

# **Report on a legal review of judgements by the Court of Milan**

Conducted as part of the ODIHR project on “Building a Comprehensive Criminal Justice Response to Hate Crime”

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## **Introduction, aim of the project and methodology**

This report presents the results of a legal review conducted as part of a project on “Building a comprehensive Criminal Justice Response to Hate Crimes”, developed by the OSCE Office for Democratic Institutions and Human Rights (ODIHR) in co-operation with the Catholic University of the Sacred Heart (UCSC) and the Court of Milan.<sup>1</sup> One of the aims of the project was to conduct a legal review of the judgements issued by the criminal Court of Milan in 2016, with a view to identifying the number of hate crime cases prosecuted and how the Court deals with such cases.

ODIHR assists OSCE participating States to address hate crimes – the most serious manifestations of intolerance. In recognition of the threat that such crimes pose to the security of individuals and communities, as well as their potential to give rise to conflict and violence, OSCE participating States have committed to undertake a range of measures to combat hate crime. In OSCE Ministerial Council decisions, participating States have recognized that collecting and maintaining reliable data and statistics on hate crimes is “essential for effective policy formation and appropriate resource allocation in countering hate-motivated incidents.”<sup>2</sup> Acknowledging the need for more consistent, comprehensive and comparable data on hate crimes, they have committed to “collect, maintain and make public, reliable data and statistics in sufficient detail on hate crimes [...] including the number of cases reported to law enforcement, the number prosecuted and the sentences imposed.”<sup>3</sup>

This research project sets out to obtain a clearer understanding of the hate crime situation in Italy, and not to criticize the Italian judiciary for its handling of hate crimes. Therefore, this research focuses on the prevalence of hate crimes and their treatment by the Court of Milan. It does not seek to revise the judgements of the Court, and the researchers would like to thank the Court for providing them with access to the files.

Regarding methodology, it should be noted that the Court of Milan has not developed a digital catalogue system for storing case files. Consequently, the review involved a thorough reading of each decision issued by the Court in 2016 in order to identify those cases involving a potential hate crime. The researcher carried out the data collection by accessing a general electronic folder containing all the judgements of the Court provided by its Office for Innovation. Each judgement is scanned and stored in the folder by the staff of the Court. Unfortunately, the cases are not classified by the charges presented by the prosecutor. Moreover, judgements are not scanned using Optical Character Recognition (OCR) software, making it impossible to perform a digital search of terminology.

Since the research began on 21 June 2017, the researcher reviewed all judgements issued by the Court in 2016 (a total of approximately 13,000 judgements).<sup>4</sup> The research did not review judgements issued by the Court of Assizes as it was not possible to access the files.<sup>5</sup>

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<sup>1</sup> For more information about the project and its activities, see: ODIHR website, “Building a Comprehensive Criminal Justice Response to Hate Crime”, <<https://www.osce.org/projects/criminal-justice-response-hate-crime>>.

<sup>2</sup> OSCE Ministerial Council, Decision No. 13/06, “Combating Intolerance and Discrimination and Promoting Mutual Respect and Understanding”, Brussels, 5 December 2006, <<https://www.osce.org/mc/23114>>.

<sup>3</sup> OSCE Ministerial Council, Decision No. 9/09, “Combating Hate Crimes”, Athens, 1 and 2 December 2009, <<https://www.osce.org/cio/40695>>.

<sup>4</sup> This number relates to “ordinary proceedings”. In 2016, the Court also issued some 5,000 judgements in cases involving alternative proceedings, such as fast-track trials. These were not analysed.

<sup>5</sup> The Court of Assizes is a separate first instance Court in which both professional judges and laymen preside over cases involving crimes such as murders, massacres, terrorist activities and slavery.

