisonment for up to 3 years.

(2) The same action committed: [...]

j) from motives of social, national, racial or religious hatred; [...]

shall be punished by imprisonment for 3 to 6 years.

[Art.152 amended by Law No. 277-XVI dated 18.12.2008, in force as of 24.05.2009]

[Art.152 amended by Law No. 184-XVI dated 29.06.2006, in force as of 11.08.2006]

[Art.153 excluded by Law No. 292-XVI dated 21.12.2007, in force as of 08.02.2008]

[Art.154 excluded by Law No. 292-XVI dated 21.12.2007, in force as of 08.02.2008]

[Art.154 amended by Law No. 184-XVI dated 29.06.2006, in force as of 11.08.2006]

[Art.154 amended by Law No. 211-XV dated 29.05.03, in force as of 12.06.03] [...]

Article 176. Violation of Citizens' Equality of Rights

The violation of citizens' rights and freedoms guaranteed by the Constitution and other laws 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

a) committed by an official;

b) resulting in considerable damage;
shall be punished by a fine in the amount of 300 to 600 conventional units or by community service for 150 to 240 hours or by imprisonment for up to 3 years, in all cases with (or without) the deprivation of the right to hold certain positions or to practice certain activities for 2 to 5 years.

*[Art.176 amended by Law No. 184-XVI dated 29.06.2006, in force as of 11.08.2006]
[...]*

Article 197. Deliberate Destruction or Damaging of Goods

(1) Deliberate destruction or damaging of goods, provided that such actions cause damage on a large scale, shall be punished by a fine of up to 1000 conventional units or by community service for 240 hours.

(2) The same actions: [...]

b) committed out of social, national, racial, or religious hatred; [...] shall be punished by imprisonment for up to 6 years.

[Art.197 amended by Law No. 277-XVI dated 18.12.2008, in force as of 24.05.2009]

[Art.197 amended by Law No. 184-XVI dated 29.06.2006, in force as of 11.08.2006]

[Art.197 completed by Law No. 211-XV dated 29.05.03, in force as of 12.06.03]

[Art.198 excluded by Law No. 292-XVI din 21.12.2007, in force as of 08.02.2008]

[Art.198 amended by Law No. 184-XVI dated 29.06.2006, in force as of 11.08.2006]

[Art.198 amended by Law No. 211-XV dated 29.05.03, in force as of 12.06.03] [...]

Article 222. Profanation of Graves

(1) Profanation by any means of a grave, a monument, a funeral urn or a corpse and the appropriation of objects inside or on a grave shall be punished by a fine in the amount of 200 to 500 conventional units or by community service for 180 to 240 hours or by imprisonment for up to 1 year.

(2) The same actions committed: [...]

b) because of social, national, racial or religious hatred,
shall be punished by a fine in the amount of 400 to 600 conventional units or by community service for 200 to 240 hours or by imprisonment for up to 3 years. [...]

Article 346. Deliberate Actions Aimed at Inciting National, Racial, or Religious Hostility or Discord

Deliberate actions, public calls including through mass-media either printed or electronic 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.

[Art.346 amended by Law No. 184-XVI dated 29.06.2006, in force as of 11.08.2006]