Judgements made by Italian Courts of first instance must meet the requirements set forth in Article 546 of the Criminal Procedure Code. They must state the charges and provide “a short statement of the Findings of Fact and of the Rules of Law upon which the decision relies, along with the inferences drawn from the evidence, the criteria employed in weighing the evidence and the reasons for not having been persuaded by rebuttal evidence”. These requirements are intended to ensure that judgements contain a complete description of the facts of the case as determined by the Court. Moreover, judgements must contain a reasoning for the sentence, and must list and describe the evidence (such as documents, materials, appraisals and statements) on which the verdict is based. This information allowed researchers to analyse cases not referred to as hate crimes in the charges or judgements in order to identify any facts about the case that may indicate a bias motivation.

### **Hate crime definition applied by ODIHR**

The OSCE defines hate crimes as criminal offences with a bias motivation. To be considered a hate crime, the offence must meet two criteria: first, the act must constitute an offence under criminal law; second – and this is what distinguishes hate crimes from other criminal offences – the act must have been motivated by bias. In other words, the perpetrator must have selected the victim owing to her or his membership or affiliation with a group that shares a “protected characteristic”. Bias motivations represent preconceived negative opinions, stereotypical assumptions, intolerance or hatred directed to a particular group that shares a common characteristic, such as disability, ethnicity, gender, gender identity, language, nationality, race, religion, sexual orientation or any other fundamental characteristic. Hate crimes can include threats, property damage, assault, murder or any other criminal offence committed with a bias motivation. It is important to note that hate crimes do not only affect individuals belonging to a protected group. People or property merely associated with – or even perceived to be a member of – a group that shares a protected characteristic, such as human rights defenders, community centres or places of worship, can also be the target of hate crime.<sup>6</sup>

### **The international legal framework**

The principle that hate crimes should be investigated, prosecuted and rightfully adjudicated is rooted in international human rights law on equality and non-discrimination. Article 2 of the United Nations’ Universal Declaration of Human Rights, underscores the following:

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”

In the same way, Article 2 of the International Covenant on Economic, Social and Cultural Rights sets forth the principle of non-discrimination, according to which: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be

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<sup>6</sup> See: OSCE/ODIHR Hate Crime Reporting website, “What is Hate Crime”, <<http://hatecrime.osce.org/what-hate-crime>>.

exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Similarly, Article 14 of the European Convention on Human Rights reads as follow: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Case law of the European Court of Human Rights (ECtHR) has provided member states with directions on applying the Convention. In particular, multiple decisions by the ECtHR have reiterated states’ positive obligation to ensure the effectiveness of the principle of non-discrimination, set forth in Article 14. The ECtHR has also established states’ responsibility to prevent bias-motivated violence on the part of private individuals and to investigate the existence of a possible discriminatory motive behind an act of violence, in line with Articles 3 and 8 of the Convention.<sup>7</sup>

Thus, member states have a duty to prevent hate crimes. However, the ECtHR does not require them to pass specific legislation, but rather to ensure that public prosecutors conduct prompt and effective investigations in order to detect and adequately punish hate crimes motivated by all types of bias.<sup>8</sup> In *Angelova and Iliev v. Bulgaria*, the Court noted the following:

“As to whether the respondent State's legal system provided adequate protection against racially motivated offences, the Court observes that it did not separately criminalize racially motivated murder or serious bodily injury, nor did it contain explicit penalty-enhancing provisions relating to such offences if they were motivated by racism. However, the Court considers that other means may also be employed to attain the desired result of punishing perpetrators who have racist motives. It observes in this respect that the possibility existed in domestic legislation to impose a more severe sentence depending on, *inter alia*, the motive of the offender”.<sup>9</sup>

Furthermore, the ECtHR has reiterated that a distinction must be made between hate crimes and those not motivated by bias, thus:

“Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention”.<sup>10</sup>

Regarding the definition of hate crime, the ECtHR has specified that “not only acts based solely on a victim’s characteristic can be classified as hate crimes. For the Court, perpetrators may have mixed motives, being influenced by situational factors equally or stronger than by their biased attitude towards the group the victim belongs to.”<sup>11</sup> Therefore, when investigating bias-motivated incidents and crimes, it is important to take into account all possible motives. For example, an

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<sup>7</sup> *M.C. and A.C. v. Romania*, ECtHR application no. 12060/12, paragraph 105, 12 April 2016.

<sup>8</sup> *Angelova and Iliev v. Bulgaria*, ECtHR application no. 55523/00, paragraph 104, 26 July 2007.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Šečić v. Croatia*, ECtHR application no. 40116/02, section 1, 31 May 2007.

<sup>11</sup> *Balázs v. Hungary*, ECtHR application no. 15529/12, section 2, 20 October 2015.

incident in which the victim is targeted because of her or his identity may still be a hate crime even if he or she is also robbed in the course of the incident.

### **Italy's legislative framework for combating hate crime**

Under Italian Law, there are several provisions that, in line with the rulings of the ECtHR, law enforcement agencies may apply for a tougher penalty for hate crimes. The most important tool is undoubtedly Article 604 of the Criminal Code, which has been inserted into a new section of the Code on “Felonies against Equality”. The article establishes an aggravating circumstance that can result in penalty increase up to one half of the sentence issued to a similar crime not motivated by bias. The penalty enhancement applies in case of “discriminative motivation or ethnic, national, religious and hate crimes, or crimes committed in order to help organizations, associations, movements or groups that – among other things – pursue the aforementioned things”. The wording of the provision is identical to that included in Article 3 of the repealed law on racial, ethnic and religious discrimination of 26 April 1993, which provides for penalty enhancements only for those crimes motivated by racism or bias against the victim's ethnicity or religion. It should be noted that the research also reviewed judgements for crimes motivated by the victim's sexual orientation, which are not covered by this provision.

Nonetheless, a penalty enhancement for offences motivated by bias against a victim's sexual orientation can be pursued by applying the aggravating circumstance established in Article 61 of the Criminal Code, which deals with “futile” or “despicable” motivations. In accordance with the case law of the Court of Cassation, this aggravating circumstance provision can be applied when the criminal offence is led by a “vile, ignoble motive that shows such a perversity that causes a deep feeling of repulsion in each man of common morality”.<sup>12</sup> This allows the aggravating circumstance provision of “despicable” motivation to be applied by prosecutors to all hate crime cases, particularly when the bias motivation does not fall within the scope of the aggravating circumstance established in Article 604 of the Criminal Code.

Article 404 (on “Offences against a religious confession through contempt or damage”) and Article 405 (“Disruption of the worship of a religious confession”) of the Criminal Code also contain penalty enhancement provisions for hate crimes. These are two separate offences that protect, on the one hand, the religious beliefs of those belonging to a religious confession<sup>13</sup> and, on the other, the freedom of religion of the members of a confession during their worship in public or official settings or at specific locations.<sup>14</sup> These two criminal provisions require that the offence be motivated by bias against one protected characteristic to amount to a hate crime, without the need for the motive to be further investigated.

In addition, Article 132 (on “Limits to the discretionary power of the Court in sentencing”) and Article 133 (on “Evaluating the gravity of the offence for the purposes of sentencing”) of the Criminal Code establish the types of penalties for hate crimes, including the mandatory minimum and maximum sentences (known as the *cornice edittale*, the “sentencing frame”) for specific

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<sup>12</sup> See the Court of Cassation, section 5, no. 33250, 2 February 2017; and Court of Cassation, section 3, no. 5171, 8 January 2015: <[www.iusexplorer.it](http://www.iusexplorer.it)>.

<sup>13</sup> F. Basile, “sub art. 403”, in *Codice penale commentato*, E. Dolcini and G.L. Gatta (eds.), fourth edition (Milanofiori Assago, 2015), p. 1484.

<sup>14</sup> Ibid., p. 1493.

crimes. However, Article 133 of the Criminal Code allows the judge a degree of discretion, providing criteria related to the “gravity of the offence” and the “perpetrator’s criminal capability.”<sup>15</sup> Thus, the gravity of an offence can be inferred from: 1) the nature, kind, means, object, time, place or other aspect of the offence; 2) the gravity of the injury or harm suffered by the victim; and 3) the degree of criminal intent or criminal negligence. The perpetrator’s criminal capability considers the following: 1) the motives for committing the offence and the character of the perpetrator; 2) the criminal record of the perpetrator and her/his behaviour and life in general prior to the conviction; 3) the behaviour of the perpetrator at the time of the offence or thereafter; and 4) the individual, domestic and social circumstances of the perpetrator.

In particular, the relevant legal scholarship has considered the “motives for committing the offence” in terms of their intensity, possible duration, ethical or social value, and have made a distinction between motives that drive the perpetrator to commit “despicable” acts from those that are somehow less reprehensible. They argue that judges should apply tougher penalties for bias-motivated crimes.<sup>16</sup>

### **An overview of the research findings**

The review of legal judgements issued in 2016 identified very few cases with a possible underlying bias motivation: just 54 out of more than 13,000 judgments (0.42 per cent). In most of these cases, the bias motivation can be grasped from the facts of the case but is not mentioned in the judgements, which do not provide a detailed description of the motivation for the offence. This is mostly due to the nature of Italian Criminal Law, which adopts an “objective perspective”, focusing only on the offence and providing very little analysis of the motivation. This leads judges to not investigate the presence of a bias motivation, so that bias-motivated crimes either appear to have no motive or to be driven by other motives that may be easier to identify (such as a pecuniary motive or, the “futile” motive or a “crime of passion”). Moreover, in almost all the 54 cases identified, the bias motivation is not mentioned in the formal accusations made by the prosecutor. Consequently, the judgements do not include increased penalties. In a handful of cases, the prosecutor applied the aggravating circumstance provision of discrimination (included in the law on racial, ethnic and religious discrimination), and in just one case was the aggravated circumstance of a “futile and despicable” motive applied (Article 61 of the Criminal Code).

#### *Types of crime identified as hate crimes*

Of the cases identified as bias-motivated offences, the most frequent type of crime (whether or not committed alongside other offences) was physical assault (Article 582 of the Criminal Code), which occurred 27 times. The next most prevalent crime was threats (Article 612) – of which there were 12 cases; robbery (Article 628) – six cases; stalking (Article 612) – four cases; and damage to property (Article 635) – three cases. Criminal acts involving an affray (Article 588), resisting a public officer (Article 337), domestic abuse (Article 572) and battery (Article 581) were each identified on two occasions as possible bias-motivated crimes. One case each of defacing a property

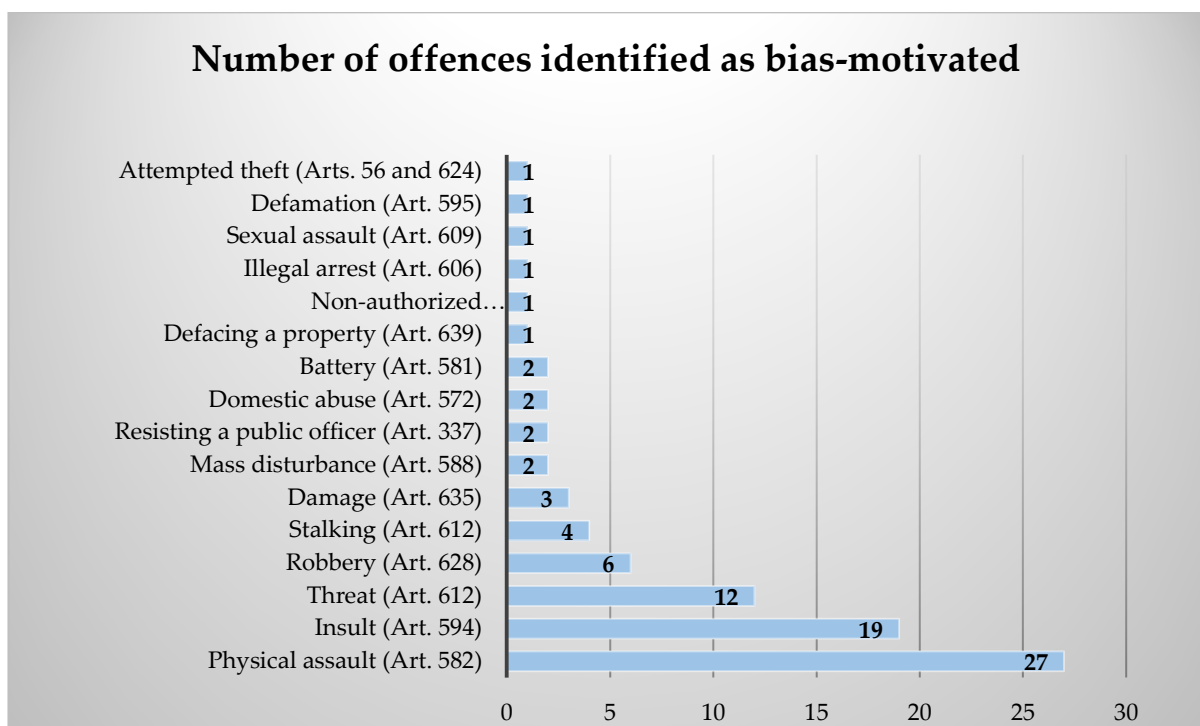
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<sup>15</sup> For comparison, see: G. Marinucci and E. Dolcini, *Manuale di Diritto penale: Parte generale*, Milan, 2017, p. 676.

<sup>16</sup> E. Dolcini, “sub art. 133”, in *Commentario breve al codice penale*, A. Crespi, G. Forti and G. Zuccalà (eds.), fifth edition, 2008, p. 458.

(Article 639), a non-authorized demonstration and disruption of public services (Article 18 l, 773/31), illegal arrest (Article 606), sexual assault (Article 609), defamation (Article 595) and an attempted theft (Articles 56 and 624) were identified as motivated by bias.

Apart from criminal acts, the research also covered instances of insult (see the repealed Article 594 of the Criminal Code) when such acts targeted the victim's race, skin colour, religion, sexual orientation and other protected characteristics. However, the act of insult was de-criminalized by the Italian legislature in 2016. These incidents were nevertheless included in the research because such cases were brought to the Criminal Court of Milan in 2016, and because of the impact that insults may have on communities frequently targeted by hate crime. Cases of insult committed out of a possible bias motivation were identified 19 times, although the proceedings all ended in acquittal owing to the de-criminalization of such acts.



#### *Types of bias motivation identified*

The cases identified as bias-motivated offences involve victims belonging to different protected groups. Most of these crimes were motivated by bias against the victim's race, ethnicity or nationality. Thus, 11 of the crimes targeted the victim for the colour of her/his skin (in such cases, the judgements did not take into consideration the victim's nationality); nine cases involved victims from South America, seven from North Africa, while four cases each targeted victims from China, the Philippines and the Arabian peninsula. Albanian, Romanian and Roma victims were each the target of one criminal offence. Lastly, one offence targeted the victim because she was "a foreigner".

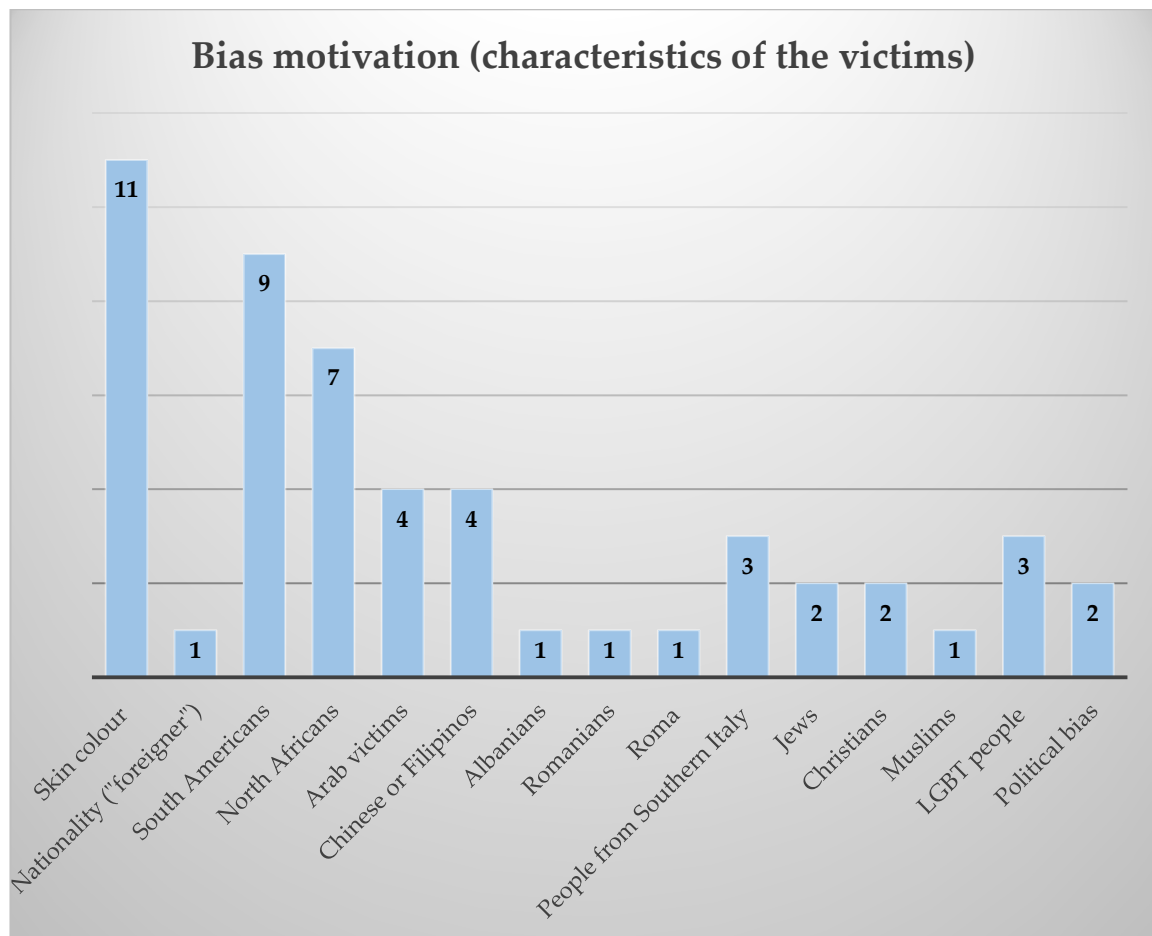
It is also noteworthy that three bias-motivated crimes were committed against persons because they were from a southern region of Italy. These crimes represent a form of "regional bias", which has



arisen following the large-scale economic migration of southern Italians to the north following World War II.

Fewer crimes were motivated by the victim's religion, with Jewish and Christian victims each targeted by two such crimes, and one crime targeting Muslims. In three cases, the crime was motivated by bias against the victims' sexual orientation. Finally, two of the cases reviewed were found to be motivated by bias against the victims' political beliefs.

A total of 76 perpetrators committed the crimes identified as bias-motivated. Of these, 66 were male and 10 were female. Age ranges of female perpetrators: two aged 18 to 30 years; five aged 31 to 65 years; three aged 65 and older. Age ranges of male perpetrators: 14 aged 18 to 30 years; 47 aged 31 to 65 years; and 5 aged 65 and older.



It should be noted that, in most cases, the crimes were not only motivated by bias. In these cases, the perpetrator was initially driven by an unrelated motive (such as a pecuniary motive or “crime of passion”), but also displayed a bias motivation when committing the crime. For example, in many cases the perpetrator sought to profit financially from the crime (such as a robbery or theft), but during the act directed racist insults or threats at the victim, who belonged to a different ethnic group.

There were also cases of crimes committed without any apparent motive. Nonetheless, differences in the ethnic group or nationality of the perpetrator and the victim led researchers to consider a possible bias motivation. This was especially the case in incidents of affray (Article 588 of the

Criminal Code), in which the fighting took place between groups whose members represent different ethnicities.

The number of cases in which the crime was clearly motivated by bias are relatively few. However, the research found that this is not because other crimes were not motivated by bias, but arises because of the nature of Italian criminal law which, as already mentioned, places an emphasis on the offence and not on the motive. Consequently, in most of the judgements analysed, the judge did not investigate evidence of a potential bias motivation. This results in criminal offences that either appear to have no motive or to be driven by other motives that may be easier to investigate (such as a pecuniary motive or a “crime of passion”).

### *Bias indicators*

Bias indicators are objective facts that signal that a case may involve a hate crime. If such indicators exist, the incident should be recorded as a possible hate crime and should trigger further investigation about the motive for the crime.<sup>17</sup> The most common bias indicators are as follows: the perception of the victim(s); the conduct of the perpetrator (the words or symbols they use); the characteristics of the victim and the perpetrator; the perpetrator’s association with an organization founded on ideologies of prejudice and with a history of violence; the timing and location of the incident; and the occurrence of similar crimes in the same area and in which members of the same group were targeted.

In almost all the judgements analysed, the only bias indicator that emerged was the use of verbal abuse, such as racial slurs used against a black victim during an attack. In most cases, such information is reported by the victim, and sometimes by witnesses. The location of the offence was considered relevant in just one case involving a homophobic physical assault that occurred in front of the entrance to a disco popular with the gay community.

In a number of other cases, the different nationalities or ethnicities of the victim and perpetrator have been found to be the only bias indicator, even where there were no other facts to confirm the bias motivation.

Based on these findings, it can be concluded that the judgements of the Court do not pay sufficient heed to perpetrators’ motivation for committing criminal acts. Moreover, the evidence provided to the Court was very often insufficient to make inferences regarding the motive for a crime.

### **Conclusions and recommendations**

The research found that the Italian legal system has the necessary tools to adequately punish hate crimes treating such offences to separate legal standards than those applied to other crimes. In particular, the following articles of the Criminal Code serve this purpose: Articles 604, 61, 133, 404 and 405.

However, it must be noted that the Court rarely employs these tools when ruling on hate crime cases: from the data collected, it emerged that the public prosecutor applied the aggravating

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<sup>17</sup> *Preventing and responding to hate crimes. A resource guide for NGOs in the OSCE region* (Warsaw: OSCE/ODIHR, 2009), p. 22, <<https://www.osce.org/odihr/39821>>.

circumstance of bias motivation (as per Article 604 of the Criminal Code) in just four out of the 54 cases reviewed, and in only one case was the aggravating circumstance of “despicable” motivation (Article 61) applied.

It is evident that the judiciary shows a general lack of interest in hate crimes, and it is presumed that this arises from a lack of attention to such crimes in the course of investigations. Without sufficient evidence of a bias motivation, it is impossible to regard the offence as a hate crime.

Thus, in order to ensure that hate crimes are prosecuted, it is necessary to raise awareness of such crimes among police officers and public prosecutors, and to enhance their ability to identify possible bias motivations.

It is also important to foster a better understanding of hate crime among lawyers: if victim reports (*denuncia-querela*) – which are often drafted by the victim’s legal counsel – clearly state that a bias-motivated offence has occurred, then this would help to draw the public prosecutor’s attention to such bias indicators.

Finally, it is recommended that a case classification system be introduced that would allow potential hate crimes to be given a provisional label or “flag” at the investigation stage. This would ensure that such offences are properly investigated and prosecuted, while also raising awareness of the problem in society.

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